IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent,	No. 39186-4-II
v.	UNPUBLISHED OPINION
RYNA RA, Appellant.	

Van Deren — Ryna Ra appeals his conviction for attempted second degree murder, drive-by shooting, and unlawful possession of a firearm. He argues that (1) the trial court abused its discretion by allowing a witness to testify to facts beyond his personal experience and offer an opinion on Ra's guilt, (2) the trial court improperly refused to grant Ra a jury instruction on self-defense, (3) his due process rights were violated when the trial court improperly refused a self-defense instruction that would have barred the State from proving the attempted second degree murder and drive-by shooting charges, (4) the trial court abused its discretion when it denied Ra's motion for mistrial because the complaining witness stated that he was having a flashback and collapsed in the courtroom and the trial court allowed that the complaining witness to show his military injuries to the jury, (5) the evidence was insufficient to find him guilty on the unlawful possession of a firearm charge because the State did not prove his prior felonies, (6) the

prosecutor, in his closing and rebuttal arguments, engaged in prejudicial misconduct when he argued facts not in evidence and made statements to inflame the passions of the jury, and (7) the errors at trial were so prevalent and prejudicial that cumulative error requires remand. We affirm.

FACTS

On the evening of September 14, 2005, Ryna Ra and three male friends were parked in a sport utility vehicle (SUV) on the Tacoma Ruston Way waterfront. Two other cars pulled into the same parking lot; James Huff and Vianna Cornatzer were in one vehicle and Nick Serdar and Ashley Suhoversnik were in the other. The two couples were friends.

After the two couples arrived, the women exited the cars and the couples heard catcalls from the occupants of the SUV. The SUV occupants called out, “Hey, look at that ass”; “[H]ey baby, nice ass”; and “I want to tap that ass.” IV Report of Proceedings (RP) (Feb. 19, 2009) at 414; RP (Feb. 23, 2009) at 536. They also directed some comments at Huff and Serdar, including, “We’re going to take your girlfriend away from you” and “Why don’t you come do something about it?” IV RP (Feb. 19, 2009) at 418. Ra and his companions taunted Huff and Serdar, saying, “I’m going to kick your f[**]king ass” and “Hey pussy, why you walking away?” RP (Feb. 23, 2009) at 640, 549. And, “Yeah, you’re a bitch.” RP (Feb. 23, 2009) at 608.

Huff engaged in a verbal exchange with the SUV occupants, saying, “F[**]k you” and “Quit talking shit to my girlfriend.” IV RP (Feb. 19, 2009) at 418-19. Huff told them to get out of the car and they threatened each other with physical violence. The SUV occupants remained in the car.

Huff shined a flashlight at the SUV from some 30 feet away and Ra told him not to do so. Huff left his friends behind and approached the SUV alone in a confrontational “attitude,” moving

toward the front passenger side window.[1] IV RP (Feb. 19, 2009) at 451. Ra was seated in the SUV on the front passenger side. Huff was unarmed. As Huff approached the SUV, Ra pulled out a gun and fired a warning shot. Huff then tried to kick the gun away but only managed to "jump-kick[ ]" the car. RP (Feb. 23, 2009) at 522. Ra fired the gun in the air several times before he shot Huff in the chest.

The SUV drove away after the last shot was fired. Serdar flagged a passing police officer and informed him of the incident; the police stopped the SUV less than a mile away. Police identified the front seat passenger as Ra, who denied being involved in any shooting or any other altercation.

The State charged Ra with one count of attempted first degree murder, one count of drive-by shooting, and two counts of second degree unlawful possession of a firearm. Ra was convicted of one count of attempted first degree murder, one count of drive-by shooting, and one count of second degree unlawful possession of a firearm. Ra appealed and we reversed his conviction and remanded, holding that the trial court abused its discretion in admitting gang evidence. *State v. Ra*, 144 Wn. App. 688, 692, 707, 175 P.3d 609, review denied, 64 Wn.2d 1016 (2008). On remand, the jury found Ra guilty of the lesser included offense of attempted second degree murder, drive-by shooting, and second degree unlawful possession of a firearm. At trial, the parties stipulated that Ra was convicted "as a juvenile of a felony crime, and, therefore, not lawfully permitted to possess a firearm." Ex. 15. The trial court read this stipulation to the jury. Ra was sentenced to a total of 266.25 months confinement.

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[1] Huff and other State's witnesses testified that Huff "walk[ed] slowly" toward the SUV. RP (Feb. 23, 2009) at 516. Ra testified that Huff ran toward the SUV. (Ra's testimony from the prior case was read to the jury.)

Ra appeals.

ANALYSIS

I. Opinion Testimony

Ra argues that the trial court abused its discretion by allowing Huff to testify to facts beyond his personal experience and in allowing him to offer an opinion on Ra's guilt. Specifically, he argues that the trial court should not have allowed "Huff to identify Ra as the shooter even though [Huff] admitted that he never saw the shooter . . . but was [only] later told that Ra was the shooter." Br. of Appellant at 6. We disagree.

We review the trial court's evidentiary rulings for abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987). Abuse of discretion occurs "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

ER 701 limits lay opinion to that which is "rationally based on the perception of the witness [and is] helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." The trial court has "wide discretion" under ER 701. *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985). "[T]he rule obviously gives the trial court an abundance of discretion" and courts have upheld lay opinions about a person's identity.[2] 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice § 701.4, at 9 (5th ed. 2007); *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), *aff'd and remanded by State v. Clark*, 129 Wn.2d 211,

[2] A police officer's testimony that a person appearing in hidden camera footage had features similar to the defendant was permissible lay witness testimony because the officer was in a better position to identify the defendant than the jury, as he had known the defendant for several years and had seen the defendant in motion. *State v. Hardy*, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994), *aff'd and remanded by State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996).

916 P.2d 384 (1996); *Kinard*, 39 Wn. App. at 874.

ER 704 provides that "[t]estimony in the form of an opinion or inferences otherwise admissible[3] is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Generally, a witness may not opine about a defendant's guilt. State *v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). But "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). "[A]n eyewitness who saw the defendant commit the crime in question can so testify, and even circumstantial evidence of guilt . . . is usually admissible[;] . . . prosecution . . . would be nearly impossible if witnesses were not allowed to identify the defendant." 5B Tegland, § 704.6, at 268.

Contrary to Ra's argument, Huff did not testify that Ra was the shooter. The relevant exchange in court was:

> [HUFF:] I approached the car and started arguing, and he pulled the gun out --
> [PROSECUTOR:] Who pulled a gun out?
> [HUFF:] The passenger, right passenger.
> [PROSECUTOR:] Which one?
> [HUFF:] Ryna Ra, I believe.
> [DEFENSE COUNSEL]: Objection. He doesn't know who it was.
> [HUFF:] It was the right passenger is all I can -- front passenger.
> THE COURT: Let's start with another question, lay the appropriate foundation.
> [PROSECUTOR:] When you say a person pulled a gun, where was that person seated?
> [HUFF:] In the front right passenger.
> [PROSECUTOR:] And would you recognize that person if you saw him again today?

[3] Under ER 704, opinion evidence is also "subject to the limitations of Rules 701 and 702, which require opinions based on personal observation and helpful to the trier of fact, and ER 403's protection against undue influence and misleading the jury." Robert A. Aronson, The Law of Evidence in Washington 704-2 (3d ed. 1998).

[HUFF:] I couldn't -- I couldn't recognize the person when I was getting shot at.
[PROSECUTOR:] Okay. My question is, if you -- well --
[HUFF:] I didn't know who was shooting. I couldn't see their face. I found out who it was --
[PROSECUTOR]: All right. Did you actually ever --

[DEFENSE COUNSEL]: Objection. Move to strike that whole line. He learned the identity later. That's hearsay. It goes to the ultimate question, as well.

THE COURT: Overruled.

But, I will say this, the jury should not make any assumptions based on what other people told him.

[PROSECUTOR:] I'm going back to that, Your Honor. . . . The person that was in the front right seat that you described as having a gun, after the incident, during the incident, at any point did you get a visual of that person such that you would know who that person was if you saw them later on the street?

[HUFF:] No.
[PROSECUTOR:] Okay. So, anything you know about who shot you as far as the actual person, you have no personal knowledge of that?
[HUFF:] It happened too fast. I couldn't see.

RP (Feb. 23, 2009) at 516-18. Huff testified that he only believed that the "right [side] passenger" who pulled the gun out was Ra. RP (Feb. 23, 2009) at 517. Following defense objections, it became clear that he could not identify Ra as the shooter or as the person in the front passenger seat. Thus, his testimony was not a direct comment on Ra's guilt, *see Heatley*, 70 Wn. App. at 578; he opines only that the passenger with the gun was seated in the front passenger seat. *Hardy*, 76 Wn. App. at 190; *Kinard*, 39 Wn.App. at 874. Further, Huff stated specifically that he did not recognize the person who shot him, thus clarifying his initial statement of opinion and offsetting any prejudice from that statement. *See* ER 704; ER 403. Moreover, the trial court instructed the jury not to assume that what Huff was told by others is true. Under these circumstances, the trial court did not abuse its discretion in allowing Huff's testimony.

II. Self-Defense Instruction

Ra also argues that the trial court improperly refused to instruct the jury instruction on self-defense. Specifically, he argues that the court misapplied the law in concluding that "a person can never fear great bodily injury when faced with an unarmed batterer." Br. of Appellant at 14. We disagree.

We review a trial court's refusal to give jury instructions based on a factual dispute for abuse of discretion and, if based on a legal issue, de novo. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Contrary to Ra's argument, the trial court did not articulate a blanket rule on "unarmed batterer[s]." Br. of Appellant at 14. Instead, the court ruled that there was insufficient evidence to find that a defendant could use deadly force "in this circumstance," referring to the facts of this case. RP (Feb. 24, 2009) at 5. Because the court refused the instruction based on insufficient evidence of a reasonable apprehension of great bodily harm and imminent danger, we review its refusal for abuse of discretion. *See Walker*, 136 Wn.2d at 771-72.

For the jury to be instructed on self-defense,[4] the defendant must produce some evidence

[4] RCW 9A.16.020 states in relevant part:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: . . . . (3) [w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.010(1) states, "'Necessary' means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended."

of a reasonable apprehension of great bodily harm and imminent danger. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person, knowing all [that] the defendant knows and seeing all [that] the defendant sees." *Janes*, 121 Wn.2d at 238. This evaluation is both subjective and objective. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The subjective prong requires fact-finders to consider all the facts and circumstances known to the defendant and the objective prong[5] requires fact-finders to use this information to determine what a similarly situated reasonably prudent person would have done. *Walden*, 131 Wn.2d at 474. If the trial court finds that no reasonable person would have perceived a threat of great bodily harm, then the court need not instruct on self-defense. *State v. Griffith*, 91 Wn.2d 572, 575-77, 589 P.2d 799 (1979); *State v. Bell*, 60 Wn. App. 561, 567-68, 805 P.2d 815 (1991).

A reasonably prudent person armed with a gun, inside a car and accompanied by three male friends, would not perceive a threat of great bodily harm from Huff who was outside the car, unarmed, and alone. Here, the trial court did not abuse its discretion in refusing a self-defense instruction because there was insufficient evidence to support it.

III. Attempted Second Degree Murder And Drive-By Shooting Charges

Ra further argues that his due process rights were violated because, had the trial court properly allowed a self-defense instruction, the State would not have been able to prove the

[5] "The importance of the objective portion of the inquiry cannot be underestimated." *Walker*, 136 Wn.2d at 772. "'Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not.'" *Janes*, 121 Wn.2d at 240 (quoting Susan R. Estrich, *Defending Women*, Mich. L. Rev. 1430, 1435 (1990) (reviewing Cynthia Gillespie, *Justifiable homicide: Battered Women, Self-Defense and the Law* (1989))). The objective prong "keeps self-defense firmly rooted in the narrow concept of necessity." *Janes*, 121 Wn.2d at 240.

attempted second degree murder[6] and drive-by shooting[7] charges. Self-defense is a "lawful act" that negates the mens rea of criminal intent, *State v. Box*, 109 Wn.2d 320, 328-29, 745 P.2d 23 (1987), and the element of "recklessness." *State v. Dyson*, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). Because the trial court properly refused a self-defense instruction, Ra's argument fails.

IV. Mistrial Motion

Ra argues that we should reverse the trial court's denial of his motion for mistrial because, while he testified, Huff stated that he was having a flashback and collapsed in the courtroom and later the trial court allowed Huff to show his military injuries to the jury. We disagree.

We review the trial court's denial of a mistrial motion for an abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). "An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court." *Greiff*, 141 Wn.2d at 921. Generally, the trial court has wide discretion in dealing with irregularities that arise at trial. *State v. Blum*, 17 Wn. App. 37, 42, 561 P.2d 226 (1977). A "court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). "Only those errors that may have affected the outcome of the trial are prejudicial." *State v. Gilcrist*, 91

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[6] Under RCW 9A.32.050(1)(a), "A person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person." Under RCW 9A.28.020(1), "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime."

[7] Under RCW 9A.36.045(1):

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Wn.2d 603, 612, 590 P.2d 809 (1979). We will overturn a trial court's denial of a motion for mistrial only when there is a substantial likelihood the prejudice affected the jury's verdict. *Greiff*, 141 Wn.2d at 921.

A witness's outburst does not automatically warrant a mistrial and the trial court is in the best position to determine the effect of any such outburst. *See State v. Wilder*, 4 Wn. App. 850, 851-52, 486 P.2d 319 (1971). In *Wilder*, the victim in a carnal knowledge prosecution "at times sobbed uncontrollably while testifying on direct examination." 4 Wn. App. at 851. Because "the trial court had the distinct advantage of observing the behavior of the complaining witness, and the visible reaction, if any, of the jurors," we held that the trial court did not abuse its discretion in denying the defendant's motion for mistrial. *Wilder*, 4 Wn. App. at 851-52. Similarly, in *Gilcrist*, the trial court denied mistrial motions where the defendant's first witness threw a cup of water on several jurors and, while defendant's counsel was making his closing statement, a bomb exploded outside the courtroom. *Gilcrist*, 91 Wn.2d at 611-613. In denying these motions, the court noted that "granting the mistrial motion would invite future courtroom misbehavior [and] gave a general curative instruction." *Gilcrist*, 91 Wn.2d at 612.

Ra relies primarily on *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963), *overruled on other grounds by State v. Land*, 121 Wn.2d 494, 500-01, 851 P.2d 678 (1993). In *Swenson*, the trial court ordered a new trial for the defendant in a first degree murder case where the record reflected that the State's key witness was visibly pregnant, physically and emotionally unable to submit to continuous cross-examination that was vital to the defendant's defense, and emotional outbursts by spectators occurred in response to defense counsel's attempts to cross-examine her. 62 Wn.2d at 272-76. The cumulative effect of these incidents violated the defendant's due

process rights. *Swenson*, 62 Wn.2d at 276, 281.

Here, during direct examination, the following exchange between Huff and the prosecutor occurred:

> [PROSECUTOR:] What happened after you were hit in the chest?
> [HUFF:] Um --
> [PROSECUTOR:] Do you need a break?
> [HUFF:] I'm feeling like I'm having a flash --
> [PROSECUTOR:] Your Honor, can we --
> THE COURT: Let's take a short break. If the jury will step into the jury room, please.

RP (Feb. 23, 2009) at 525. Following this exchange, the prosecutor related the events that followed to the court:

> [PROSECUTOR:] Your Honor, Mr. Huff went downstairs to smoke a cigarette . . . [a]nd he's not doing very well. He collapsed here in the courtroom. I think Your Honor walked off the bench, but he was physically doubled over. The jurors were here for part of that, to be honest. The jurors walked out. He didn't say anything. Then he had a seat here; he's crying. He keeps saying he's having a flashback.

RP (Feb. 23, 2009) at 525-26. When Ra moved for a mistrial, the trial court ruled that the incident was not "so prolonged so much as to overemphasize Mr. Huff's wound to the point where the jury is not going to be able to do its job any further." RP (Feb. 23, 2009) at 529.

Later, Huff described and showed the wounds he received from the shooting. Huff distinguished these wounds from those he received during his military service. Ra did not object. The parties had previously agreed to show the jury Huff's wounds and to distinguish

the gunshot wounds from previous injuries.[8]

We hold that Huff's collapse that was witnessed by some jurors, his statement that he was having a flashback, and the display of his injuries in accord with the parties' agreement do not constitute the "same quantum of irregularities" as in *Swenson*. *Gilcrist*, 91 Wn.2d at 612; *see also Swenson*, 62 Wn.2d at 272-76. As the trial court noted here, the jury would likely attribute Huff's collapse and flashback statement to the obvious fact that "[t]rials are about real people with real issues, experiencing real emotions." RP (Feb. 23, 2009) at 528-29. Huff's emotional reaction is analogous to the victim's uncontrollable sobbing in *Wilder*, in which the trial court properly denied a mistrial motion. *See* 4 Wn. App. at 851-52. As in *Gilcrist*, "[w]hile the irregularities in *Swenson* were of such a number and magnitude as to affect the outcome of that trial, the irregularities here do not require a mistrial." 91 Wn.2d at 612. Thus, the trial court did not abuse its discretion in denying Ra's motion for mistrial.

V. Offender Score

Ra argues that the State failed to prove his offender score during his sentencing following the second trial because it did not produce certified copies of his prior convictions, but instead relied on the previous trial court's calculation of his offender score.

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[8] The pretrial exchange follows:

> [DEFENSE COUNSEL:] . . . As much as I would like the jury not to see the injuries, I can understand the State's argument and I think that that is a reasonable argument that the State can show the injury to the jury, and I think it's important to separate which injuries were from this incident versus some other incident. . . .
>
> THE COURT: . . . I think everybody agrees there needs to be a mechanism for Mr. Huff to be able to demonstrate that there is a difference between the injury that was inflicted by Mr. Ra and the injury that he previously received.

RP (Feb. 19, 2009) at 13-15.

We review a sentencing court's offender score calculation de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). In order to establish a defendant's criminal history for sentencing purposes, the State must prove a defendant's prior convictions by a preponderance of the evidence. RCW 9.94A.500(1); *State v. Ammons*, 105 Wn.2d 175, 185-86, 713 P.2d 719, 718 P.2d 796 (1986). "The best evidence of a prior conviction is a certified copy of the judgment[, but] the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history," *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (citation omitted), if the State "shows that the writing is unavailable for some reason other than the serious fault of the proponent." *State v. Rivers*, 130 Wn. App. 689, 698-99, 128 P.3d 608 (2005); *State v. Mendoza*, 139 Wn. App. 693, 702, 162 P.3d 439 (2007), *aff'd*, 165 Wn.2d 913, 205 P.3d 113 (2009).

As Ra points out, our court did not decide the issue of the offender score in *Ra*. "We consider . . . only those issues dealing with the sufficiency of the evidence or issues likely to arise on retrial." *Ra*, 144 Wn. App. at 702. But Ra did not raise an issue relating to his offender score during the first sentencing or in his first appeal. *See* 144 Wn. App. at 692-709. Thus, the controlling rule is RAP 2.5(c)(1):

> If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

The Supreme Court addressed the scope of RAP 2.5(c)(1) in *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993), explaining that, "[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an

appealable question." In *Barberio*, the court held that it would not consider on second appeal the propriety of an exceptional sentence of 72 months because the trial court, on remand, did not independently review the exceptional sentence but rather made only corrective changes in the amended judgment and sentence. 121 Wn.2d at 51-52.

Here, at sentencing following the trial on remand, Ra did not dispute the offender score until defense counsel realized that the State did not have certified copies of the earlier convictions at court that day.[9] The State relied on Ra's failure to raise a sentencing issue related to the offender score in his prior appeal.

Before making its decision to adopt the offender score used by the first trial court without

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[9] The relevant exchange follows:

> [DEFENSE COUNSEL]: . . . . We are not going to stipulate to the offender score.
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> I also would note that I don't see that the State has provided certified copies of -- unless the Court has it prior -- of the Judgment and Sentence.
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> [PROSECUTOR]: I don't have certifieds. We did this before [a different judge], who found the priors. I have a signed document, and that issue was not raised in the Court of Appeals. I believe the State has made a showing based on that, a sufficient showing.
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> [DEFENSE COUNSEL]: I think it's insufficient to show the offender score.
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> THE COURT: Well, it also would have been a little better to do that before the sentencing statements and the Court's ruling were made. When I asked you whether or not you had any disagreement about the offender score, you indicated you did not.
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> [DEFENSE COUNSEL]: That is correct. I apologize Your Honor. I had thought that [the prosecutor] had that information.
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> THE COURT: Since it was determined once and not appealed and I'm not hearing any specific defect in the calculation, I am going to go ahead and sign the final sentencing paperwork.
>
> . . . .
>
> [PROSECUTOR]: I would just respond that I did [have that information] at a prior hearing with both Mr. Ra and [defense counsel] here in front of [the different judge]. There's a document that reflects the Court's findings.

RP (April 10, 2009) at 12-13.

independent review of the score, the trial court noted that the defense raised no objection to the offender score when the trial court inquired during the sentencing hearing if the defendant disagreed with it. The trial court also pointed out that Ra did not direct its attention to any errors in the offender score.

It appears that Ra's refusal to agree to the offender score, identical to the offender score used in the first sentencing and not appealed, was based solely on the discovery that the State did not plan to again prove the score using certified copies of the prior convictions or a transcript of the sentencing hearing before the first judge. But because Ra did not point to any error in the established offender score and did not disagree with the State's representations about its earlier proof and the resolution of Ra's offender score, the trial court did not independently review the offender score and merely used the score earlier determined.

Under these circumstances, there is no decision to review other than the trial court's reliance on both counsels' representations about how the offender score had been proved earlier and whether the State should be required to prove it again. Based on the evidence before it and the explanation that Ra's offender score had been proved earlier based on certified copies of the judgments and sentences, we hold that the trial court did not err in using the offender score properly established at sentencing following the first trial.

VI. Unlawful Possession of a Firearm

Ra argues that the evidence was insufficient to find him guilty on the unlawful possession of a firearm charge because the State did not prove his prior felonies. We disagree.

We review a challenge to the sufficiency of the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements

beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

A person is guilty of second degree unlawful possession of a firearm if the person "has in his or her possession, or has in his or her control any firearm . . . [a]fter having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony [that is not a serious offense]." Former RCW 9.41.040(2)(a)(i) (2005) (emphasis omitted). Here, Ra stipulated that he was convicted "as a juvenile of a felony crime, and, therefore, not lawfully permitted to possess a firearm." Ex. 15. The trial court read this stipulation to the jury without objection by the defense and in accordance with the parties' agreement. We hold that the jury's reliance on the stipulation was sufficient to persuade a fair-minded, rational person of the truth of the finding that Ra had a prior felony barring his possession of a firearm, and thus, there was sufficient evidence for his conviction on this count.

VII. Prosecutorial misconduct

Ra argues that the prosecutor, in his closing and rebuttal arguments, engaged in prejudicial misconduct when he argued facts not in evidence and made statements "to inflame the passions of the jury." Br. of Appellant at 30. Again, we disagree.

Prosecutorial misconduct is grounds for reversal only when the conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial." *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Misconduct is "prejudicial" only if there is a substantial likelihood that it affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). We analyze prejudice in the context of the total argument, the issues, the evidence, and the instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert. denied*, __ U.S. ___, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). "The prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility." *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). The defendant bears the burden of showing both that the conduct was improper and that it caused prejudice. *Gregory*, 158 Wn.2d at 809. Where, as here, defense counsel objected, we evaluate the trial court's ruling for abuse of discretion. *Gregory*, 158 Wn.2d 7 at 809-10.

At trial, Ra objected to the following statements of "opinion" from the prosecutor, which he now argues as grounds for his misconduct claim: (1) "The State believes firmly that the evidence in this case has proven that the defendant acted with premeditated intent" and (2) "the State believes, again, firmly, based on the evidence that the defendant is guilty." RP (Feb. 25, 2009) at 785, 835. The trial court denied the defendant's motion for mistrial based on these statements because the use of "the State believes," while "problematic," was not inflammatory. RP (Feb. 25, 2009) at 840-41. The trial court did not abuse its discretion in so ruling because the State's belief that the evidence supports certain propositions is not so prejudicial as to affect the jury's decision. *See Pirtle*, 127 Wn.2d at 672.

Ra also complains about various prosecutor comments to which Ra did not object at trial.

When the defendant fails to object to a comment in the prosecutor's closing argument, we do not review the alleged misconduct unless the comment is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Otherwise, a defendant's failure to object waives the error. *Stenson*, 132 Wn.2d at 719. Thus, when a defendant does not object to a prosecutor's comments in closing, the defendant's burden to show misconduct is greater than when the defendant does object.

Ra argues that the following statements, to which he did not object, are also grounds for his misconduct claim: (1) making up a definition of "tapping ass"; (2) commenting in a degrading manner on "poor, poor, Mr. Ra"; (3) stating without evidence that the occupants in the car thought that they had killed Huff before they drove away; (4) creating a "non-existent scenario between a husband and wife" when explaining the impetus for Huff to confront Ra, even though Huff was not married to the woman who was insulted by Ra's friends' comments; and (5) arguing that the State's witnesses' testimony was consistent.[10] Br. of Appellant at 30-34. We consider each of these statements in turn.

The first statement relates to the prosecutor's argument that "tap that ass" expresses an intent to have sex. RP (Feb. 25, 2009) at 795. In light of Serdar's testimony that the SUV occupants were "essentially [saying that] they wanted to have sex with [the women] and they were hot," when their words were, "I want to tap that ass," RP (Feb. 23, 2009) at 605-06, 536,

[10] Ra argues that when the prosecutor stated that, if the jury considered Ra's testimony, "they would not be doing their job," is also grounds for misconduct. Br. of Appellant at 32. But, as the State points out, Ra does not cite to the record where this statement appears. We cannot find this statement in the record, and we do not review issues unsupported by the evidence in the record. *State v. Leach*, 113 Wn.2d 679, 693, 782 P.2d 552 (1989).

we hold that the prosecutor's argument about the meaning of the comment was not fabricated and was certainly not "so flagrant and ill-intentioned" as to constitute misconduct. *Stenson*, 132 Wn.2d at 719.

The second statement refers to the State's rebuttal to defense counsel's argument that Ra was drawn into the confrontation with Huff. The prosecutor stated, "It's not Happy Days. . . . [T]his was confrontational. . . . Defense counsel says poor, poor Mr. Ra. . . . His buddy is the one saying nice ass, not me." RP (Feb. 25, 2009) at 824. In the context of rebutting Ra's argument that he was unwillingly drawn into the confrontation, the State's reference to Ra as "poor, poor Mr. Ra," RP (Feb. 25, 2009) at 824, though unnecessarily sarcastic, is not "so flagrant and ill-intentioned" as to constitute misconduct. *Stenson*, 132 Wn.2d at 719.

The third statement Ra challenges is the prosecutor's statement that, when Ra was caught, he did not tell the truth that "I just shot somebody and I think I killed them." RP (Feb. 25, 2009) at 803. Certainly the prosecutor could not know whether Ra thought he killed Huff so that part of the argument has no basis in the evidence and was improper. That Ra knew he shot Huff in the chest and lied about it when he was arrested is a logical inference from the evidence that Ra shot Huff and, at the time of arrest, denied shooting anyone. *See Gregory*, 158 Wn.2d at 810. But the prosecutor also stated, "I think the testimony is they thought they killed him." RP (Feb. 25, 2009) at 803. As Ra correctly points out, this statement is not supported by the evidence. Nonetheless, in the context of the total argument, the issues, the evidence, and the instructions, this statement, to which the defendant did not object, does not constitute misconduct. *Warren*, 165 Wn.2d at 28.

The fourth statement deals with the prosecutor's analogy between a boyfriend's reaction to a man catcalling his girlfriend and a husband's reaction to a man catcalling his wife. This

analogy is a reasonable inference from the evidence at trial that Huff reacted in a confrontational manner to the SUV occupants catcalling his girlfriend. *See Gregory*, 158 Wn.2d at 810. Thus, this statement is also not misconduct.

The fifth statement addresses the prosecutor's argument that each of the State's witnesses' testimony was consistent with other witnesses' testimony. The final determination of the weight and credibility of witness testimony is for the jury. *Walton*, 64 Wn. App. at 415-16. But the prosecutor can argue the evidence and inferences from the evidence, including inferences about witness credibility. *Gregory*, 158 Wn.2d at 810. This statement does not constitute misconduct.

Ra's claims of prosecutorial misconduct fail.

VII. Cumulative Error

Ra argues that "the errors at trial were so prevalent and prejudicial, that Ra was denied his right to a fair trial." Br. of Appellant at 34. "A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair." *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). However, absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. *Saunders*, 120 Wn. App. at 826. Because we find no errors, Ra's argument fails.

We affirm.

A majority of the panel has determined 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.

Van Deren, J.

We concur:

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Armstrong, J.

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Hunt, J.