NO. 100779-5
COURT OF APPEALS NO. 83284-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW JOHN MCCOLLIAN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner Matthew John McCollian, the appellant below, seeks review of the Court of Appeals decision, State v. McCollian, noted at ___ Wn. App. 2d ___, 2022 WL 597320, No. 83284-1-I (Feb. 28, 2022).

B. ISSUES PRESENTED FOR REVIEW

1. The defense in this case was general denial and the defense opening portrayed the decedent and Mr. McCollian as drug users who inexplicably traveled southbound, ending up in Tumwater in the early morning hours. The defense argued that "we don't know" what happened that night and "you won't hear" what happened. The trial court later excluded all further drug evidence and instructed the jury to disregard hearsay evidence that had been admitted that Mr. McCollian was "smoked out." But the court admitted hearsay statements such as "he's scaring me" and "he's so out of his mind." Does the Court of Appeals decision approving admission of these

statements conflict with precedent barring hearsay about state of mind unless relevant to a specific defense and barring hearsay altogether if it pertains to the words or conduct of the defendant, meriting review under RAP 13.4(b)(1)?

2. The prosecution presented no firearm evidence other than that the decedent was shot. The trial court admitted evidence that Mr. McCollian had a handgun in the week prior to Ms. Stutzman's death. Although lukewarmly acknowledging this as error, the Court of Appeals concluded the error was harmless, comparing the case to State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). Because Freeburg establishes firearm evidence is highly prejudicial even in strong circumstantial cases and because no other evidence would have indicated Mr. McCollian ever possessed a firearm, should the Court of Appeals decision be reviewed pursuant to RAP 13.4(b)(2)?

3. A police officer testified about his conversation with Mr. McCollian about a police report filed out by Mr.

McCollian. The officer said he repeatedly told Mr. McCollian about the perjury statement contained on the police report and reminded Mr. McCollian that perjury and making a false police report are crimes. The Court of Appeals stated this was not improper opinion testimony or that if it was, it was harmless, addressing the error under a nonconstitutional standard. Does the Court of Appeals decision conflict with precedent recognizing that explicit or near explicit law enforcement opinions on credibility and guilt are constitutional errors, meriting review under RAP 13.4(b)(1), (2), and (3)?

C. STATEMENT OF THE CASE

1. Background

Mr. McCollian lived in Everett apartment complex and had a a casual dating relationship with Sophia Stutzman, the decedent. RP[1] 642-43. Ms. Stutzman lived with her fiancé and mother. RP 638, 640. On December 11, 2018, Ms. Stutzman's

[1] Mr. McCollian references the consecutively paginated 1672-page transcript as "RP." He references the May 8, 2019 sentencing transcript as "SRP."

mother, Chanelle Livingston, drove Ms. Stutzman to Mr. McCollian's apartment to drop her off around 9:00 p.m. RP 647-49, 653, 697. Ms. Livingston saw Mr. McCollian greet her and saw them walk away. RP 654.

Ms. Livingston later received text messages from Ms. Stutzman that she was ready to be picked up. RP 654-57. Ms. Livingston headed back toward the apartment and received instruction on where to park (the content of the texts will be discussed below). Although Ms. Stutzman said she was coming down, she never did. RP 720-21. Previously, she had changed her mind about coming down before when she'd visited Mr. McCollian and had ignored her mother's texts before as well. RP 737-38. However, Ms. Livingston was worried when she did not respond to further texts, she and a friend banged on all the doors of the apartment complex looking for her, and ultimately left the scene. RP 724-25. Ms. Livingston sent Ms. Stutzman further texts in the evening but received no response. RP 721-22.

Ms. Stutzman's body was found along the side of a road in Tumwater in the early morning hours of December 12, 2018. RP 303-04, 344. The medical examiner concluded the cause of death was a gunshot wound to the chest, which had pierced both the left lung and the aorta. RP 506-07, 512. The gunshot had an indeterminate range. RP 492. Ms. Stutzman had other various bruises, but the medical examiner could not say much about them other than that they were perimortem injuries that occurred right around the time of death. RP 474-81. Ms. Stutzman's vaginal swabs indicated the presence of Mr. McCollian's DNA and that of another man. RP 519, 1294.

The prosecution presented cell phone tower evidence. Both Mr. McCollian's and Ms. Stutzman's cell phones were pinging off cell phone towers along I-5 southbound at around the same general times in the same general places on the night of December 11, 2018. RP 1409-17, 1425-34. Centralia gas station footage showed what appeared to be Mr. McCollian at RP 855,

1382. Ms. Stutzman's phone was eventually found in Renton. RP 575.

Mr. McCollian was staying in a hotel in Bothell and had a date with a woman there on the early morning hours of December 15, 2018. RP 1059, 1064-65. He checked out on December 15 at 10:50 a.m. RP 1065-66. He reported this to a police officer when he reported that his rental car had been stolen, which he made a formal report of with his mother. RP 888, 1090. He stated that he had originally parked it in a handicapped spot, moved it, and then when he came out to give his date a ride home, the car was gone. RP 883-86.

The officer located the car parked on a street nearby. RP 893-94. According to the fire marshal, someone had intentionally tried to set the car on fire. RP 1040, 1042. The interior of the car was covered in soot, there were gas of gasoline in the car that appeared to have been set on fire with a handheld flame. RP 894-96, 1040. The passenger seat and glove box of the car tested

positive for blood and the blood was a one in 600 octillion match to Ms. Stutzman. RP 1288-89.

The state charged and tried Mr. McCollian with second degree intentional murder, second degree felony murder predicated on first and second degree assault, second degree unlawful possession of a firearm, and second degree arson. CP 84-85. The murder counts included deadly weapon and domestic violence allegations. CP 84-85.

2. Decedent's hearsay statements

At trial, the prosecution sought to admit a text message exchange between Ms. Stutzman and her mother, Chanelle Livingston, sent when she was alleged to have been at Mr. McCollian's apartment. The defense objected to the admission of Ms. Stutzman's text messages, including specifically to, "He's scaring me," "He is smoked out," "He is so out of his mind, one sec. Please wait a sec," and "Don't let her see where he lives. Park way down." RP 671-81; CP 58-62; see also McCollian, slip op. at 7-8 (quoting text message exchange). The trial court ruled

that these text messages were admissible under either present-sense impression or then-existing state of mind exceptions to the hearsay rule. RP 682-83. The prosecutor then had Ms. Livingston identify the text messages and trial court admitted the text messages into evidence. RP 705-08 (admitting Exs. 35-41). Ms. Livingston discussed some of her activities and perceptions based on the text messages. RP 709-17.

During cross examination, the defense asked Ms. Livingston specifically about Ms. Stutzman's text about needing to leave. The defense established that Ms. Stutzman had spent time with Mr. McCollian before and had said she wanted to leave but then change her mind and did not leave on at least one occasion. RP 737.

On redirect, the prosecution asked whether Ms. Stutzman had ever described Mr. McCollian as "smoked out" or "out of his mind" on any prior occasion, and the defense objected. RP 740. The court sustained the objection, the prosecution asked to be heard, there was a sidebar, and then additional argument outside

the jury's presence. RP 740-42. The trial court ruled that the question was a yes or no question, so it did not call for hearsay. RP 745-46. Ms. Livingston thus proceeded to testify that Ms. Stutzman never had referred to Mr. McCollian as "smoked out" or "out of his mind" prior to that occasion. RP 747-48.

On recross, the defense asked whether Ms. Livingston knew that Ms. Stutzman was going over to McCollian's to get high together, and Ms. Livingston said she did not know. RP 748. At another hearing outside the jury's presence, the prosecution objected to evidence of Ms. Stutzman's drug use. RP 749-51. (The prosecution itself had elicited from the medical examiner that Ms. Stutzman had morphine, methamphetamine, and a metabolite of methamphetamine in her blood at the time of death. RP 518.) The trial court wanted to hear an offer of proof and called the lunch recess. RP 751-53.

The trial court later reversed some of its previous rulings, stating it found cases from "our higher courts with respect to the admissibility of evidence of drug usage on the part of the

defendant, and, more specifically, such references of drug usage admitted via hearsay." RP 754. So the court struck the "He is smoked out" statement, Ms. Livingston's testimony that Ms. Stutzman had never previously described Mr. McCollian as "smoked out" or "out of his mind," and precluded both parties from presenting any other drug-related evidence. RP 757.

The defense moved for a mistrial as for the erroneous admission of the "smoked out" statement, arguing, "I don't think we can unring that bell." RP 759-60. The trial court denied the mistrial motion because "[t]his issue is but a -- on a relative scale, a minor issue. The Court has done its best to, for lack of a better term, corral the issue at this stage so as not to taint this case with the danger of the further introduction of evidence relating to drug usage . . . ." RP 761. The court indicated it would provide a curative instruction to the jury. RP 761.

The court then instructed the jury,

> The Court is striking from evidence the portion of the Exhibit No. 36 . . . . The comment,

> quote, "He is smoked out." That is stricken from evidence.
>
> Furthermore, the question, "Had she ever described him on any prior occasion as being 'smoked out' or 'out of his mind' anything like that?" And the answer, 'No.' That is stricken from the evidence.

RP 767.

The prosecution explicitly relied on Ms. Stutzman's texts, "He's scaring me," instructions to park "way down," and "he is so out of his mind," repeatedly during closing argument, emphasizing that she was specifically afraid of Mr. McCollian, which meant he was guilty of murdering her. RP 1552-55, 1556-58, 1648-49.

3. Firearm testimony

The parties litigated the admission of Jonathan Thomas's testimony, whom the prosecution wished to call to establish that Mr. McCollian had several weapons about a week prior to Ms. Stutzman's death. CP 66-81; RP 841-44, 1305-19. Among other things, the defense contended that such evidence was propensity evidence, particularly because the state had not offered any

evidence regarding the weapon that shot Ms. Stutzman. RP 1309-10, 1314, 1316; CP 68-69. The defense asserted Mr. McCollian's possession of a Glock brand gun in specific was not admissible because "without knowing the caliber of the weapon or the caliber of the bullet in this case, that absent that link this is not probative." RP 1314.

The trial court excluded any evidence that Mr. Thomas saw a rifle or a shotgun in Mr. McCollian's possession because there was not any evidence to suggest that the homicide was committed with one of these weapons. RP 1317. Nevertheless, the court concluded that Mr. Thomas's observation of a handgun "within five days of this incident" was relevant and that it was not unduly prejudicial. RP 1317-19. The trial court declined to address Mr. McCollian's contention that this was improper propensity evidence in its ruling.

Jonathan Thomas testified that Mr. McCollian showed him a pistol, which he had previously referred to as a "Glock," around December 4. RP 1333-34. Mr. Thomas said that someone had

given Mr. McCollian the gun in exchange for a debt. RP 1335. Mr. Thomas did not know the caliber of the gun and called it "fully automatic" with an extended clip. RP 1335. Mr. Thomas also admitted to not knowing much about guns. RP 1336.

The defense proposed a limiting instruction as to Mr. Thomas's testimony, indicating that the jury must not consider the testimony for the purpose of assessing whether Mr. McCollian unlawfully possessed a firearm. CP 83. The state did not object to this limiting instruction and so the jury was instructed,

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of John [sic] Thomas. You are not to consider the testimony of John [sic] Thomas as it relates to whether or not the Defendant possessed a firearm, as charged in Count 2. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 107.

The prosecution relied on Mr. Thomas's testimony during closing to establish that Mr. McCollian had a gun. RP 1616-17, 1646-47. The prosecutor asserted the gun was "consistent with

the handgun -- would be consistent with the type of round that was used to kill Sophia Stutzman. So that's the limited purpose that is offered is to show that the defendant had, in fact, access to a handgun five days before this happened." RP 1646.

4. Police testimony highlighting perjury and false reporting

Police officer Mike Szilagyi testified that he responded to Mr. McCollian's complaint about a stolen vehicle and met Mr. McCollian and his mother at the police station. RP 876, 879. According to Mr. McCollian's report, he had initially parked the car at the Tumwater Holiday Inn where he was staying, but it was in a handicapped spot, so he moved the car to a side road, and reported it stolen the next morning. RP 883.

Szilagyi proceeded to testify that the stolen vehicle report included a "perjury statement": "There's the perjury statement on there that we always have the person read. Basically, it says that you're not making a false preliminary report, that you understand that making a false police report is a crime." RP 889-90. The

defense objected to this testimony as an improper comment on veracity, but the objection was overruled. RP 889-90.

The police found the vehicle shortly after the report was made. Szilagyi stated, "I informed [Mr. McCollian] I had located the vehicle, it was right near where he told me he had parked it, and I asked him if he could come meet me, and his response was he was busy." RP 912. Szilagyi tried to insist that Mr. McCollian come meet him at the scene of the car for additional questions and information and, according to Szilagyi, "He responded just by saying that he was busy. I asked him where he was and what he was doing, and he said it didn't matter. He became increas[ing]ly defensive in response to my questions." RP 912. Szilagyi continued,

> I told him that this didn't seem to be a random act and so it seemed to me he might actually know the person who had done it, but he basically ended up saying he didn't appreciate the accusations and got increas[ing]ly sort of aggressive and defensive on the phone. I reminded him that making a false police report is a crime, and he didn't want to talk anymore.

RP 912-13.

The state relied on Mr. McCollian's exchange with Officer Szilagyi to suggest his lack of credibility and his evasion showed he was guilty. RP 1583, 1590-91.

5. Verdicts, judgment, sentence, and appeal

The jury returned guilty verdicts on second degree murder,[2] second degree unlawful possession of a firearm, and second degree arson. The jury also returned special verdicts with respect to the murder charge that Mr. McCollian and Ms. Stutzman were household and family members and that Mr. McCollian was armed with a deadly weapon. CP 120-25.

The trial court imposed concurrent high-end standard-range sentences of 357 months on the second degree murder, 43 months on the second degree unlawful possession of a firearm, and 70 months on the second degree arson. CP 147. A 24-month deadly weapon enhancement was also imposed, for a total term of 381 months. CP 147; SRP 65-66.

[2] The jury found Mr. McCollian guilty of both felony second degree murder and intentional second degree murder. CP 105-06, 120, 123.

Mr. McCollian appealed. CP 158. The Court of Appeals rejected his assignments of trial error, as discussed below, but reversed his sentence and remanded for resentencing.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **The Court of Appeals opinion reads State v. Parr[3] too narrowly, conflicting with its holdings that because decedent hearsay evidence is not capable of cross examination, it is not admissible to prove the defendant's intent unless a specific defense places it in issue**

The Court of Appeals held that the decedent's statement, "I'm so scared" was relevant to rebut a defense theory and that the decedent's statement, "He is so out of his mind" was a present sense impression and therefore not covered by authority cited by Mr. McCollian, which pertained to the state of mind hearsay exception. McCollian, slip op. at 13-15.[4]

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[3] 93 Wn.2d 95, 606 P.2d 263 (1980).

[4] The Court of Appeals also declined to consider Mr. McCollian's challenge to other hearsay statements under RAP 10.3(a)(6) due to Mr. McCollian's lack of "supportive substantive argument." McCollian, slip op. at 12 n.3. In addition to the statements already identified, Mr. McCollian challenged hearsay admitted by the trial court that Ms.

"In a homicide case, if there is no defense which brings into issue the state of mind of the deceased, evidence of fears or other emotions is ordinarily not relevant." State v. Parr, 93 Wn.2d 95, 103, 606 P.2d 263 (1980). General such evidence is allowed only when a defense such as accident or self-defense is raised. Id. Further, "[w]e do not perceive the necessity of allowing hearsay testimony about conduct of the defendant to go to the jury." Id. at 104. Although rebutting a specific defense theory might "allow the State to prove the victim's declarations about his or her own state of mind, where relevant," the courts "should not permit [the prosecution] to introduce testimony which describes conduct or words of the defendant." Id.

Stutzman instructed her mother's friend to park away so that they would not see where Mr. McCollian lived. Although Mr. McCollian did not discuss these text messages (or the others) in much specific detail, he did argue that this statement was inadmissible hearsay because it pertained "either to her fear, which was not at issue, or Mr. McCollian's conduct, which is not admissible via hearsay statement." Am. Br. of Appellant at 19. The Court of Appeals does not explain how this argument fails to qualify as "argument" under RAP 10.3(a)(6).

Ms. Stutzman's state of mind was not at issue and therefore irrelevant. The Court of Appeals focuses on defense counsel's opening remarks painting Ms. Stutzman and Mr. McCollian as drug users and stating, "for some reason they wanted to be at th[e] back parking lot at 3:00 a.m." when something "went wrong" in the back of the Costco parking lot, and Mr. McCollian "fled th[e] area quickly" "trying to get away." McCollian, slip op. at 14 (alterations in original). According to the Court of Appeals, this created a material issue as to whether Ms. Stutzman would voluntarily leave with Mr. McCollian to head to the parking lot and thus her statement of fear became relevant because tended to indicate she would not.

The Court of Appeals takes the defense opening out of context. Counsel made clear, "You won't hear any specific evidence why, probably, but you will have clear indication that they went directly from his apartment to the back parking lot at Costco at 3:00 a.m." RP 297. Counsel also stated that jurors would hear "quite a bit about detective and law enforcement

officers to understand what happened in that back parking lot at 3:00 a.m., but throughout this entire case, you are not going to see or hear any evidence that answers those questions." RP 300. While counsel might have inartfully said "for some reason they wanted to be at that back parking lot at 3:00 a.m.," the defense never put in issue that Ms. Stutzman was or was not voluntarily with Mr. McCollian. Counsel was not arguing that Ms. Stutzman literally wanted to be in that parking lot. Counsel's framing of the case was that jurors would not know why Mr. McCollian and Ms. Stutzman left and traveled together that evening, why they ended up in that parking lot, what went wrong there, and why Mr. McCollian left from the area quickly. RP 297-300. This opening did not put Ms. Stutzman's state of mind at issue.

The Court of Appeals also noted that the defense argued in closing that people don't generally just go to Tumwater together in the middle of the night, and that there must have been some purpose. McCollian, slip op. at 11. But counsel again clearly stated, "we don't know what it is," why they ended up

somewhere without any surveillance, suggesting they could have been directed there, and "We don't know who they were meeting. We don't know why they were meeting," and "we don't know anything about Mr. McCollian's mental state." RP 1610, 1618, 1621. This was also consistent with the general denial theory presented at trial that jurors would not find out the motives or reasons behind what happened that evening. Counsel also suggested that Mr. McCollian's not calling police could be explained by being there for an illegal purpose, and had previously stated he was an addict. It did not place Ms. Stutzman's state of mind at issue or make relevant Ms. Stutzman's out-of-court statements regarding Mr. McCollian's state of mind or conduct.

Because no defense put her state of mind at issue, Ms. Stutzman's hearsay statements were not relevant to any issue at trial. It was error under Parr to admit Ms. Stutzman's hearsay statement "he's scaring me" and the Court of Appeals' approval of this result conflicts with Parr's holding restricting hearsay

evidence unless relevant to a specific defense raised at trial. Review should be granted per RAP 13.4(b)(1).

In addition, the Court of Appeals refused to apply Parr to the statement "he's so out of his mind" because it is the decedent's present sense impression rather a state of mind. But Parr thoroughly discussed the error of admitting any hearsay regarding the words or conduct of the accused. Although Parr was primarily concerned with the state of mind exception, it did not strictly limit its analysis to that exception to the hearsay bar. In fact, it discussed several cases and their rationales, noted that the decedent's hearsay testimony admitted to express the intent and purpose of the defendant was not capable of cross examination, and could not "perceive the necessity of allowing hearsay testimony about conduct of the defendant to go to the jury." 93 Wn.2d at 101-04. Ms. Stutzman's statements that Mr. McCollian was "so out of his mind" and paranoid about people seeing where he lived pertained to his words and conduct and were not otherwise relevant to a defense theory or issue. The

Court of Appeals reads Parr to narrowly in permitting hearsay about the words and conduct of the accused to be presented via hearsay, conflicting with Parr and meriting review. RAP 13.4(b)(1).

2. The Court of Appeals' harmlessness holding on the erroneously admitted firearm evidence conflicts with precedent recognizing the extreme prejudice of firearm evidence

In a case where the prosecution presented absolutely no evidence tying the shooting death of Ms. Stutzman to any firearm, the trial court admitted testimony from a witness who stated he saw Mr. McCollian with a Glock handgun about a week prior to Ms. Stutzman's death. The Court of Appeals agreed with Mr. McCollian that the trial court incorrectly refused to consider the firearm evidence under ER 404(b). McCollian, slip op. at 19-20. The Court of Appeals also questioned the admissibility of the evidence under basic relevancy standards, given the low probative value of the evidence and the high prejudice when the

prosecution fails to otherwise defendant's possession handgun to the crime in question. Id. at 20.

Nevertheless, the Court of Appeals determined that the error was harmless. Id. at 20-21. Although it acknowledged that firearm evidence was highly prejudicial, and agreed there would otherwise have been no evidence of the any gun aside from the evidence of the shooting death, the Court of Appeals concluded, "But the evidence of the shooting death connected McCollian." Id. at 22. Being *connected to* a shooting death, however, does not make you the shooter. Without Mr. Thomas's testimony that Mr. McCollian possessed a gun days before Ms. Stutzman's death, there would have been no evidence that Mr. McCollian had ever possessed a gun. Allowing the jury to draw the forbidden propensity inference by admitting the gun evidence was highly prejudicial. It made Mr. McCollian the shooter where no other evidence would have.

Freeburg recognizes that firearm evidence is highly prejudicial and that the courts have "uniformly condemned" the

introduction of such evidence in almost identical circumstances almost identical. Although the facts of Freeburg might differ, the Court of Appeals decision conflicts with Freeburg's basic recognition of prejudice in these circumstances and, under the Court of Appeals decision, courts no apparently no longer "uniformly condemn[]" such evidence. The conflict with Freeburg merits review. RAP 13.4(b)(2).

In addition, the Court of Appeals' harmlessness determination fails to recognize the defense theory. In rejecting Mr. McCollian's hearsay challenges, discussed above, the Court of Appeals relied on the defense theory that Mr. McCollian and Ms. Stutzman were traveling that evening, perhaps related to drug use, commerce in drugs, or some other illegal purpose. McCollian, slip op. at 7, 11. Yet the Court of Appeals does not acknowledge this theory in addressing prejudice of the firearm evidence. Admitting the improper firearm testimony tended to foreclose Mr. McCollian's chosen theory that no one knew why they were there but might have been there in relation to a

dangerous purpose. In failing to recognize how the firearm evidence would have impacted the presentation of Mr. McCollian's chosen defense, the Court of Appeals too easily sidesteps Freeburg's holdings that improper firearm evidence of the type presented in Mr. McCollian's case is highly prejudicial and should be uniformly condemned. The Court of Appeals decision should be reviewed pursuant to RAP 13.4(b)(2).

3. **The prosecutor and law enforcement witness repeatedly pointing out a perjury statement and the crime of filing a false police report was an explicit or near explicit comment on Mr. McCollian's credibility, a constitutional error**

As formulated by the Washington Supreme Court, improper opinion testimony is constitutional error where there is an "explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Opinions on the veracity of the accused is improper a criminal trial. State v. Montgomery, 163 Wn.2d 577, 590-91, 183 P.3d 267 (2008). Such opinion invades the province of the jury to decide the facts, which fails to maintain the "inviolate"

jury trial rights under the state and federal constitutions. Id. at 590 (quoting CONST. art. I, § 21; citing CONST. art. I, § 22; U.S. CONST. amend. VI). Witnesses should, whenever possible, allow jurors to reach their own conclusions about the evidence rather than tell them what opinion to reach. Id. at 591. Law enforcement witnesses pose special risk when offering opinions on the accused's guilty or veracity given their "aura of special reliability and trustworthiness." State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 12 78 (2001). It is improper opinion for an officer to state he does not believe the accused or that the accused is lying, whether on the stand or through a pretrial interview presented or discussed in evidence. State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003).

It also constitutes prosecutorial misconduct to inject a witness's personal opinion about the accused's guilt or veracity. State v. Jerrels, 83 Wn. App. 504, 507-08, 925 P.2d 209 (1996).

The testifying officer repeatedly referenced a perjury statement included in the police report Mr. McCollian filled out

about the stolen car. He also repeatedly referenced the crime of false reporting and also said perjury was a crime. He explained that he reminded Mr. McCollian of perjury and false reporting during one of their conversations.

These were explicit statements or near explicit statements on Mr. McCollian's veracity—repeatedly accusing him of crimes of making untruthful statements—and this situation is little different than Jones, where an officer interviewing the defendant told him he did not believe he was truthful. 117 Wn. App. at 92. There is "no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him." Id. Either way, "the jury learns the police officer's opinion about the defendant's credibility." Id. The Court of Appeals decision that the officer's references to the crimes of perjury and false reporting were not improper opinions on veracity conflicts directly with Jones. It should be reviewed per RAP 13.4(b)(2).

Acknowledging the repeated reminders about the crime of false reporting might actually be an improper opinion, the Court of Appeals determines it was harmless under a nonconstitutional standard. McCollian, slip op. at 24. The Supreme Court recognized in Montgomery that improper opinion testimony invades the state and federal rights to a jury trial, and that the "right to have factual questions decided by the jury is crucial to the right to trial by jury." 163 Wn.2d at 590. The Court of Appeals' treatment of this important constitutional issue as nonconstitutional is in conflict with precedent, meriting review. RAP 13.4(b)(1), (3).

Finally, the Court of Appeals disposes of the prosecutorial misconduct argument by claiming that the officer made no comment on Mr. McCollian's credibility. As discussed, and even as the Court of Appeals opinion partially recognizes in reaching harmlessness, this is untenable. The Court of Appeals does not acknowledge the Jerrels decision which addressed the elicitation of a witness's opinion on the complaining witness's veracity (and

thereby the accused's guilt) through the prosecutorial misconduct lens. 83 Wn. App. at 507-08. The Court of Appeals' decision fails to recognize the prosecutorial misconduct claim in conflict with Jerrels, another reason review should be granted RAP 13.4(b)(2).

E. CONCLUSION

Because he satisfies the RAP 13.4(b)(1), (2), and (3) review criteria, Mr. McCollian asks the Washington Supreme Court to grant review.

DATED this 30th day of March, 2022.

I certify this document contains 4998 words. RAP 18.17(b)(10).

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MATTHEW MCCOLLIAN, Appellant.	No. 83284-1 DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Matthew McCollian appeals his convictions of murder in the second degree, unlawful possession of a firearm in the second degree, and arson in the second degree. McCollian claims that (1) the trial court failed to grant a mistrial after erroneously admitting text messages from the deceased to her mother, (2) testimony that McCollian had a handgun five days prior to the murder violated ER 404(b), (3) a police officer testifying to the existence of a perjury statement on a form signed by McCollian improperly commented on his credibility, and (4) the accumulation of errors affords him a new trial. The trial court incorrectly concluded an ER 404(b) analysis did not apply, but any error was harmless. We find no other error.

However, we accept the State's concession that McCollian is entitled to resentencing with a reduced offender score that comports with State v. Blake,

197 Wn.2d 170, 481 P.3d 521 (2021). Because we cannot determine if the trial court intended to impose community custody supervision fees, the parties can clarify that issue at resentencing. We affirm the convictions but remand for resentencing.

FACTS

In December 2018, Sophia Stutzman and her mother, Chanelle Livingston, lived with Stutzman's fiancé in Monroe, Washington. On December 11, Stutzman asked Livingston to take her to go see McCollian at his apartment in Everett. Livingston knew McCollian as someone who was "interested in seeing" Stutzman, but she was unsure if they had a romantic relationship. Livingston drove Stutzman to McCollian's apartment in Everett at around 9:00 p.m. Livingston saw McCollian greet Stutzman halfway up a stairway, they waved to Livingston, and Livingston left to go to her friend's house. Livingston had planned to stay at her friend's until Stutzman needed a ride home.

At around 11:30 p.m. or 12:00 a.m., Livingston noticed that she had a missed call from Stutzman. Accordingly, Livingston left to pick Stutzman up from McCollian's apartment. During that time, Stutzman and Livingston exchanged multiple text messages, where Stutzman expressed fear, her desire to leave, and her observations about McCollian's behavior. Stutzman stopped responding to Livingston at around 1:05 a.m. Livingston waited for Stutzman in McCollian's apartment complex parking lot, eventually knocking on the door with no response and subsequently leaving.

About 3:20 a.m. on December 12, 2018, Stutzman's body was found face down in a road behind Costco in Tumwater, Washington. A pathologist concluded the cause of death was a gunshot wound to the chest. The bullet had entered just underneath her collarbone on the left side and exited her right arm, piercing both her left lung and aorta. The bullet had exited her body. The pathologist characterized the gunshot wound as "an indeterminate range gunshot wound," which he described as normally being between 18 and 24 inches. An analysis of a vaginal swab from Stutzman disclosed the presence of semen that matched with McCollian's deoxyribonucleic acid (DNA) profile along with the DNA of another man.[1]

Cell phone tower records for both Stutzman's and McCollian's cell phones showed that both phones were pinging off cell phone towers in the same general areas along I-5 southbound from 2:21 a.m. to 6:56 a.m. on December 12. McCollian's cell phone pinged in Tumwater near Costco at 3:15 a.m., south of Chehalis at 3:57 a.m., and La Center at 5:56 a.m. Cell phone tower records then showed McCollian's cell phone heading back north. The records also showed that Stutzman's phone was near McCollian's apartment when she was text messaging with Livingston. Stutzman's phone was located in a garbage can in Renton.

[1] The forensic scientist explained that "it was 400 octillion times more likely to observe that mixed DNA profile if it originated from [Stutzman], [McCollian], and an additional unknown contributor rather than [Stutzman] and two unrelated individuals selected at random in the U.S. population."

Detectives later discovered that McCollian's bank card was used to make a withdrawal on December 12, 2018, at around 12:30 a.m. The video and bank records of the withdrawal correlated with a withdrawal receipt that was located in a white Toyota Camry McCollian had rented. The bank records also showed a transaction at the ARCO station in Centralia, Washington, at around 6:58 a.m. on December 12, 2018.

On December 15 at 7:52 a.m., McCollian called the police and reported that his rental vehicle, a white Toyota Camry, was stolen. McCollian told the officer that "he couldn't remember where he had rented it from." Later, McCollian went into the police department to make a formal report and provided his keys. He told the officer that he rented the vehicle the previous Monday. He said that he had been on a date the night before and came back to the hotel and parked the car in the hotel parking lot in a handicapped stall but then moved it onto the side of the road. He first told the officer that he noticed it was stolen sometime after midnight, and then later told the officer he noticed it was stolen at 2:00 a.m. He stated he was going to the car in order to bring his date home.

McCollian completed a police vehicle theft report form that contained a perjury statement and a consent to have law enforcement search the vehicle.

The officer who took the report then located the vehicle near the same hotel where McCollian had stayed. When the officer inspected the vehicle, he observed that there was soot all over the inside of the car. He found fire damage and two gas cans in the front passenger seat area.

The officer called McCollian about 15 to 20 minutes after he had seen him last and told him he located the vehicle. The officer asked McCollian if he would come meet him, but McCollian's response was that he was busy. The officer asked him where he was and what he was doing, but McCollian said it did not matter and became increasingly defensive. The officer suggested that it did not seem to be a random act, and that McCollian might actually know the person who had done it. McCollian did not appreciate the accusations and got increasingly "sort of aggressive and defensive on the phone." The officer reminded McCollian that making a false police report is a crime, and McCollian indicated that he did not want to speak with him anymore.

The hotel where McCollian was staying had surveillance video that showed he had checked into the hotel at 1:52 a.m. on December 15 and checked out at 10:40 a.m. that morning. He did not list his car with the hotel as the Toyota Camry that was stolen but as a Honda Element.

Detectives impounded the Camry and conducted an investigation. A cigarette butt that was smoked a little more than half sat on the center console, and a motorcycle helmet sat on the back seat. A one-gallon gas can sat on the front passenger seat that was burned, and another gas can on the floor appeared untouched by the flames with a puncture on the side of it. The majority of the fire damage occurred in the front passenger seat.

A fire marshal inspected the vehicle and found there was "minimal damage, because [the fire] was confined to the interior of the vehicle. . . ." He indicated that the fire was an "oxygen-deprived fire" that "starved itself out." He

concluded that the "fire [w]as an intentionally set incendiary fire" that was "set by a hand-held open flame."

A forensic examination of the car discovered blood on the passenger side of the center console, the front vertical portion of the center console, the front passenger side floorboard, above the glove box door, and the interior surfaces of the glove box door. A DNA analysis of the blood from the vehicle glove box resulted in a match to Stutzman's DNA.

Investigators also found evidence of the firing of a handgun inside the vehicle. They found (1) an empty 9mm Luger cartridge case, commonly referred to as a "shell," on the rear driver's side floorboard, (2) a bullet-impacted passenger seatbelt and strap, (3) a bullet defect in the passenger side B pillar[2] (4) a fired bullet in between that B pillar cover and the B pillar, and (5) a dent in that B pillar. A forensic scientist concluded that it was likely that one shot was fired inside the vehicle, the general direction the bullet traveled was likely from the driver's side to the passenger side, Stutzman's wound was consistent with the bullet trajectory, and that "the female subject was likely sitting in the front passenger seat when she was shot."

The State charged McCollian with intentional murder in the second degree or in the alternative felony murder in the second degree predicated on assault, unlawful possession of a firearm in the second degree, and arson in the second

[2] The B pillar refers to the structural framing of the vehicle between the two doors where the seatbelt is located.

degree. The State also sought a deadly weapon enhancement and domestic violence aggravator on the murder charges.

At trial, defense counsel's opening statements suggested the defense theory would revolve around the fact that Stutzman and McCollian used drugs, and when they traveled south together, something went wrong causing McCollian to flee. Counsel told the jury Stutzman "had a drug addiction," and McCollian "also ha[d] a drug addiction." Counsel stated the two left the area together heading south to Costco, and "for some reason they wanted to be at that back parking lot at 3:00 a.m." When "something went wrong in that back area of Costco," Stutzman was shot and McCollian "fled that area quickly" "trying to get away."

McCollian objected to the introduction of text messages from Stutzman to Livingston as inadmissible hearsay. The following is the text message conversation at issue:

Livingston:	"R u okay" "Sorry missed your text" "I'm stopping by Lynnwood then to you okay"
Stutzman:	"Mom?" "I need to leave" "Now" "He is smoked out" "He's scaring me"
Livingston:	"I'm a exit away" "Have Ashley with me we have to drop her off it's on way" "Here"
Stutzman:	"Ok don't let her see where he lives park way down" "Be out in a couple mins"

Livingston: “I’m across next to van”

Stutzman: “Ok he is so out of his mind one sec please wait a sec”

Livingston: “Of course”
“I can’t be patk like this please let’s go”

Stutzman: “Ok coming”

Livingston: “Car is trippin”
“C’mon”

Stutzman: “I’m coming”

Livingston: “I’m parked to the right in left by blk truck”

The court ruled on the admissibility of each phrase and, initially, admitted all the text messages. We discuss the basis for the rulings below.

During Livingston’s testimony, the State asked Livingston if Stutzman had ever previously described McCollian as “smoked out” or “out of his mind.” Livingston said Stutzman had not referred to McCollian in that way previously. On defense’s re-cross, defense counsel asked Livingston, “[D]o you think or do you know if [Stutzman] was going over to his home that night to get high together?” Livingston responded that she did not know. The prosecution objected and argued that the drug use by both the defendant and the victim potentially has “kind of inherent prejudicial effect” under ER 403.

After a recess, the court expressed concern about admitting evidence of drug use on the part of the defendant. The court also stated it was concerned with the previous text message admission that McCollian was “smoked out.” The court ruled it was striking the “He is smoked out” statement from the record, including ordering the parties to redact it from an admitted exhibit of that text

message. The court also ruled it was striking the question that asked Livingston if Stutzman had ever previously described McCollian as "smoked out" or "out of his mind," as well as Livingston's answer. The court informed the parties it planned to issue a curative instruction to the jury. The court further precluded the parties from introducing any further evidence of drug usage on the part of the defendant or Stutzman.

After the court's ruling that the text "He is smoked out" should not have previously been admitted, McCollian moved for a mistrial, arguing, "I don't think we can unring that bell." The prosecution responded that "a curative instruction can be given." The trial court denied the motion for mistrial. The court then instructed the jury:

> The Court is striking from evidence the portion of Exhibit No. 36. You may recall that's one of the alleged text message communications between the alleged victim and this witness. The comment, quote, "He is smoked out." That is stricken from evidence.
>
> Furthermore, the question, "Had she ever described him on any prior occasion as being 'smoked out' or 'out of his mind,' anything like that?" And the answer, "No." That is stricken from the evidence.
>
> And, as you know, as I previously advised you after you were administered the second oath and sworn in as jurors, when I strike evidence, that means you should not consider it in your deliberations, even though you may have heard or seen that evidence.

The parties redacted Exhibit No. 36 as ordered by the court.

Defense also objected to the State introducing testimony of Jonathan Thomas regarding witnessing McCollian possessing firearms in his apartment five days before the murder. The State explained Thomas would testify that McCollian "displayed for him three firearms, two what [the Prosecutor

understood] to be more long guns, but one pistol that was identified to him as a Glock, Glock hand gun." Defense counsel argued that this evidence would be governed by ER 404(b). The prosecutor disagreed and stated:

> Our sole purpose of offering this is because it has direct relevance because it is close in time to the homicide and demonstrates that the defendant had access to a weapon that at least could be consistent with the one used in this case based on what we know, a firearm, and, in particular, a pistol.

The court replied, "The Court does not consider this proffered evidence as evidence offered by the State pursuant to or in relation to Evidence Rule 404(b)." Instead, the court stated that "the proper analysis is pursuant to Evidence Rule 403 and 401 and 402." It then proceeded with its analysis, first deciding that Thomas' observation of McCollian in possession of a handgun within five days of the incident was relevant evidence. It then conducted an ER 403 balancing test, deciding to limit Thomas' testimony to his observation of McCollian with a handgun and not long weapons.

Thomas testified that on about December 4, he went over to McCollian's apartment and that McCollian showed him a "pistol" that he described as a "Glock." The court gave a limiting instruction proposed by the defense:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of [Thomas]. You are not to consider the testimony of [Thomas] as it relates to whether or not the Defendant possessed a firearm, as charged in Count 2. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Count II was the charge for unlawful possession of a firearm in the second degree. The parties stipulated that McCollian had previously been convicted of a felony and the trial court read the stipulation to the jury.

Defense counsel argued a defense theory in closing consistent with its suggested theme from its opening statement. Defense counsel told the jury that Stutzman and McCollian were in a car going to Tumwater, which was a two-hour trip. She explained, "People don't get in their car and go to Tumwater - - hey, let's go to Tumwater - - when they are from Everett and they have no ties." She stated that there was a purpose, but the purpose was unclear, because "you don't get in the car for two hours for no reason at 1:00, 1:30 in the morning after standing up your mom. Something had to propel them. There had to be a purpose, but we don't know what it is." She indicated that Stutzman had $140 cash, and despite having no ties to Tumwater, "somehow, conveniently, they find a place in Tumwater that's on a road in an area where there's no surveillance camera coverage." Defense counsel mused "is it more reasonable that they were directed there by somebody else and that they had a purpose for going there? We don't know who they were meeting. We don't know why they were meeting." Defense counsel argued that McCollian failing to call the police could be explained by the possibility that they were in Tumwater for an "illegal purpose." The jury found McCollian guilty on all counts.

At sentencing, the parties argued whether McCollian's California conviction of unlawful possession of a controlled substance should be counted toward his offender score. The trial court found the out-of-state conviction comparable, and it was included in McCollian's offender score. The court imposed a high-end sentence of 357 months in addition to a 24-month deadly weapon enhancement amounting to 381 months, with 43 months for unlawful

possession of a firearm and 70 months on the arson in the second degree charge to run concurrently. McCollian appeals.

DISCUSSION

Text Messages

McCollian first contends that the trial court erred in admitting Stutzman's text messages to her mother on the night of the incident because they were inadmissible hearsay.[3] We disagree.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. ER 801(c); ER 802. A statement can be written, but it must be intended as an assertion by the person making it. ER 801(a). Hearsay is not admissible unless it falls under an exception. ER 802; ER 803. "Whether a statement is hearsay depends upon the purpose for which the statement is offered. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay." State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000). The trial court has great discretion in determining the admissibility of evidence, and its ruling will be reversed only upon a showing of manifest abuse of discretion. Id. at 25. Abuse of discretion occurs when the court's decision is "manifestly unreasonable or based upon untenable grounds." Id. at 25-26.

[3] On appeal, McCollian only provides argument regarding the specific text messages addressed in this opinion. We decline to address any other text messages between Stutzman and Livingston that were admitted by the trial court because McCollian does not provide a supportive substantive argument. RAP 10.3(a)(6).

A. "He's scaring me"

Over defense objection, the trial court admitted the text message, "He's scaring me" as a state of mind exception to hearsay. McCollian claims Stutzman's state of mind was not relevant unless the case involved a particular defense theory such as accident or self-defense, which was not at issue.

ER 803(a)(3) provides, "A statement of the declarant's then existing state of mind, emotion, sensation or physical condition. . ." is not excluded by the hearsay rule. The state of mind exception applies (1) if there is some degree of necessity to use out-of-court, uncross-examined declarations, and (2) if there is circumstantial probability of the trustworthiness of the out-of-court, uncross-examined declarations. State v. Parr, 93 Wn.2d 95, 98-99, 606 P.2d 263 (1980).

McCollian relies on Parr and State v. Cameron, 100 Wn.2d 520, 674 P.2d 650 (1983). In Cameron, where the defense's theory was insanity, the court held that hearsay testimony from the victim's relatives indicating that the victim told them prior to the incident that she was having problems with the defendant and feared him, was not admissible under the then existing state of mind exception because "the victim's state of mind itself was not relevant to any material issue before the jury. At best, it bears only a remote or artificial relationship to the legal or factual issues actually raised and thus was inadmissible." Cameron, 100 Wn.2d at 531. Insofar as the defense theory in Cameron was insanity, that case is inapposite. However, even the Cameron court recognized that the question of whether a victim's state of mind is relevant depends on material issues before the jury. Id. at 531.

The Parr court stated, "In a homicide case, if there is no defense which brings into issue the state of mind of the deceased, evidence of fears of other emotions is ordinarily not relevant." Parr, 93 Wn.2d at 103. Further, it stated, "But where a defense such as that of accident of self-defense is interposed, as is the case here, courts have generally allowed the admission of the victim's fears, as probative of the question whether that person would have been likely to do the acts claimed by the defendant." Id. at 103. In Parr, the court determined that because the defense's theory of the case was accident, "the trial court should allow the State to prove the victim's declarations about his or her own state or mind, where relevant, but should not permit it to introduce testimony which describes conduct or words of the defendant." Id. at 104.

While Parr involved a defense theory of accident, the Parr court's holding did not expressly restrict admissibility to cases where the defense was accident or self-defense. In fact, the Parr court recognized that a defense can bring "into issue the state of mind of the deceased," and that courts should consider whether the issue is "probative of the question whether that person would have been likely to do the acts claimed by the defendant." Id. at 103.

In the instant case, the defense's opening statement painted a picture of Stutzman and McCollian as two drug addicts who left the area together heading south to Costco, and "for some reason they wanted to be at th[e] back parking lot at 3:00 a.m." when "something went wrong in th[e] back area of Costco." Stutzman gets shot and McCollian "fled th[e] area quickly" "trying to get away." The defense theory created a material issue as to whether Stutzman would

voluntarily leave with McCollian to head to the back of Costco in Tumwater around 3:00 a.m. Thus, Stutzman stating that McCollian was scaring her suggested that her state of mind at that time was such that she would not have likely voluntarily gone with McCollian to Tumwater.

Under these facts, Stutzman's state of mind was relevant and material. The trial court did not abuse its discretion in admitting the text message, "He's scaring me."

B. "He is so out of his mind"

The trial court, over defense objection, admitted Stutzman's text message, "Ok he is so out of his mind. One sec, please wait a sec," under the present sense impression exception to hearsay.

Statements that are present sense impressions, describing or explaining an event or condition while the declarant was perceiving the event or condition, or immediately thereafter, are not excluded as hearsay. ER 803(a)(1). McCollian incorrectly cites Parr and Cameron for the proposition that the victim's present sense impressions are irrelevant in a homicide case unless a specific defense places the decedent's state-of-mind in issue. Neither Parr nor Cameron addressed the present sense impression exception. McCollian cites no other authority and makes no argument as to why the text message does not qualify as present sense impression.

The court did not abuse its discretion when it admitted the "he is so out of his mind" text message as a present sense impression hearsay exception.

C. "He is smoked out"

McCollian further contends that the trial court erred when it denied McCollian's motion for a mistrial after the jury heard testimony that Stutzman sent the text message, "He is smoked out."

The denial of a mistrial motion is reviewed for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 45 P.3d 541 (2002). A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). In considering whether a motion for mistrial should have been granted, the reviewing court considers (1) the seriousness of the claimed irregularity, (2) whether the information imparted was cumulative of other properly admitted evidence, and (3) whether admission of the illegitimate evidence can be cured by a jury instruction. State v. Escalona, 49 Wn. App. 254, 255, 742 P.2d 190 (1987).

Here, the fact that the jury heard that McCollian was smoked out was not a serious irregularity in context of the whole trial. Defense counsel described Stutzman as a drug addict and implied that Stutzman and McCollian were going to Tumwater for an "illegal purpose." Defense counsel also stated in their opening statement that after the events in Tumwater, McCollian "tried to stay high." Evidence of McCollian's drug use was consistent with the defense's theory. The trial court struck the text message from the evidence as well as other references in evidence suggesting drug usage by McCollian. Further, the trial court properly delivered a curative instruction to the jury.

The trial court did not abuse its discretion in denying the defense's motion for a mistrial.

Handgun Testimony

McCollian also contends that the trial court erred when it admitted Thomas' testimony that McCollian had a handgun five days before Stutzman's death because it was propensity evidence under ER 404(b). McCollian was charged with unlawful possession of a firearm and the parties stipulated that McCollian had a previous felony conviction.

We first address whether the trial court erred by concluding it need not conduct a ER 404(b) analysis because the State was offering the evidence for a purpose other than propensity.

ER 404(b) "is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). ER 404(b) expressly applies to "[e]vidence of other crimes, wrongs, or acts." Such evidence may be admissible for "other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

While the other purposes are sometimes referred to as "exceptions," they are not exceptions to the rule. 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 404.9, at 497 (6th ed. 2021). Instead, there is one improper purpose and multiple undefined proper purposes for which the evidence can be admitted. Gresham, 173 Wn.2d at 420. "Only when the term 'exception' is read out of

context and the plain text of ER 404(b) is ignored does the possibility of confusion arise." Id. at 421.

> Washington courts have developed a thorough analytical structure for the admission of evidence of a person's prior crimes, wrongs, or acts. To admit evidence of a person's prior misconduct, 'the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'

Id. (quoting State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "The third and fourth elements ensure that the evidence does not run afoul of ER 402 or ER 403, respectively. The party seeking to introduce evidence has the burden of establishing the first, second, and third elements." Gresham, 173 Wn.2d at 421. "It is because of this burden that evidence of prior misconduct is presumptively inadmissible." Id.

In the instant case, defense counsel argued that ER 404(b) governed the admissibility of evidence of McCollian's prior handgun possession. The State disagreed, explaining that the "sole purpose" of offering the evidence is to demonstrate that McCollian "had access to a weapon that at least could be consistent with the one used" to kill Stutzman. The trial court agreed with the State stating, "The Court does not consider this proffered evidence as evidence offered by the State pursuant to or in relation to Evidence Rule 404(b)." Instead, it engaged in an analysis pursuant to ER 403, 401, and 402. But the State providing another purpose as to why it was offering the evidence did not remove the danger of introducing presumptively inadmissible prior misconduct. The trial

court incorrectly concluded that an ER 404(b) analysis did not apply.[4] It did, however, conduct a balancing test on the record.

The court found the evidence probative because the issue "appears to be who fired the gun, and it is relevant that, four or five days prior [to] this incident, it is alleged that Mr. McCollian was in possession of a handgun. So it's highly probative." In balancing the prejudicial effect, the trial court did not appear to articulate anything more than a conclusory statement. The court reasoned, "Frankly, the Court doesn't see any prejudice to the defendant. Clearly – let me rephrase that, an unfair prejudice to the defendant. Clearly it's prejudicial. It's harmful to the defendant, but it's not unfairly – and the Court, for purposes of the record emphasizes the term 'unfairly' – prejudicial to Mr. McCollian."

"Although evidence of weapons entirely unrelated to the crime is inadmissible, if the jury could infer from the evidence that *the weapon* could have been used in the commission of the crime, then evidence regarding the possession of *that weapon* is admissible." State v. Luvene, 127 Wn.2d 690, 708, 903 P.2d 960 (1995) (emphasis added).

McCollian cites State v. Hartzell for the proposition that the evidence was not admissible because the State did not establish that the handgun Thomas witnessed was the handgun used to shoot Stutzman. 153 Wn. App. 137, 221 P.3d 928 (2009). In Hartzell, defendants were convicted of armed assault and unlawful possession of a firearm for shooting into an apartment occupied by a

[4] The court did not determine, as part of an ER 404(b) analysis, whether, by a preponderance of the evidence, the misconduct occurred. McCollian does not challenge on this basis.

woman and her daughter. Id. at 145. "Investigators were able to link [the defendants] to the crime by establishing that the guns they possessed in two separate incidents were the same guns used to shoot into the apartment." Id.

Unlike the gun evidence in Hartzell, the handgun testimony in the instant case did not allow for even a reasonable inference that the handgun Thomas saw McCollian possess was the same gun that was used to kill Stutzman. Even the State explained that it was proof that McCollian had access to a weapon that "at least could be" consistent with the one used. The State could not even argue that the gun *was* consistent with the one used because no evidence linked the type of handgun Thomas saw with the type of handgun that was actually used to kill Stutzman.

We question whether the jury could reasonably infer from the evidence, that the handgun Thomas saw McCollian possess, could have been the handgun used in the commission of the crime. The probative value of the Thomas testimony was, at most, extremely low. And if the handgun was completely unrelated to the crime, the concern for prejudice is high. "Evidence of weapons is highly prejudicial, and courts have 'uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.' " State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001).

Regardless, any error in the trial court for not conducting an ER 404(b) analysis and admitting the Thomas testimony was harmless. "It is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed

under the lesser standard for nonconstitutional error." Gresham, 173 Wn.2d at 433. The question, then, is whether, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Id.

McCollian relies on Freeburg to argue admission of the handgun testimony was not harmless. In Freeburg, this court held that the trial court erred by admitting evidence that the defendant possessed a handgun at the time of arrest around three years after the charged crime of murder for the purpose of showing flight and demonstrating consciousness of guilt. 105 Wn. App. at 500-01. Nothing connected the handgun found in 1997 to the victim's death in 1994. Id. at 501. At trial, the jury heard conflicting testimony as to who had the gun involved in the altercation. Id. at 495-96. The State's key witness was the victim's girlfriend. Id. at 495. Freeburg testified that he acted in self-defense. Id. at 496. The court could not characterize the admission of the gun as harmless absent a limiting instruction. Id. at 502. The court reasoned that "jurors could well have regarded the evidence Freeburg had a gun when arrested not as further evidence of flight but rather as tending to show he was a 'bad man,' or had a propensity to carry guns, or was likely to have brought a gun [to the scene of the crime]." Id. at 502.

The evidence of the underlying crime in Freeburg is far different than the evidence against McCollian. The jury in Freeburg had to decide which witness to believe and had conflicting explanations of what happened.

In the instant case, a substantial amount of undisputed evidence in the record supports McCollian's convictions. McCollian argues that without the testimony from Thomas, "there would have been no evidence of any gun aside from the evidence of the shooting death itself." But the evidence of the shooting death connected McCollian. McCollian did not dispute that he rented the Toyota Camry and that he drove it with Stutzman the morning Stutzman was murdered. Forensic evidence concluded Stutzman was likely shot while sitting in the front passenger seat of that car. Detectives found a casing and a fired bullet in the B pillar of the car that was consistent with the trajectory of the gunshot that killed Stutzman. The jury could find that Stutzman would not have gone willingly with McCollian, given her state of mind at the time she wanted to leave McCollian's apartment. Phone records and hotel security video provided circumstantial evidence that McCollian drove the Camry south with Stutzman, dumped her body and drove the Camry back. A jury could find that McCollian burned the Camry and later reported it stolen as an attempt to destroy evidence of the murder.

It is not reasonably probable that the outcome of the trial would have been materially affected if Thomas' handgun testimony had been excluded.

Credibility Comment

McCollian contends that a police officer commented on McCollian's credibility, invading McCollian's right to a fair and impartial jury. We disagree.

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Such testimony is unfairly prejudicial to the

defendant because it invades the exclusive province of the jury. Id. In determining whether testimony amounts to impermissible opinion testimony, courts consider the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). In State v. Jones, this court concluded that an officer's statement that the defendant was lying was improper opinion testimony. 117 Wn. App. 89, 91-92, 68 P.3d 1153 (2003). "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).

In the instant case, the officer described the form that McCollian filled out when McCollian reported the theft of his Toyota Camry. The officer stated, "There's the perjury statement on there that we always have the person read. Basically, it says that you're not making a false preliminary report, that you understand that making a false police report is a crime." After the defense objected on the basis of improper testimony and veracity of a witness, the prosecutor explained, "I'm not planning to ask him any questions about anybody's veracity. He was just noting what the form had printed on it." The court overruled the objection, and the officer continued, ". . . perjury is also a crime, that's kind of the gist of it."

The officer never made a direct comment on McCollian's veracity. His testimony included statements of fact including a description of the perjury

statement on the police report, a description of how he reminded McCollian about the perjury statement he signed after the vehicle was found, and a description of McCollian's demeanor and reactions. None of this testimony was improper.

After the vehicle was located, the officer described McCollian's reaction to the news, saying McCollian got increasingly "sort of aggressive and defensive on the phone." The officer responded to McCollian and "reminded him that making a false police report is a crime . . ." The prosecutor asked the officer, "Did you feel at that point that you had accused him of anything?" The officer responded, "No. I had not."

To the extent that the officer's reminder can be interpreted as the officer not believing the veracity of McCollian's statement, the error of including this statement was harmless. Once again, evidentiary error is not of constitutional magnitude. "[E]rror is prejudicial only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984).

The officer's comment did not materially affect the outcome of the trial in light of all of the other evidence presented as discussed above.

McCollian further contends that this issue is one of prosecutorial misconduct because it is improper for a prosecutor to seek to compel a witness' opinion as to whether another witness is telling the truth. As discussed, the prosecutor did not seek to compel the officer's opinion as to whether McCollian was telling the truth.

Cumulative Error

McCollian asserts that cumulative error should result in remand for retrial. "The accumulation of errors may deny the defendant a fair trial and therefore warrant reversal even where each error standing alone would not." State v. Davis, 175 Wn.2d 287, 345, 290 P.3d 43 (2012). The cumulative error doctrine does not apply where there are few errors which have little, if any, effect on the result of the trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). "The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary." State v. Yarbrough, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). The doctrine does not apply in the absence of prejudicial error. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005). For the reasons already discussed, the cumulative error doctrine does not apply.

Offender Score Calculation

McCollian also contends that McCollian's California conviction for possession of a controlled substance should not be included in his offender score in light of Blake, 197 Wn.2d at 170.[5] A prior conviction that is constitutionally invalid on its face may not be included in the offender score. State v. Ammons, 105 Wn.2d 175, 187-188, 713 P.2d 719 (1986). "Out-of-state convictions must be comparable to a valid Washington offence to be included in the calculation of the offender score." State v. Markovich, 19 Wn. App. 2d 157, 173, 492 P.3d 206

[5] McCollian also contends that the California conviction was not legally comparable to the Washington State offense and should not have been considered in his offender score calculation for that reason. The State did not concede on this point. However, we need not address this claim because of the State's concession under Blake.

(2021). The State agrees that remand for resentencing without the California possession of methamphetamine charge is appropriate. Accordingly, we remand for resentencing.

Imposition of Legal Financial Obligations

The trial court sentenced McCollian to 36 months of community custody. The judgment and sentence indicates that McCollian must "pay supervision fees as determined by" the Department of Corrections (DOC). McCollian contends that the trial court's imposition of community custody supervision fees should be stricken from the judgment and sentence because the court declared McCollian indigent.

RCW 10.01.160(3) provides that the trial court shall not order a defendant to pay costs if a defendant is indigent as defined in RCW 10.101.010(3)(a)-(c). Further, RCW 9.94A.760(1) provides that the trial court cannot order costs as described in RCW 10.01.160 if the defendant is indigent. Community custody supervision fees are not considered costs as contemplated in RCW 10.01.160(3). State v. Spaulding, 15 Wn. App. 2d 526, 537, 476 P.3d 205, 211 (2020). RCW 10.01.160(2) provides, "Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision."

The community custody supervision assessment is imposed under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to pay supervision fees as

determined by the department." A community custody supervision assessment is not included in the definition of costs.

Because the supervision fees are waivable by the trial court, they are discretionary legal financial obligations (LFOs). State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Nothing prohibits a trial court from exercising its discretion and waiving the supervision fees if the defendant is indigent.

Our Supreme Court has previously discussed the negative impacts of LFOs, including the serious negative consequences on employment, housing, and finances. State v. Blazina, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). Additionally, LFO debt can impact credit ratings, making it difficult to find secure housing. Id. "The barriers that LFOs impose on an offender's reintegration to society are well documented . . . and should not be imposed lightly merely because the legislature has not dictated that judges conduct the same inquiry required for discretionary costs." State v. Clark, 191 Wn. App. 369, 376, 362 P.3d 309 (2015).

However, the trial court never found McCollian indigent. To support his claim of indigency, McCollian cites to an Order of Indigency filed on May 9, 2019, which states, "The court finds that the defendant was previously declared indigent. . ." However, the court did not engage in a colloquy at sentencing to make a determination if McCollian was indigent.

The supervision fees were ordered by the trial court via the form language in the judgment and sentence that required the defendant to pay supervision fees

as determined by DOC. This form presumes the judge orders the supervision fees.

None of the parties or the trial court made any mention of the community custody supervision fees during sentencing. We are unable to determine based on this record whether the trial court intentionally imposed the supervision fees and whether McCollian was indigent. Therefore, we remand for the parties to clarify at resentencing.

CONCLUSION

The trial court properly admitted the victim's text messages as an exception to hearsay under state of mind and present sense impression. The trial court did not err in denying McCollian's motion for mistrial. The trial court incorrectly concluded that an ER 404(b) analysis did not apply to the Thomas handgun testimony. However, any error in failing to conduct a 404(b) analysis and admitting the testimony was harmless. McCollian failed to show that an officer was questioned about or testified to his personal opinion about McCollian's credibility. The cumulative error doctrine did not apply. The parties agree that remand for resentencing is appropriate in light of Blake. We also remand for the parties to clarify with the trial court if it intended to impose the community custody supervision fees.

Affirm and remand for resentencing.

Coburn, J.

WE CONCUR:

Brennan, J.

Andrus, A.C.J.

NIELSEN, BROMAN & KOCH, PLLC

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