# State v. Guilliot

106 Wash.App. 355 (2001) | Cited 31 times | Court of Appeals of Washington | May 18, 2001

PART PUBLISHED OPINION

Edmund Guilliot sought to present a diminished capacity defense against a first degree premeditated murder charge for killing his fianc`e. He claimed that he had a personality disorder that interfered with his ability to self-medicate his diabetes, which in turn led to hypoglycemia, which in turn caused mental impairment. After ruling that Guilliot had not laid an adequate foundation, the trial court excluded evidence of Guilliot's personality disorder and his expert's opinion on Guilliot's ability to form the intent to kill and to premeditate. Guilliot challenges these rulings along with the court's refusal to give lesser included offense instructions. He also alleges evidentiary error, prosecutorial misconduct, and ineffective assistance of counsel. Finding no abuse of trial court discretion or other reversible error, we affirm.

FACTS

Guilliot pointed a 9 mm semi-automatic handgun at his fianc`e, Sharon Sullivan, pressed the trigger, and shot her in the head. Fifteen or twenty seconds later, he shot her again. Sullivan died from her injuries.

At the time, Guilliot was at Sullivan's apartment in Tacoma where they had been arguing about their relationship, including Guilliot's lack of candor about his employment and his illnesses, cystic fibrosis and diabetes. After the shooting, Guilliot took the gun and drove to his parents' home, told his mother there had been an accident, and prepared himself a beverage shake.

Guilliot's mother called his father at work and all three returned to Sullivan's apartment about twenty minutes later when, at his father's direction, Guilliot called 911. He told the operator that he had accidentally shot Sullivan when he was showing her the gun. He also said that he had diabetes and that he thought he had low blood sugar.

After his arrest, Guilliot told police that he had taken insulin and had something to eat at approximately 7 a.m. the day of the shooting, eventually went back to sleep with Sullivan, and awoke at about 9 a.m. when he drank some juice and ate a rice cake, thinking this resolved any diabetic reaction he might have been experiencing. The shooting occurred around 11:30 a.m. that same morning. Guilliot also told police that he and Sullivan had argued and that he was angry when he shot her.

# State v. Guilliot

106 Wash.App. 355 (2001) | Cited 31 times | Court of Appeals of Washington | May 18, 2001

The State charged Guilliot with first degree premeditated murder in violation of RCW 9A.32.030(1)(a), with a firearm enhancement. Guilliot sought to present a diminished capacity defense based on hypoglycemia. At a pretrial hearing, the trial court heard testimony from Guilliot's expert witness, Dr. Killoran; Guilliot's treating physician, Dr. Carter;[1] a psychologist, Dr. Whitehill; and Guilliot's mother. Based on this testimony, the trial court allowed Guilliot's expert to testify about hypoglycemia and to give an opinion that Guilliot was hypoglycemic at the time of the shooting but it excluded evidence of Guilliot's narcissistic personality disorder and his expert's opinion that Guilliot lacked the ability to form the intent to kill at the time of the shooting.

The trial court instructed the jury on first and second degree murder but declined to instruct on manslaughter. The jury found Guilliot guilty of first degree murder.

I. DIMINISHED CAPACITY

Guilliot challenges the rulings excluding testimony about his alleged narcissistic personality disorder and excluding his expert's opinion that he lacked the ability to form the intent to kill and to premeditate that intent.

The admissibility of evidence rests within the trial court's sound discretion and we will not disturb its ruling unless no reasonable person would adopt the trial court's view. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001); State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). Criminal defendants also have the constitutional right to present, with some limitations, relevant evidence in their defense. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

A. EDMON FACTORS

Guilliot first asserts that the trial court committed reversible error by using the State v. Edmon, 28 Wn. App. 98, 621 P.2d 1310 (1981), factors to evaluate the admissibility of expert testimony on his diminished capacity defense.

In Ellis, the Supreme Court rejected reliance on the Edmon factors as 'the last, absolute and definitive word on foundational requirements for presentation or admissibility of expert testimony on diminished capacity.' 136 Wn.2d at 522. The Ellis court concluded that the trial court should look to ER 401, 402, and 702[2] to determine the admissibility of such evidence. 136 Wn.2d at 523. Since Ellis, other appellate decisions have emphasized that the trial court should consider the admissibility of diminished capacity expert testimony under the aforementioned rules of evidence. See, e.g., Atsbeha, 142 Wn.2d at 915-16; State v. Greene, 139 Wn.2d 64, 73 n.3, 984 P.2d 1024 (1999), cert. denied, 529 U.S. 1090 (2000); State v. Bottrell, 103 Wn. App. 706, 713-14, 14 P.3d 164 (2000); State v. Mitchell, 102 Wn. App. 21, 25-26, 997 P.2d 373 (2000).

Here, although the trial court mistakenly considered the Edmon factors, it also independently considered the admissibility of Guilliot's diminished capacity evidence under ER 702, 401, and 402. Thus, its initial use of an incorrect test was harmless. See Mitchell, 102 Wn. App. at 26.

B. EXCLUSION OF EXPERT TESTIMONY

Guilliot supported his motion to present a diminished capacity defense with a statement that he would present testimony showing that he did not check his blood sugar before self-medicating himself the morning of the shooting and that he consequently injected too much insulin, thereby causing hypoglycemia. Guilliot specified that his treating physician, Dr. Carter, would testify about his diabetes, about his daily one-shot regimen of insulin, and about his instances of low blood sugar while being treated at Madigan Army Medical Center. The motion indicated that Killoran, a psychiatrist, would testify about hypoglycemia's effect on higher brain function and would opine that Guilliot suffers a hypoglycemic episode when he injects too much insulin.

Killoran provided an offer of proof at a pretrial hearing about the narcissistic personality traits he had observed in Guilliot and the tendency those traits had to make an individual deny any physical defects. Killoran testified that although there was a 'logical bridge' between these narcissistic personality features and Guilliot's tendency to have insulin reactions, the only psychiatric condition relevant to his diminished capacity opinion was the alleged insulin reaction or hypoglycemia. The trial court sustained the State's objection to the mental disorder evidence, thereby precluding testimony on Guilliot's narcissistic personality features.

Killoran also testified that, to a reasonable degree of medical certainty, Guilliot 'suffered from a hypoglycemic episode at the time {of the shooting} resulting in mental confusion and impaired ability to premeditate and a decreased ability to form the requisite {sic} to commit the charge.' VII Report of Proceedings (RP) at 339. Killoran based this opinion on information Guilliot provided about the amount of food he ingested and the amount of insulin he injected the morning of the shooting, on a review of the discovery documents, and on a one and one-half hour interview with Guilliot.

But Killoran admitted on cross-examination that he did not review Guilliot's medical records or speak with Guilliot's treating physician. Killoran could not quantitatively determine Guilliot's blood sugar level at the time of the shooting but estimated it was between 50 and 60 milligrams per dilution. And Killoran conceded that Guilliot's report of injecting his normal daily dosage of insulin the morning of the shooting belied the narcissistic personality features that suggested a tendency to ignore his diabetes.

Carter, Guilliot's treating physician, also testified about his treatment of Guilliot's diabetes and his recommendation that Guilliot maintain his blood sugar levels between 70 and 150. Carter indicated that even when Guilliot's blood sugar levels were in the 40s or 50s, Guilliot did not appear incoherent, unconscious, or otherwise unable to answer questions appropriately.

The trial court ruled that there was not substantial evidence of a mental condition that prevented Guilliot from forming the culpable mental states and that none of the expert witnesses could testify to such a condition to a reasonable degree of medical certainty. But the trial court found that the testimony on diabetes would be helpful to the jury and, thus, allowed Killoran to opine that Guilliot may have been hypoglycemic at the time of the shooting. The court found Carter qualified to testify about diabetes but ruled that Killoran, a psychiatrist, was not.[3] The court noted that Killoran had not reviewed Guilliot's medical records, had not independently tested him, and generally was unaware of the range in which Guilliot was asymptomatic. Guilliot challenges the exclusion of evidence about his personality disorder and his expert's opinion that he lacked the ability to form the culpable mental states.

To support a diminished capacity defense, Guilliot had to produce substantial evidence and expert testimony 'demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged.' Atsbeha, 142 Wn.2d at 914; State v. Ferrick, 81 Wn.2d 942, 944-45, 506 P.2d 860 (1973).

Further, that evidence must 'logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required {mental states} to commit the crime charged.' Ferrick, 81 Wn.2d at 945.

When determining the admissibility of expert testimony on diminished capacity, ER 702 requires that we engage in a two-part inquiry: (1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wn. App. 453, 460, 970 P.2d 313 (1999). As to the latter inquiry, evidence is helpful if the ''testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party.'' Farr-Lenzini, 93 Wn. App. at 461 (quoting State v. Jones, 59 Wn. App. 744, 750, 801 P.2d 263 (1990)). See also Greene, 139 Wn.2d at 73-79 (expert testimony on diminished capacity and insanity not helpful to trier of fact under ER 702 where evidence could not reliably connect symptoms to defendant's mental capacity).

Neither party disputes that Killoran was qualified to testify as an expert. Thus, the issue is whether the trial court abused its discretion in determining that evidence about Guilliot's personality disorder and Killoran's opinion that Guilliot lacked the capacity to form the culpable mental states would not be helpful to the trier of fact.

As to the personality disorder, Killoran testified that Guilliot's narcissistic personality might have affected his ability to appropriately monitor his blood sugar levels, which in turn might have led to a hypoglycemic episode the morning of the shooting. Although Killoran testified that there was a 'logical bridge between {Guilliot's} personality structure and his tendency to have insulin reactions,' he acknowledged that the personality disorder did not cause Guilliot to commit the charged crime and that Guilliot's injection of his daily dose of insulin the morning of the shooting belied the theory

that his personality structure suggested he might tend to ignore his diabetes. VII RP at 328. Nor did Guilliot even tell Killoran whether he checked his blood sugar level the morning of the shooting.

Given these gaps in the causal link between Guilliot's personality disorder and his ability to form the required mental states the morning of the shooting, the trial court did not abuse its discretion in ruling that the mental disorder evidence did not satisfy the ER 702 test of being helpful to the jury. See Atsbeha, 142 Wn.2d at 921 (there must be a diagnosis of a particular mental disorder that, under the facts of the case, is 'capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime'). Thus, the trial court did not err in excluding the mental disorder evidence.

Guilliot also failed to establish a link between the general symptoms of hypoglycemia and his capacity to form the culpable mental states at the time of the shooting. Nor could Killoran connect the general symptoms of hypoglycemia, including confusion, irritability, violence, anger, and anxiety, with Guilliot's condition the morning of the shooting.

Killoran's opinion that Guilliot was hypoglycemic the morning of the shooting was inconsistent with the testimony of Guilliot's treating physician who testified that when Guilliot's blood sugar level was as low as the 40s, Guilliot's sole complaint was headaches and that Guilliot never appeared to be incoherent at these levels. Although Guilliot reported that he experienced diaphoresis (perspiration), confusion, and a severe headache that morning, there is no evidence that he suffered from these symptoms to such a degree that they affected his ability to form the culpable mental states. Rather, his activities around the time of the shooting suggest that his capacity was not affected. Guilliot remembered showing Sullivan the gun, pointing it at her head, and shooting it twice. He then took the gun, drove to his parents' house, and made himself a beverage shake.

Again, without an adequate causal link between the hypoglycemia symptoms and Guilliot's mental capacity at the time of the shooting, Killoran's opinion that Guilliot lacked the capacity to form the culpable mental states was not helpful to the trier of fact. Thus, the trial court did not err in excluding it. See Atsbeha, 142 Wn.2d at 918-19 (diminished capacity expert testimony not relevant and not helpful to trier of fact because testimony did not relate to defendant's ability to form intent to deliver controlled substance; testimony suggested that defendant's capacity not impaired); Greene, 139 Wn.2d at 73-79 (expert testimony on dissociative identity disorder not helpful to trier of fact because it was not possible to reliably connect symptoms of disorder to defendant's mental capacity or sanity).

We note that Guilliot's defense based on hypoglycemia is similar to a voluntary or involuntary intoxication defense. See People v. Morton, 100 A.D.2d 637, 473 N.Y.S.2d 66, 68 (1984) ('Drugs have been recognized as a cause of voluntary intoxication and there is no logical reason why insulin should be treated differently, especially in light of the expert testimony that hypoglycemia, also known as insulin reaction, could produce an intoxicated state.') (citations omitted). See also State v.

Gilcrist, 15 Wn. App. 892, 894, 552 P.2d 690 (1976) (in cases where physician prescribed a drug that caused intoxication, that intoxication has been held to be involuntary). A defendant seeking a voluntary intoxication instruction must show (1) that the charged crime has a mental element; (2) that there is substantial evidence of drinking; and (3) that there is evidence that the drinking affected the defendant's ability to form the requisite mental state. State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996).

Thus, as with diminished capacity, 'the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.' Gabryschak, 83 Wn. App. at 252-53. See also State v. Coates, 107 Wn.2d 882, 891, 735 P.2d 64 (1987) ('{I}t is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state.'). Applying these principles by analogy here, there was not substantial evidence of a link between an insulin reaction and Guilliot's ability to form the culpable mental states the morning of the shooting. Again, Guilliot's expert's opinion would not have helped the trier of fact and it was not an abuse of discretion for the trial court to exclude it.

II. LESSER INCLUDED INSTRUCTIONS

Guilliot next argues that the trial court erred in refusing to give lesser included offense instructions for first and second degree manslaughter. The State asserts that because Guilliot argued that the shooting was accidental, he was not entitled to lesser included offense instructions on manslaughter.

In determining whether to give a lesser included offense instruction, we apply a two-prong test. State v. Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the legal prong, we determine if each of the elements of the lesser offense is a necessary element of the greater charged offense. Berlin, 133 Wn.2d at 545-46; Workman, 90 Wn.2d at 447-48. Under the factual prong, we consider whether the evidence supports an inference that only the lesser offense was committed. Berlin, 133 Wn.2d at 546; State v. Pettus, 89 Wn. App. 688, 698, 951 P.2d 284 (1998). A mere possibility that the jury might disbelieve the State's evidence is not justification for a lesser included instruction. Pettus, 89 Wn. App. at 700.

Here, there is no dispute as to the legal prong. See State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). But the State contends that the evidence does not support the factual prong.

To commit manslaughter, one must either recklessly[4] cause the death of another (first degree) or with criminal negligence[5] cause the death of another (second degree). RCW 9A.32.060 and .070. But to commit first degree premeditated murder one must act with a premeditated intent to cause the death of another.[6] RCW 9A.32.030(1)(a).

The evidence in this case supports giving the requested lesser included offense instructions. The jury

could have rationally concluded that Guilliot acted recklessly or with criminal negligence either in failing to appropriately monitor his blood sugar or in not acting with appropriate caution when he showed Sullivan the gun.

The only Washington case the State relies on is inapposite.[7] In State v. Hernandez, 99 Wn. App. 312, 318, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000), the State charged the defendant with second degree murder under the alternatives of intentional and felony murder. The jury convicted the defendant as charged after the trial court refused to instruct on first and second degree manslaughter but instructed the jury on excusable homicide based on the defendant's assertion that the shooting was accidental. Hernandez, 99 Wn. App. at 314, 318.

The Court of Appeals affirmed the trial court's refusal to instruct on the lesser included offenses, finding that the defendant's statements to police did not admit to any acts that caused his girlfriend's death. Hernandez, 99 Wn. App. at 320. Further, the court found that the jury was properly instructed that if they believed the defendant's theory of accident, it was a completely excusable homicide. Hernandez, 99 Wn. App. at 320-21. Here, unlike in Hernandez, Guilliot admitted that he was showing Sullivan the gun, demonstrating how to use it, and pointing it at her when he shot her.

Nonetheless, the trial court's error in denying the lesser included offense instructions was harmless because the court instructed the jury on first and second degree murder but the jury rejected the second degree offense and chose to convict Guilliot of first degree murder. See State v. Hansen, 46 Wn. App. 292, 297-98, 730 P.2d 706, 737 P.2d 670 (1986) (trial court's failure to instruct on lesser included offense of unlawful imprisonment harmless where court instructed on first and second degree kidnapping but jury convicted the defendant of first degree kidnapping); State v. Barriault, 20 Wn. App. 419, 427, 581 P.2d 1365 (1978) (defendant not prejudiced by court's failure to give second degree manslaughter instruction where court instructed on second degree murder and first degree manslaughter and the jury convicted the defendant of the greater offense). See also Schad v. Arizona, 501 U.S. 624, 646-48, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (defendant not entitled to every lesser included non-capital offense instruction in capital case where jury not given all-or-nothing choice between first degree murder conviction or acquittal; use of second degree murder instruction sufficient to ensure verdict's reliability); State v. Williams, 977 S.W.2d 101, 106-08 (Tenn. 1998) (error in failing to instruct on voluntary manslaughter was harmless where jury convicted defendant of first degree premeditated murder and rejected option of convicting of second degree murder and reckless homicide).

If the jury believed that Guilliot was less culpable due to an accident or his hypoglycemia, logically it would have returned a verdict on the lesser offense of second degree murder. But the jury rejected this intermediate offense and elected to convict him on the highest offense. Thus, because the factual question posed by the omitted manslaughter instructions was necessarily resolved adversely to Guilliot by the jury's rejection of second degree murder, this error does not require reversal. See Hansen, 46 Wn. App. at 297.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III. 'TRIGGER PULL' EVIDENCE

At trial, a firearms expert from the Washington State Patrol Crime Laboratory used a trigger pull machine to demonstrate the amount of trigger pull required to fire the murder weapon and to illustrate his testimony that it would take 10 pounds of trigger pull to fire the gun in the double action mode but only 4 pounds in the single action mode. Guilliot objected to the use of the machine, arguing that the exhibit had not been properly certified, did not simulate the same or substantially similar conditions as occurred during the shooting, and the expert could not determine if the gun was fired in the double or single action mode. Guilliot concedes that because he failed to object to the 'trigger pull' evidence based on the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), standards, he may not challenge it on that basis on appeal but he renews the arguments he made at trial.

Demonstrative evidence that accurately illustrates the facts that its proponent intends to prove is admissible if the proponent conducts the experiment under conditions reasonably or substantially similar to the events in issue. State v. Finch, 137 Wn.2d 792, 816, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999); State v. Stockmyer, 83 Wn. App. 77, 83, 920 P.2d 1201 (1996). We defer to the trial court's determination on the issue of similarity and will not disturb this ruling absent an abuse of discretion. Finch, 137 Wn.2d at 816; Stockmyer, 83 Wn. App. at 83. Once the trial court determines that there is sufficient similarity, any lack thereof is for the jury's consideration in determining what weight to give the evidence. Finch, 137 Wn.2d at 816. Finally, the evidence must be relevant and, even if relevant, the trial court should exclude it if it is more prejudicial than probative. Finch, 137 Wn.2d at 816.

Guilliot contends that the trigger pull evidence was not reliable and did not substantially simulate the conditions of the shooting. He notes that the expert did not know whether the gun was in single or double action mode at the time of the shooting, that the trigger pull machine did not take additional factors into account, that there had been no official weighing and measure testing, and that the trigger pull of a frequently fired gun will change.

The trigger pull evidence had significant probative value to rebut Guilliot's theory that this was an accidental shooting and, thus, it was clearly relevant. ER 401. And Guilliot does not show that the evidence was unfairly prejudicial such that it was 'likely to arouse an emotional response rather than a rational decision among the jurors.' Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994).

Further, the conditions in the courtroom need not be identical to conditions present at the time of the incident. See Finch, 137 Wn.2d at 816 (experiment must be conducted under 'substantially similar' conditions). Given the defense of accident, the trigger pull evidence was highly relevant to

show the amount of trigger pull required to fire the gun in either the single or double action mode. 'Illustrative evidence is appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on the accuracy of the evidence.' State v. Lord, 117 Wn.2d 829, 855, 822 P.2d 177 (1991).

As Guilliot acknowledges, the State's expert told the jury that he could not determine what mode the gun was in -- single or double action --when Guilliot shot Sullivan. But the State did not present the evidence as a reenactment of the shooting. Rather, the expert's testimony highlighted the possible differences between the demonstration and the shooting.

The trial court did not abuse its discretion in concluding that the feel of the trigger pull using the device was sufficiently similar to the feel of the murder weapon to allow the use of the device for the limited purpose of demonstrating the amount of trigger pull required to fire the gun. See People v. Agado, 964 P.2d 565, 567-68 (Colo. App. 1998) (no abuse of discretion in trial court's denial of motion for mistrial where defendant was asked to demonstrate how he had held the gun at the time of the shooting but had a broken middle finger at the time of the demonstration). Once the court determined there was sufficient similarity, any lack thereof was for the jury's consideration. Finch, 137 Wn.2d at 816.

IV. FAIR TRIAL

A. EVIDENTIARY RULINGS

Guilliot alleges that the trial court erred by overruling his objections to testimony from (1) Sullivan's neighbor who heard arguments coming from Sullivan's apartment; (2) Sullivan's friend about Sullivan's attempt to end her relationship with Guilliot; and (3) a forensic investigator regarding blood spatter. But as he fails to support his allegations with specific argument or citation to legal authority, we do not address these issues further. RAP 10.3(a)(5).

Guilliot next asserts that the trial court erred by overruling defense counsel's objection to an 'in life' photograph of Sullivan, contending that the picture was not relevant to any issue in the case. At trial, Guilliot based his objection on ER 403.

The decision to admit in life photographs rests within the trial court's sound discretion. Finch, 137 Wn.2d at 811; State v. Pirtle, 127 Wn.2d 628, 653, 904 P.2d 245 (1995). The trial court must consider a photograph's relevance and determine whether its probative value is substantially outweighed by its unfair prejudice. Finch, 137 Wn.2d at 811. But ''{i}n life' pictures are not inherently prejudicial, particularly where as here the jury has seen 'after death' pictures of the victim's body.' State v. Furman, 122 Wn.2d 440, 452, 858 P.2d 1092 (1993). See also Pirtle, 127 Wn.2d at 653 (no abuse in admitting in life pictures and noting that, given the other 'gruesome' photos before the jury, the in life pictures could not have added much additional prejudice).

Here, the record does not contain the in life photograph and Guilliot has not alleged that it caused any specific prejudice. Given the use of autopsy and crime scene photographs in this case, we see no abuse of discretion in admitting the in life photograph of Sullivan. See Furman, 122 Wn.2d at 452.

Guilliot next contends the trial court erred in rejecting his objection to the State's publication of autopsy pictures and crime scene photos by enlarging them on a projector. He challenges the relevance of the crime scene photos and contends that the enlargements were prejudicial.

The trial court has discretion in ruling on the admission of photographs and we will not disturb its ruling absent an abuse of discretion. State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). 'Accurate photographic representations are admissible, even if gruesome, if their probative value outweighs their prejudicial effect.' Crenshaw, 98 Wn.2d at 806. While the prosecution has freedom in selecting the manner in which to prove the crime, it must exercise restraint in offering inflammatory or unnecessary evidence. Crenshaw, 98 Wn.2d at 807.

The crime scene photos were relevant to provide context to the testimony about the crime scene. See Lord, 117 Wn.2d at 870 (photos are probative where they explain the pathologist's testimony). And, ''{a} bloody, brutal crime cannot be explained to a jury in a lily-white manner'.' Crenshaw, 98 Wn.2d at 807 (quoting State v. Adams, 76 Wn.2d 650, 656, 458 P.2d 558 (1969), rev'd on other grounds, 403 U.S. 947 (1971)). Further, the State exercised restraint in offering a relatively limited number of photos and Guilliot has not demonstrated that the photos were unduly inflammatory or unnecessary. Nor does he provide any reasoned argument supporting his challenge to the enlarged photos. Citing ER 602 and 702, Guilliot claims trial court error in overruling his objection to testimony about the position of the victim's head at the time of the shooting. He asserts that the witness lacked personal knowledge or forensic evidence to support that testimony. But the witness, a detective, was discussing Guilliot's comments to the police about where he and Sullivan were when the shooting occurred. This testimony was not improper.

Guilliot also complains of the trial court's refusal to admit testimony about his cystic fibrosis after the State purportedly opened the door on the issue in violation of the court's in limine ruling.[8] But even assuming error, it was harmless because the defense elicited testimony through Guilliot's treating doctor and Guilliot's mother that Guilliot has many medical problems, including an underlying terminal illness requiring recurrent hospitalization. And on cross-examination of Carter, the State elicited the testimony that Guilliot had cystic fibrosis. Thus, the jury was aware of Guilliot's medical situation.

Guilliot also complains that the trial court overruled his objection to the prosecutor's allegedly leading questions, to a non-responsive answer by one witness, and to the State's questioning of Killoran, and that it sustained the State's objections to the defense's attempt to rehabilitate Killoran. But given the voluminous and substantial evidence supporting the State's case, any isolated error in these instances did not affect the trial's outcome and, thus, was not prejudicial.

B. PROSECUTORIAL MISCONDUCT

Guilliot also raises numerous instances of alleged prosecutorial misconduct: (1) eliciting testimony that Guilliot was lying; (2) eliciting testimony that commented on Guilliot's exercise of his right to counsel; (3) violating the trial court's in limine ruling regarding one of Guilliot's statements; (4) improper closing argument; and (5) cross-examining Killoran about irrelevant matters. When a defendant alleges prosecutorial misconduct, he must prove both the impropriety of the conduct and its prejudicial effect. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

1. Eliciting Testimony that Defendant Lying

It is misconduct for a prosecutor to elicit a witness's opinion as to whether another witness is telling the truth because such testimony invades the jury's province as to credibility determinations and is irrelevant and argumentative. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). But a defendant waives his objection to alleged misconduct if he fails to object; reversal is required only if the misconduct is so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice. Jerrels, 83 Wn. App. at 508 (reversing rape and molestation convictions where prosecutor asked defendant's wife whether she believed the alleged victims were telling the truth; credibility was crucial, and no definitive medical evidence linked the defendant to the crimes). If the defendant does preserve the issue by an appropriate objection, reversal is required only if there is a substantial likelihood that the misconduct affected the jury's verdict. Padilla, 69 Wn. App. at 301 (reversing conviction where prosecutor repeatedly asked the defendant if he was saying a testifying officer was lying; as case essentially turned on credibility of the two witnesses, there was substantial likelihood that this misconduct affected verdict).

Guilliot does not specify the exact testimony that he challenges but he points to several pages of the record in which an officer was describing the police interview of Guilliot.[9] Guilliot did not object to this questioning.

Under State v. Demery, 100 Wn. App. 416, 997 P.2d 432, review granted, 11 P.3d 824 (2000), this testimony may have been improper. In Demery, the trial court admitted, over the defendant's objection, an audio tape of the police's interview of the defendant in which the police said that the defendant was lying. 100 Wn. App. at 417-18. This court held that the trial court abused its discretion because the officer's comments were an impermissible opinion as to the defendant's guilt. Demery, 100 Wn. App. at 422-23. We distinguished the audio tape from an officer giving testimony on the interview process, finding that a jury is more likely to perceive the former as an opinion on the defendant's guilt. Demery, 100 Wn. App. at 421. The error was not harmless beyond a reasonable doubt because the case turned primarily on the credibility of the victim and the defendant. Demery, 100 Wn. App. at 423.

We stated that '{t}he impact of admitting accusatory comments on an audio recording is very similar to admitting a live witness's inadmissible personal opinion about a defendant's guilt.' Demery, 100 Wn. App. at 422. Here, an officer commented that he told Guilliot that he did not believe what Guilliot was telling him. Although this evidence is one step removed from listening to an audio tape where the officer tells the defendant he thinks the defendant is lying, there is little substantive difference. In either case, the officer's statements suggested that he believed the defendant was lying and was an inadmissible opinion of the defendant's guilt.

But Guilliot did not object to this alleged misconduct and thus has waived the objection unless the evidence is so flagrant and ill intentioned that a curative instruction would have been ineffective. Jerrels, 83 Wn. App. at 508. Here, the court instructed the jury that it was the sole judge of the witnesses's credibility and we presume that the jury follows the court's instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987). Further, the State presented the comments as a description of the interview process rather than as a comment on the defendant's guilt. See Dubria v. Smith, 224 F.3d 995, 1001 (9th Cir. 2000) (affirming denial of habeas petition where defendant challenged admission of unredacted tape and transcript of interview with police; the officer's comments and questions put the defendant's answers in context and the interview was, on the whole, ''unremarkable''). Thus, because Guilliot has failed to show that a curative instruction would not have obviated the prejudice, he has waived this claim of error.

Guilliot also asserts that the prosecutor designed his cross-examination of Killoran to elicit a response that Guilliot was lying. Guilliot cites to fourteen pages of trial testimony without specifically discussing any of the testimony. In the cited portions of the record, the prosecutor highlighted that Killoran relied almost entirely on Guilliot's self-report in reaching his conclusions despite apparent inconsistencies with Guilliot's statements to the police. The prosecutor also asked Killoran if he thought Guilliot had an incentive to 'color' his version of events when speaking with Killoran. Given this legitimate basis for the State to explore the foundation for Killoran's testimony, the absence of any objection, and the failure to show that a curative instruction would not have cured any prejudice, this contention lacks merit.

2. Comment on Exercise of Constitutional Right

Guilliot also asserts misconduct in a question that allegedly elicited testimony on his exercise of his constitutional right to counsel. The colloquy was as follows:

{State:} What conversations did you have about the second taped statement?

{Officer:} Well, when I asked him if he wanted to revise his statement, obviously the facts were changing a little bit different from the first statement. He said, what about an attorney, and at that time I told Edmund Guilliot that he could have an attorney any time that he wished, and that he -- XIV RP at 1012-13.

The defense objected at this point and the trial court allowed the answer to stand based on its conclusion that the answer was relevant to the advisement of rights but it would not allow further questioning on that issue.

Again, Guilliot fails to explain how this is an improper comment on his exercise of his right to counsel. The trial court's ruling was reasonable and well within its discretion.

3. Violation of Motion in Limine

Guilliot asserts that the prosecutor 'repeatedly' violated the trial court's in limine ruling that suppressed any reference to Guilliot's statement to police that there was 'no sense crying over spilled milk.' Appellant's Brief at 43. Guilliot fails to provide any record cites for these allegations; thus, we do not address this claim further. RAP 10.3(a)(5).

4. Improper Closing Argument

Guilliot contends that the prosecutor, in closing argument, improperly (1) vouched for the credibility of the State's witnesses, (2) discredited the defense's theory of accident, (3) took advantage of the trial court's exclusion of Guilliot's diminished capacity defense by misleading the jury as to the purpose of Killoran's testimony, and (4) characterized Sullivan's death as an 'execution' on numerous occasions.

Guilliot points to two instances in the record to support his first assertion that the prosecutor vouched for the State's expert witnesses's credibility.[10] The defense did not object in either instance.

A prosecutor may not express a personal belief as to an accused's guilt or personally vouch for a witness's credibility. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). 'A prosecutor may comment on a witness's credibility so long as the remarks are based on the evidence and are not a personal opinion.' State v. Johnson, 80 Wn. App. 337, 339, 908 P.2d 900 (1996). See also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

Because prosecutors may argue inferences from the evidence, we will not find prejudicial error unless it is clear and unmistakable that the prosecutor is expressing a personal opinion. Brett, 126 Wn.2d at 175 (statement, ''I would suggest that one reason you might want to believe'' one witness, an inference from evidence, not a statement of personal belief); Sargent, 40 Wn. App. at 343-45 (comments improper where prosecutor explicitly stated that he believed the witness); State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983) (no improper comments where, in context of entire argument, prosecutor was attempting to highlight evidence supporting credibility). It is reasonable to interpret the prosecutor's statements in this case as suggesting criteria for assessing witness credibility. Because it is not clear that the prosecutor was expressing a personal opinion, we do not find prejudicial error. See Brett, 126 Wn.2d at 175.

Guilliot next asserts that the prosecutor personally discredited the defense theory of accident and encouraged the jury to convict based on the State's representations. Guilliot supports this argument with four citations to the record.

The prosecutor may argue that the evidence does not support the defense theory. Johnson, 80 Wn. App. at 339. The prosecution did so in this case in regard to the defense theory of accident; thus, there was no error. Similarly, Guilliot fails to explain how it is misconduct for the State to sum up its closing argument by stating that it is seeking a conviction for the charged crime.

Further, the prosecution's statements that Guilliot did not commit manslaughter and that the jury could choose between first or second degree murder or an acquittal were in response to the defense's repeated closing statement that the justice system was not fair because the jury was not offered the choice of manslaughter. The prosecutor, as an advocate, may make a fair response to a defense argument. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Thus, even improper remarks are not grounds for reversal 'if they were invited or provoked by defense counsel . . . unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.' Russell, 125 Wn.2d at 86. Here, the prosecution's statements were a restrained response to defense counsel's comments and were not so prejudicial that a curative instruction would not have been effective.

Guilliot next claims that the prosecution took advantage of the trial court's exclusion of the diminished capacity defense to mislead the jury as to the purpose of Killoran's testimony. Guilliot cites at length from the record as to alleged instances of unfair cross-examination and argument but fails to explain why it was unfair or improper and fails to cite to legal authority in support of such an argument. Thus, we do not consider this claim further. RAP 10.3(a)(5).

Guilliot also asserts that the State improperly referred to Sullivan's death as an 'execution' at least eight times. But he provides no argument or authority to support his contention.

Other cases addressing similar situations do not support Guilliot's assertion of misconduct. See, e.g., State v. Davis, 141 Wn.2d 798, 873, 10 P.3d 977 (2000) (remark in penalty phase that defendant acted as ''judge, jury and executioner of the victim'' was not improper); People v. Millwee, 18 Cal. 4th 96, 954 P.2d 990, 1015, 74 Cal. Rptr. 2d 418 (1998) (no prosecutorial misconduct when prosecution referred to killing as an execution; the term merely served as shorthand description of premeditated intentional murder and evidence, instructions and argument supported the description); State v. Loftin, 146 N.J. 295, 680 A.2d 677, 722 (1996) (nothing improper about State's characterization of killing as ''execution-style murder'' where strong evidence supported characterization and prosecutor has considerable leeway in developing a theory).

The evidence in this case supported the prosecutor's characterization of the killing as an execution in that it involved two shots to the head at close range preceded by an argument that made Guilliot

angry. Given the prosecutor's role as an advocate and his right to develop a theory of the case, it was not misconduct for the prosecutor to refer to the killing as an execution in support of his argument for premeditated intentional murder. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985) (counsel is afforded latitude in arguing facts in evidence and the reasonable inferences therefrom).

5. Improper Cross-Examination

Guilliot argues that the State improperly cross-examined Killoran by referring to him as a 'charlatan' in a pretrial hearing; by arguing with him about whether Guilliot 'fudged' or 'lied'; and by questioning him about his testimony in other cases, which violated the court's in limine ruling that excluded Guilliot's diminished capacity defense.

First, the prosecutor did refer to Killoran as a 'charlatan' during pretrial argument on the admissibility of Guilliot's diminished capacity defense. The defense objected and also alluded to an alleged statement that the prosecutor made off the record referring to Killoran as a whore. The court overruled the objection, basically stating that neither parties' characterization of witnesses influenced the court's decision. This is harmless error because it is inconceivable that this remark made outside the presence of the jury could have had any impact on the trial's outcome.

Second, Guilliot alleges that the prosecutor improperly argued with Killoran about whether Guilliot 'fudged' or 'lied' and at one point asked Killoran if he was hypoglycemic. This latter question was improper and the trial court properly sustained defense counsel's objection. But again, the error was harmless because there is not a substantial likelihood that this single inappropriate question affected the verdict.

Although Guilliot gives an inaccurate record cite, the prosecution did ask Killoran whether Guilliot had an incentive to color his version of events when he spoke with the doctor after Guilliot had been charged with murder. But when Killoran said he did not think Guilliot was lying, the prosecutor specifically corrected him, stating that that was not the question. Guilliot has not explained why it was improper for the prosecutor to question Killoran's reliance on Guilliot's self-reporting in forming his opinion.

Third, Guilliot asserts that the prosecutor improperly alluded to diminished capacity, which was not an issue in the case because of the trial court's in limine ruling excluding that defense. The prosecutor did question Killoran generally as to bias, asking who retained him, how much he was being paid, and later asking how many times the State had retained him as opposed to the defense and how many times he had been retained 'to determine whether or not there was something that excused criminal behavior.' XV RP at 1279. Given the absence of an objection to this question and a party's right to cross-examine a witness for bias, we can not say that this question was so flagrant and ill intentioned as to require reversal. See State v. Robbins, 35 Wn.2d 389, 395-96, 213 P.2d 310 (1950); State v. Swanson, 16 Wn. App. 179, 194, 554 P.2d 364 (1976).

C. CUMULATIVE ERROR

Guilliot also asserts that the cumulative effect of these evidentiary errors and prosecutorial misconduct require reversal of his conviction. We disagree. Any errors were minimal and cumulatively did not deprive Guilliot of a fair trial. See State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Guilliot asserts that defense counsel was ineffective by (1) failing to obtain Guilliot's medical records for Killoran's review, and (2) failing to object to the 'trigger pull' evidence based on the Frye standards. Frye v. United States, 392 F. 1013 (D.C. Cir. 1923).

To prevail on an ineffective assistance claim, a defendant must show that his counsel's performance was objectively unreasonable and that the unprofessional errors prejudiced him such that there is a reasonable probability that, but for the errors, the result would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A claim of ineffective assistance fails if either prong is not met. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Further, we strongly presume that counsel provided effective representation and we will not consider legitimate trial tactics as evidence of deficient performance. McFarland, 127 Wn.2d at 335; State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Guilliot asserts first that trial counsel may have been deficient for failing to provide 'adequate materials for Dr. Killoran's review, such as medical records{.}' Appellant's Brief at 49. But Guilliot does not explain what these 'adequate materials' might encompass. Further, defense counsel may have had a tactical reason for not providing Guilliot's medical records to Killoran. For example, the records may not have supported Guilliot's assertion that he had numerous hypoglycemic incidents or that his symptoms at the time of the shooting were as severe as he claimed. Thus, Guilliot has not met his burden of showing counsel's deficient performance. See McFarland, 127 Wn.2d at 336 (defendant must rebut presumption of effective representation based only on the record established below); State v. Hayes, 81 Wn. App. 425, 443, 914 P.2d 788 (1996) (allegations of ineffective assistance involving matters outside the record are more properly reviewed by way of a personal restraint petition).

Guilliot next asserts that his counsel's failure to object to the trigger pull evidence on the basis of the Frye standards was deficient and prejudicial. But he gives only passing treatment to the question of whether this evidence met the Frye standards.

There is a two-part inquiry to determine the admissibility of novel scientific evidence. First, the evidence must meet the Frye test, which states that "evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant

scientific community.'' State v. Baity, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000) (quoting State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984)). But evidence that does not involve new methods of proof or new scientific principles is not subject to the Frye test. Baity, 140 Wn.2d at 10-11 (citing cases finding that evidence not subject to Frye because not novel scientific evidence); State v. Ortiz, 119 Wn.2d 294, 310-11, 831 P.2d 1060 (1992).

If Frye is satisfied, the court must consider the evidence under the two-part inquiry of ER 702, i.e., whether the witness qualifies as an expert and whether the testimony would help the trier of fact. State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996). This court's review of admissibility under Frye is de novo but we review the trial court's ER 702 determination only for an abuse of discretion. Baity, 140 Wn.2d at 9-10.

Guilliot does not provide any argument showing that the trigger pull device was novel scientific evidence subject to the Frye test. This case is similar to Ortiz, 119 Wn.2d at 297, 308, where the trial court allowed testimony from a United States Border Patrol tracker without holding a Frye hearing. The Supreme Court affirmed, stating that the witness's 'testimony was not based on novel scientific experimental procedures, but rather upon his own practical experience and acquired knowledge.' Ortiz, 119 Wn.2d at 311 ('Moreover, no particularized background knowledge would be necessary to an understanding of the evidence {the witness} presented.').

Here, also, this was demonstrative evidence applying the concept of weighing physical forces, hardly a novel scientific concept. Thus, the Frye test did not apply and Guilliot's counsel was not deficient for failing to object to the evidence on that basis. The ineffective assistance of counsel claim must fail. See Hendrickson, 129 Wn.2d at 78.

We affirm.

Seinfeld, J.

We concur:

Morgan, P.J.

Houghton, J.

1. As a military dependent, Guilliot received treatment at Madigan Army Medical Center. Under army regulations, Dr. Carter could not testify as an expert witness but could only testify as to the factual information regarding his own patient.

2. ER 702 provides: 'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.' ER 401 provides: ''Relevant evidence' means

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' And ER 402 provides: 'All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.'

3. To the extent that Guilliot asserts that this ruling was error, he has failed to explain how it was prejudicial because Killoran testified at trial about diabetes and hypoglycemia.

4. A person acts recklessly 'when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.' RCW 9A.08.010(1)(c).

5. A person acts with criminal negligence 'when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.' RCW 9A.08.010(1)(d).

6. Intent is acting 'with the objective or purpose to accomplish a result which constitutes a crime.' RCW 9A.08.010(1)(a). Premeditation is forming an intent, after deliberation that is more than a moment in time, to take another person's life. RCW 9A.32.020; 11 Washington Pattern Jury Instructions: Criminal 26.01.01, at 283 (2d ed. 1994). Further, case law defines premeditation as ''the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.'' State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (citations omitted).

7. The State also cites to a New York case where the defendant defended against a second degree murder charge by arguing that he suffered from hypoglycemia at the time of the shooting, which in effect rendered him intoxicated. Morton, 473 N.Y.S.2d at 67. The trial court denied the defendant's request to instruct the jury on second degree manslaughter (reckless) and criminally negligent homicide. Morton, 473 N.Y.S.2d at 67. The appellate court reversed, concluding that the trial court should have instructed on second degree manslaughter because the evidence supported a conclusion that the defendant acted recklessly. Morton, 473 N.Y.S.2d at 68-69. But because a person who fails to perceive a risk by reason of intoxication only acts recklessly, the evidence did not support an inference that the defendant acted with criminal negligence. Morton, 473 N.Y.S.2d at 69. But in New York, unlike in Washington, the statute defining the culpable mental states specifically provided that a person who is unaware of a risk solely because of voluntary intoxication acts recklessly. Morton, 473 N.Y.S.2d at 69. Thus, we cannot apply that court's holding to this case.

8. The trial court considered its in limine ruling twice and found no violation by either party.

9. What may be the relevant exchange is as follows: {State:} Once you went back in, what did you tell the Defendant? {Officer:} We were just up front with him. We sat down and we told him that {we} had listened to his story and we didn't find it credible. {State:} Did you say anything else? {Officer:} Yes. I basically -- Well, he responded, but I told him that evidence, physical evidence, evidence is what it is and it never lies. And people do lie. And we encouraged him to think about what he had told us and tell us the truth. {State:} Okay. What was {Guilliot's} reaction to you during this

conversation? {Officer:} Well, initially during the interview process he was leaning on the table and he was forward in his chair. After I had told him his story wasn't credible and we weren't buying into portions of it, he pushed back away from the table, sat back in his chair and stared at the floor. During that time he told us that he was telling us the truth. But I again told him that, well, it's just not credible. It's not the truth. XIV RP at 1009-10.

10. First, the prosecutor argued as follows: Dr. Howard testified that Sharon Sullivan died from two gunshot wounds. Probably the testimony that you didn't need to hear, you have seen the photographs in this case. But Dr. Howard's testimony was important for some other things that he had to say. First of all, and most importantly in this case, Dr. Howard showed you what an expert witness is supposed to be like. Honest, with integrity, unbiased. He answered questions that I put to him. He answered questions that the defense put to him. He had no stake in this at all. That's very important when you consider the credibility of Sean Killoran later. XVII RP at 1432-33. Next the prosecutor pointed to the state crime lab expert: '{T}he crime lab guy{} testified as well. His testimony was important from the perspective of again what a credible expert witness is supposed to be like. He answered questions put to him from both sides, and in fact, he was even called as a witness for the defense.' XVII RP at 1436.