IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FLOYD TEO, Appellant.	No. 39108-2-II UNPUBLISHED OPINION

Lau, J. — A jury found Floyd Teo guilty of two counts of attempted first degree murder while armed with a firearm and one count of drive-by shooting. Teo appeals, arguing that (1) the trial court abused its discretion in giving a first aggressor instruction, (2) the prosecutor committed prosecutorial misconduct by misstating the level of harm Teo had to fear before acting in defense of another, (3) the trial court abused its discretion admitting ER 404(b) evidence that he stole the firearm used, (4) the trial court erred in not giving a limiting instruction or he received ineffective assistance of counsel when his trial counsel did not request a limiting instruction, (5) cumulative error denied him a fair trial, and (6) the trial court erred by not entering written findings of fact and conclusions of law following his CrR 3.5 hearing. Finding no reversible error, we affirm Teo's convictions but remand for entry of written findings of fact and conclusions of

law from the CrR 3.5 hearing.

FACTS

Witnesses testified to the following facts. On September 22, 2006, David Barker was outside his parents' home in east Tacoma throwing a football with his brother Joseph and his friends Manny Duncan, Christopher Sheets, and Marimo Yim. None of the young men were involved with gangs. But Duncan's older brothers had been involved with the Crips. While the men were outside, gang taunts were shouted at them several times.[1] David[2] and his friends ignored the taunts.

Later that day, a tan Lincoln Town Car pulled up. Floyd Teo, Sandy Dillon, Sean McClendon, and "Curious" were inside. Teo and his friends are Eastside Green Raggers, a gang affiliated with the Bloods. The group called Duncan over to the car and told Duncan he was going to fight Teo one-on-one. Duncan agreed. Teo's friends shouted, "let's get him up," as Duncan approached.[3] Teo and one other person got out of the car. David accompanied Duncan to ensure a fair fight. Duncan and Teo fought for awhile. The witnesses agreed that this fistfight was fair and left neither participant injured.

David and Joseph's father, Bruce Barker, saw Teo and Duncan fighting in the street. Bruce grabbed his cell phone and went outside to stop the fight. Teo and Duncan eventually

[1] David testified that a male named "Curious" and one other person approached and shouted gang taunts. Verbatim Report of Proceedings (VRP) at 352. Sheets testified that Teo and two friends made these taunts.

[2] We refer to the Barker family by their first names for clarity.

[3] 6 VRP at 370.

stopped. Bruce told Teo and his group to leave, but they refused so Bruce called 911.

Instead of leaving, Teo's group continued shouting gang insults and urged Duncan to fight McClendon. Around this time, two of Teo's companions jumped out of the car and joined the fight. Yim went down to the fight to see what was going on and suddenly Curious and Dillon attacked him. At this point Joseph's friend, Sarath Phai,[4] pulled up and saw 10 people scuffling.[5] As Phai got out of his car, McClendon hit Phai on the wrist and pushed him to the ground.[6] No one in David's group had any weapons or had made any threats.

Teo then returned to the car, opened the door, and pulled out a Roarm, 7.62x39mm semiautomatic rifle.[7] Dillon and Curious, who were still fighting Yim at this point, returned to the car. Teo held the gun at waist level and started firing. David heard someone shout "gun," saw Teo point the gun at him and Duncan, and pushed Duncan out of the way.[8] Teo shot David twice while standing within 10 feet of David. Teo then turned and began firing at Yim, who was

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[4] Phai was never a gang member, but used to be associated with the Loc'd-Out Crips, a Cambodian gang generally located on the east side of Salishan.

[5] There is conflicting evidence about who was fighting. For instance, Phai agreed with defense counsel's suggestion that during the fight that Joseph, Sheets, and David may have been fighting someone from Teo's group. But David testified that he, Duncan, Sheets, and Joseph were not involved in the fight at this point. Sheets said that he had tried to pull one of the men off Yim, but otherwise did not get involved in the fight.

[6] The record does not show that Phai and McClendon had gotten into a fight, because Phai testified that he ran over to help Yim.

[7] Several witnesses testified that the gun was an AK-47 or an SKS. The State's forensic scientist testified that the Roarm has a similar design to the AK-47, but the AK-47 is fully automatic, while the Roarm is semiautomatic.

[8] 6 VRP at 374.

standing only two or three feet from David. Phai stated that Yim was already on the ground when Teo shot him. But Yim said that he was trying to run away when Teo fired the first shot. Yim fell to the ground and got back up two more times. Teo shot Yim both times Yim stood up. While Yim was laying on the ground, Teo approached, placed the gun against Yim's forehead, and was ready to pull the trigger.[9]

Before Teo could fire again, Joseph tackled Teo and Bruce took the gun away. Teo and his group returned to the car and left before police arrived. David had been shot in the stomach and leg by Teo. Yim had been shot in the leg, arm, and buttocks by Teo.

In a taped police interview, Teo claimed that David's friends were Crips, and initiated the fight. Teo claimed that at least 12 Crips were present, but he had only 3 of his gang members with him. He insisted that after he fought Duncan, a fight broke out between McClendon and one of the Crips that quickly expanded to a group-wide fight. And when he looked over, Teo saw at least four people stomping and kicking Dillon as he lay on the ground. Dillon is 5 feet 2 inches to 5 feet 4 inches tall, and weighs no more than 100 pounds. Teo further stated that to help his friend, he ran back to the car and "grabbed my gun from my bag."[10] Teo told the Crips to get back, but when he put the gun down to load it they resumed beating up Dillon. Because Dillon could not get away, Teo fired shots towards the people beating Dillon. He acknowledged shooting two people. Despite Teo's claims that a group of Crips beat Dillon, when police interviewed Dillon on the night of the shooting, they noticed he suffered only slight swelling over

[9] Yim is the only witness who testified that Teo put the gun to his forehead.

[10] Ex. 67, at 4.

one eye.

The State charged Teo with two counts of attempted first degree murder while armed with a firearm and one count of drive-by shooting. The jury convicted Teo as charged and returned a special verdict finding that he was armed with a firearm. Teo appeals.

ANALYSIS

I. Aggressor Instruction

First, Teo argues that the trial court erred by giving a first aggressor instruction,[11] claiming that doing so relieved the State of its burden to prove the absence of defense of another beyond a reasonable doubt. He contends that words alone, such as the gang taunts he made, are not sufficient to support an aggressor instruction. The State responds that substantial evidence supports the instruction because Teo armed himself with a semiautomatic rifle during a fistfight that he and his gang friends provoked.

At trial, Teo objected to the State's proposed aggressor instruction, arguing that there was no evidence that he was a first aggressor. And Teo claimed he acted in defense of another. The trial court overruled the objection, finding that the evidence showed Teo acted as a first aggressor when he twice antagonized the victims by taunting them. The trial court described the comments

[11] The instruction stated:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self[-]defense or defense of another and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

Clerk's Papers (CP) at 55.

as "antagonistic" and "aggressive."[12]

Jury instructions are sufficient if they are supported by substantial evidence, permit each party to argue their theory of the case, and properly inform the jury of the applicable law.[13] In general, we review a trial court's choice of jury instructions for abuse of discretion.[14]

Because the State has the burden of disproving the defendant's defense of another claim beyond a reasonable doubt, courts should use care in giving a first aggressor instruction.[15] "'Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.'"[16] There must be evidence to support a finding that the defendant's conduct precipitated the need to use force before the trial court may give a first aggressor instruction.[17] Generally, a person who provokes an altercation may not claim self-defense unless he or she in good faith withdrew in a time and manner that let the other person know he or she was withdrawing.[18] When determining if the evidence at trial was sufficient to support giving an

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[12] 9 VRP at 740.

[13] *State v.Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

[14] *State v. Fleming*, 155 Wn. App. 489, 503, 228 P.3d 804 (2010).

[15] *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

[16] *Riley*, 137 Wn.2d at 910 n.2 (quoting *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)).

[17] *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039, *review denied*, 113 Wn.2d 1014 (1989).

[18] *Riley*, 137 Wn.2d at 909.

instruction, we view the supporting evidence in the light most favorable to the party that

requested the instruction.[19]

Sufficient evidence exists to support a first aggressor instruction if there is credible evidence that the defendant made the first move by drawing a weapon.[20] But, the provoking act must be related to the eventual assault as to which defense of another is claimed,[21] and it must be intentional.[22] And the provoking act cannot be the actual assault.[23] "Nor can it be an act directed toward one other than the actual victim, unless the act was likely to provoke a belligerent response from the actual victim."[24]

Teo correctly states the rule that words alone are insufficient provocation to warrant a first aggressor instruction.[25] The trial court erred by giving the first aggressor instruction based solely on Teo's gang taunts.

But here the first aggressor instruction involving the attempted murder of David Barker was proper.[26] Taking the facts in the light most favorable to the State, Teo attempted to shoot

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[19] *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

[20] *Riley*, 137 Wn.2d at 910.

[21] *Wasson*, 54 Wn. App. at 159.

[22] *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847, *review denied*, 115 Wn.2d 1010 (1990).

[23] *Kidd*, 57 Wn. App. at 100.

[24] *Kidd*, 57 Wn. App. at 100.

[25] *See Riley*, 137 Wn.2d at 910-11.

[26] We can affirm on any ground supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Duncan, but shot David instead. Teo was a first aggressor towards Duncan because he started the fistfight with Duncan. David testified that he pushed Duncan out of the way because he thought Teo was going to kill Duncan. Teo's aggressive act towards Duncan transferred to David.[27] We conclude substantial evidence supports the trial court's first aggressor instruction as to David.

We also conclude substantial evidence supports the first aggressor instruction involving the attempted murder of Yim. The record shows that Teo and four gang members arrived uninvited at the Barker house with a semiautomatic rifle. Teo immediately provoked a fistfight with Duncan. He and his group refused to leave the street even after Bruce broke up the fight. Instead, they stayed and initiated the fight between Duncan and McClendon. At this point, Teo's two fellow gang members got out of the car. And within minutes, a larger fight broke out involving Teo's gang attacking Barker and his friends, including Yim who had come to see what was going on. The jury could reasonably infer from the evidence that the actions of Teo and his gang members provoked a belligerent response from David and his group.[28]

A first aggressor instruction is appropriate even where there is conflicting evidence as to whether Teo's conduct precipitated the assault.[29] Taking the facts in the light most favorable to

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[27] *See* CP at 41 (Jury instruction 10: "As applied to [attempted murder of David], a defendant's intent to assault an intended victim transfers to an unintended victim. An intent against one victim is an intent against all victims").

[28] *Kidd*, 57 Wn. App. at 100.

[29] *Riley*, 137 Wn.2d at 910.

the State, the trial court did not abuse its discretion in giving a first aggressor instruction.[30]

[30] *Fernandez-Medina*, 141 Wn.2d at 455-56.

II. Prosecutorial Misconduct

Teo next argues that the prosecutor committed incurable prosecutorial misconduct when he argued that to accept Teo's defense, the jury would have to find "two people deserved to die."[31] We disagree.

During closing argument, the prosecutor stated:

> In essence, this case does involve a fist fight, a group of kids—initially, a single person versus another person—but, groups together on opposite sides, clearly, engaging in fist fights. And so the question is, during any part of that fist fight, fist fights in general in this case, do you find that *someone had to be shot and killed* in order to either stop—well, actually, to stop or prevent someone from suffering great physical injury? That's the question. And that's the big picture in this case.
>
> I ask you to use your common sense in determining, of course, the defense view from the defendant's statements that were admitted in court, whether Sandy Dillon – who would be the subject matter of the self-defense —was in the process of being beaten so severely that two people *deserved to die* in order to stop that beating.[32]

Later, the prosecutor also asked the jury to consider whether Teo reasonably believed that "Sandy Dillon was *about to be killed*, in essence, or suffer some huge amount of *great personal injury*."[33] Teo did not object or request a curative instruction. He now asserts that this was a misstatement of the law and that the statement was inflammatory and calculated to incite a decision based on passion rather than an impartial application of the law to the evidence. He asserts that misstating the law of self-defense is "particularly problematic" because we give self-defense instructions

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[31] Br. of Appellant at 15 (capitalization omitted).

[32] 10 VRP at 754 (emphasis added).

[33] 10 VRP at 766 (emphasis added).

heightened scrutiny.[34]

An appellant claiming prosecutorial misconduct must establish the impropriety of the prosecutor's comments and their prejudicial effect.[35] A prosecutor's comments are prejudicial when there is a substantial likelihood the comments affected the jury's verdict.[36] When determining the prejudicial effects of the prosecutor's comments, we view the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.[37] Because Teo did not object to the alleged misconduct, he waived any error unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction.[38]

Teo claims that the prosecutor misstated the law of defense of others. Teo contends the jury did not have to believe the victims deserved to die. Teo is correct that the prosecutor's comments implied a higher burden of proof than required by the jury instructions. The State contends that the statement, considered in the context of the jury instructions, shows that the prosecutor was arguing that the jury should consider whether, from Teo's view, lethal force was necessary in order to stop the beating of Sandy Dillon.

A prosecutor's argument to the jury must be confined to the law stated in the court's

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[34] Br. of Appellant at 22.

[35] *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

[36] *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

[37] *Brown*, 132 Wn.2d at 561.

[38] *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

instructions.[39] When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial.[40] A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury.[41]

The trial court instructed the jury:

> It is a defense to a charge of attempted murder that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.[42]

The jury instruction required Teo to fear only injury, not death or great personal injury, as the prosecutor argued on three occasions.[43] The prosecutor requested this instruction and was bound by the instruction.[44] Under the court's instructions to the jury, the prosecutor misstated the

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[39] *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972).

[40] *State v. Gotcher*, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988).

[41] *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

[42] CP at 50.

[43] Here, the State likely proposed the wrong defense-of-others instruction. If the defendant is charged with attempted homicide, the Justifiable Homicide—Defense of Self and Others instruction, § 16.02, is appropriate. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal § 16.02, note on use at 234 (3d ed. 2008) (WPIC). WPIC § 16.02 states that it is a defense to a charge of attempted murder that the homicide was justifiable. WPIC 16.02, at 234. Homicide is justifiable, when, *inter alia*, committed in the lawful defense of another when the slayer reasonably believed that the person slain intended to commit a felony or inflict death or great personal injury. WPIC 16.02, at 234. Thus, the prosecutor was likely correct that Teo had to fear that Dillon was about to suffer death or great personal injury.

[44] *Davenport*, 100 Wn.2d at 760 (prosecutor or defense attorney must confine their statements to

burden of proof on defense of others[45] and this was improper.[46]

However, the statement was neither prejudicial nor flagrant and ill-intentioned. In addition, the court instructed the jury: "The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions."[47] And we presume the jury follows all instructions.[48] Finally, Teo has not demonstrated that the error could not have been cured with an instruction. The trial court could have reminded the jury of the burden of proof given in the jury instruction. If defense counsel failed to request a curative instruction, we are not required to reverse.[49]

Teo asserts that the statement was inflammatory and calculated to incite a decision based on passion rather than an impartial application of the law to the evidence. He contends that the prosecutor's statement was intended to create sympathy for otherwise unsympathetic victims who were likely associated with gangs. Bald appeals to passion and prejudice constitute misconduct.[50]

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the law as set forth in the jury instructions).

[45] Contrary to Teo's argument, the prosecutor did not shift the burden of proof onto the defense. Rather, the prosecutor misstated the burden of proof.

[46] *See also State v. Wanrow*, 88 Wn.2d 221, 240-41, 559 P.2d 548 (1977) (error to improperly instruct jury on self-defense).

[47] CP at 31.

[48] *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

[49] *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

[50] *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Here, the record does not show the prosecutor made any statements intended to create sympathy for the victims. Rather, the prosecutor misstated the level of harm Teo had to fear Dillon suffered. The prosecutor did not appeal to the jury's passions and prejudices.

Although the prosecutor's comments were improper because they misstated the jury instructions, Teo has failed to show a flagrant or ill-intentioned comment that could not have been remedied with a curative instruction. Teo failed to demonstrate prosecutorial misconduct.

III. ER 404(b) Evidence

Teo also argues that the trial court abused its discretion by admitting ER 404(b) evidence that he had stolen the gun he used to shoot the victims. He contends that the evidence does not fall under the res gestae exception of ER 404(b). The State argues that the evidence completed the picture for the jury because it explained how Teo acquired the gun used in the fight. The State maintains that the gun theft is "clearly relevant" because it relates to the gun Teo used during the incident and it explains how he came to be in possession of a semiautomatic rifle.[51] We agree with Teo but find any error harmless.

Teo admitted during his police interview that he stole the gun he used in the shooting:

[OFFICER]	Let's get back to the gun real quick, I just want a, a couple of questions regarding the AK 47. How did you acquire that AK 47?
TEO	Um, I stole it from a car.
[OFFICER]	How long ago?
TEO	Um, probably couple months.
[OFFICER]	Was this the first time you actually used this AK 47?
TEO	Yes.
[OFFICER]	Did you ever let anyone else use this AK 47?
TEO	Um, no.
[OFFICER]	So since the time that you stole this gun from a vehicle, this is the

[51] Br. of Resp't at 42.

first time that you actually used it?
TEO Um, I've took it with me when I went camping and stuff but, yeah, other than, other than firing it in the woods, yeah.[52]

The State moved to play Teo's taped confession to the jury, including this statement, and Teo objected. He argued that the evidence was prejudicial prior bad acts evidence and therefore inadmissible. After lengthy argument, the trial court noted that Teo had essentially confessed to all essential elements of the charge and that admission of the evidence would not prejudice Teo's defense of another defense. The trial court found that the evidence was admissible to explain how Teo happened to have this gun, and that the evidence was "not highly prejudicial, and especially in view of the other facts that the finder of fact may agree on beyond a reasonable doubt."[53] The trial court admitted the evidence over Teo's objection. No limiting instruction was given or requested.

The State then played for the jury an unedited copy of Teo's taped confession and provided the jury with a transcript. The evidence was not mentioned again until the State's closing argument where during a lengthy closing argument, the State reminded the jury: "This is his weapon that he admits he stole; his gun, he brought to the scene."[54] We review the trial court's decision to admit evidence under ER 404(b) for abuse of discretion.[55] The trial court

[52] Ex. 67, at 5.

[53] 8 VRP at 646.

[54] 10 VRP at 773.

[55] *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

abused its discretion if exercised on untenable grounds or for untenable reasons.[56] "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion."[57]

"ER 404(b) prohibits a court from admitting "'[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.'"[58] ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity.[59] "Under the res gestae . . . exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime."[60] "Unlike most ER 404(b) evidence, res gestae evidence is not evidence of unrelated prior criminal activity but is itself a part of the crime charged."[61]

"Before admitting ER 404(b) evidence, a trial court 'must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'"[62] "This analysis must

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[56] *Foxhoven*, 161 Wn.2d at 174.

[57] *Foxhoven*, 161 Wn.2d at 174.

[58] *Foxhoven*, 161 Wn.2d at 174-75.

[59] *Foxhoven*, 161 Wn.2d at 175.

[60] *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005).

[61] *State v. Sublett*, 156 Wn. App. 160, 196, 231 P.3d 231 (2010).

[62] *Foxhoven*, 161 Wn.2d at 175 (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159

be conducted on the record."[63]

The State argued that the evidence was relevant to complete the picture and show how Teo was able to acquire this type of gun. We disagree. Evidence might be admissible as res gestae evidence where the defendant disputes certain facts necessary to show the complete picture.[64] The State claimed that the evidence was admissible to show that Teo had knowledge about the gun and that it was his. But, during the police interview, Teo admitted that he grabbed his gun. He did not claim that the gun belonged to any other person. He also did not deny using the gun. The evidence was not admissible to show that the gun was Teo's or that he had knowledge of it. And how Teo acquired the gun was similarly irrelevant. Teo did not dispute that he knew about the gun. Teo admitted grabbing the gun from his own bag and using it. Furthermore, the evidence did not complete the picture for the shooting because Teo's gun theft occurred two months before the shooting and was in no way related to the shooting. Rather, as the State admitted, the evidence tended to show that Teo was more likely to commit this crime because he had previously stolen a gun.[65]

The evidence was not properly admitted as res gestae evidence.[66] The trial court abused

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(2002)).

[63] *Foxhoven*, 161 Wn.2d at 175.

[64] *State v. Tharp*, 96 Wn.2d 591, 598, 637 P.2d 961 (1981) (error to admit evidence of defendant's furlough status to establish why defendant in Bellingham at time of crime where defendant did not dispute his presence in city).

[65] Defense counsel argued that the State wanted to admit the evidence because it made it more likely that Teo was guilty because he had stolen the gun. The State responded, "It is." 8 VRP at 652.

[66] The State argues that in the alternative, the trial court admitted the evidence to show

its discretion admitting evidence that Teo stole the gun. But an erroneous ruling is not reversible error unless the court determines that "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"[67] "Improper admission of evidence constitutes harmless error if the evidence is of minor significance when compared with the evidence as a whole."[68] We conclude that the admitted evidence was not prejudicial and was harmless in the context of the evidence as a whole.[69]

IV. Cumulative Error

Teo argues that cumulative errors combine to require a new trial. "The cumulative error doctrine applies only when several errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial."[70] Reversal may be required even if each error examined on its own would otherwise be considered harmless.[71] "The defendant bears the burden of proving an accumulation of error of sufficient magnitude that

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premeditation. This is incorrect. While the trial court initially thought the evidence might be relevant to show premeditation, it ultimately concluded that stealing the gun two months prior to the event made the gun "stale." 8 VRP at 644.

[67] *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

[68] *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

[69] Given our resolution of Teo's ER 404(b) claim, we need not address his related limiting instruction and ineffective assistance of counsel arguments.

[70] *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004).

[71] *Russell*, 125 Wn.2d at 93.

retrial is necessary."[72]

Although the prosecutor made improper comments during closing argument and the trial court abused its discretion admitting ER 404(b) evidence, we conclude the combined errors do not warrant a new trial.

V. CrR 3.5 Written Findings of Fact and Conclusions of Law

Finally, Teo argues that the trial court failed to enter written findings of fact and conclusions of law following his CrR 3.5 hearing. We accept the State's concession that remand for entry of written findings and conclusions is necessary.

We affirm Teo's judgment and sentence, but remand for entry of written findings of fact and conclusions of law regarding the CrR 3.5 hearing.

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

Lau, J.

I concur:

Worswick, A.C.J.

I concur in the result:

Armstrong, J.

[72] *State v. Price*, 126 Wn. App. 617, 655, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005).