SUPREME COURT NO. 101031-1

NO. 81504-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONY WILLIAMS,

Petitioner.

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

The Honorable Janice E. Ellis, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Tony Williams asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' decision in State v. Williams, 2022 WL 1078171 (No. 81504-1-I, filed April 11, 2022).[1]

B. ISSUES PRESENTED FOR REVIEW

1a. Should review be granted under RAP 13.4(b)(1), (2), (3) and (4), where insufficient evidence supports Williams's conviction for attempted first degree robbery and whether attempted first degree robbery is an alternative means crime presents a significant question of law and an issue of substantial public interest?

1b. Should review be granted under RAP 13.4(b)(1), (3) and (4), because whether a sufficiency challenge can be waived by invited error presents a significant question of law and an

[1] A copy of the opinion is attached as an appendix. A motion for reconsideration was denied on May 24, 2022.

issue of substantial public interest, and if so, to determine whether defense counsel was ineffective in proposing jury instructions that were unnecessary and relieved the state of satisfying its burden of proof?[2]

2. Should review should be granted under RAP 13.4(b)(1) where the prosecution failed to prove Williams was armed with a firearm during commission of the attempted first degree robbery for purposes of the sentence enhancement?[3]

3. Should review be granted under RAP 13.4(b)(1) where the offenses of first degree assault and attempted first

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[2] Williams unsuccessfully attempted to raise this issue in the motion to reconsider. He now asks this Court to exercise its discretion to consider, as it has in the past, this issue, despite its being raised again in this petition for review. E.g., State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983), overruled on other grounds by State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989); Conner v. Universal Utils, 105 Wn.2d 168, 171, 712 P.2d 849 (1986).

[3] Williams unsuccessfully attempted to raise this issue in both a supplemental opening brief and the motion to reconsider. He also asks this Court to exercise its discretion and consider this issue.

degree robbery constitute the same criminal conduct under Washington's transactional view of robbery?

4. Should review be granted under RAP 13.4(b)(1) where Williams was denied his constitutional right to confront witnesses and present a defense when evidence probative of the lead investigator's untruthfulness was improperly excluded?

C. STATEMENT OF THE CASE

Wade Clute made his living as a drug dealer, selling methamphetamine and heroin. 3RP[4] 81. Early one August morning in 2018, Clute drove to a carwash in Lynwood to sell drugs. 3RP 82. Clute had drugs, $4,600 in cash, and several hundred bullets inside his car. 1RP 488-89, 495, 531, 533-34, 541, 558; 3RP 82-83, 88.

Clute was in the driver's seat of his car smoking a cigarette when an unknown man approached and tried to tase him. 3RP 83; Ex. 1. Clute fought back and took the taser away,

[4] The index to the citations to the record is found in the Brief of Appellant (BOA) at 4, n.1.

causing the man to flee. 3RP 83-84; Ex. 1. Clute returned to his car, put it into drive, and was driving away when a single gunshot struck him in the neck. Clute fell forward as the car continued to move forward, drove through a fence and off a small embankment. 3RP 84-85; Ex. 1. The man did not return to Clute's car. Ex. 1.

The shooter had already left when police arrived. 1RP 287; Ex. 1. Deputy Jacob Merrill stopped a car to speak with a woman he initially believed was involved in the incident. 1RP 258-59, 278-79, 287. The woman seemed nervous. 1RP 270. She told Merrill that she had been washing her car, but Merrill did not believe her. 1RP 279. Merrill failed to identify the woman or take a statement from her. 1RP 283, 287.

A single purple tinted shell casing was found at the car wash. 1RP 276-77, 292, 297-98, 300-01, 426-27, 435, 452. Police also obtained the surveillance video from the car wash and identified an orange PT Cruiser. Ex. 1; 1RP 236, 344, 347-48, 350, 566-67. Later that morning homeowner, Dean

Nakanishi observed an orange PT Cruiser parked on his residential street. 1RP 395-96. Nakanishi also noticed clothing along the side of his house. 1RP 396-98. Recognizing neither, Nakanishi contacted police. 1RP 397-99, 406-10, 503-04. Police seized both the clothing and the PT Cruiser. 1RP 406-08, 410, 423-24, 474.

Police had not identified any suspects nearly one week after the incident. 1RP 522. A now permanently paralyzed Clute was interviewed at the hospital by Detective David Fontenot. 1RP 360-61, 365-67; 3RP 86. Fontenot showed Clute a photograph of Kevin Helm. Clute responded, "it looks like him, that's the guy." 2RP 133-35, 151. Fontenot agreed, and arrested Helm for the shooting. 1RP 583-85; 2RP 109-10, 136, 152, 161.

A search of the PT Cruiser revealed paperwork in the name of Nicholas Naylor. 1RP 522, 524, 529. Fingerprints were collected from the car and sent for testing. 3RP 40-42. Fontenot listed Helm and Naylor as possible suspects on the request

form. 3RP 42. Fontenot also retrieved cigarette butts from the car and submitted them for DNA testing. 1RP 525-26. The butts tested positive for Naylor's DNA. 2RP 144; 3RP 116-17, 129.

In September 2018 Naylor was arrested while trying to hide from police. 1RP 669-73; 2RP 36-37. Naylor also told police that Helm was involved in the shooting. 1RP 672-73. Helm was found to be a possible contributor to the DNA profile for the black sweatshirt found outside Nakanishi's house. 3RP 111-13, 129, 135-36, 138. Helm was eventually released by police and excluded as a suspect however, after his DNA and fingerprints were found not to match any of the other collected evidence. 1RP 584, 586-90; 2RP 45-46, 48, 138, 144; 3RP 57, 62-63, 67-68, 109-10, 122-23, 129, 134-35.

Naylor and Williams had been friends since 2017 and stayed in touch while Naylor was in jail. 1RP 595-96, 602, 676; 2RP 36. The men frequently had video chats. 1RP 677-80; 2RP 34. During separate video calls, Williams was observed with a flashlight, a taser, and at a carwash. 1RP 685-87; 2RP 158-59.

Williams also put money on Naylor's jail account. 1RP 676-78; 3RP 90-91.

Williams was arrested in December 2018 while riding as a passenger in his wife's car. 2RP 34, 51-53, 61, 82-84, 114-17, 120. Williams was cooperative during his arrest. 2RP 119. A purple tinted bullet was found in the car's driver side door pocket. 2RP 55-56, 64-67, 84. A zippered bag on the car floorboard contained a bank card in Williams's name and two additional purple tinted bullets. 2RP 56-58, 70, 72, 84-87. The bag also contained a pistol magazine with three purple tinted bullets. 2RP 61-63, 71. The car's center console contained a handheld electric taser. 2RP 68. It was not the same taser used during the incident. 1RP 480-82, 495-96, 498; Exs. 210-15.

Fontenot collected DNA reference samples from Naylor and Williams. 2RP 45, 48-49, 75-76; 3RP 118-20. Those samples were tested against the various clothing items found outside Nakanishi's house. 1RP 511-15; 2RP 49-50. Williams was one of three DNA contributors to the black hat with a

matching profile of one in 5.7 quintillion. Clute, Helm, and Naylor did not match the two other unknown profiles. 3RP 109-11, 122-24, 129, 135. Hair fibers from inside the hat were not tested. 3RP 148.

Hair fibers from inside the black sweatshirt also were not tested. 3RP 126. Williams was one of four DNA contributors to the sweatshirt with a matching profile of one in 6.3 octillion. 3RP 111-12, 129, 135-36. Clute, Helm, and Naylor were also found to be possible DNA contributors, with Naylor a one in 260,000 match. 3RP 112-14, 137-38.

Several other items were found to contain multiple DNA contributors, including black gloves, sunglasses, the flashlight taser, and a camouflage jacket. 3RP 114-16, 121. Police were not able to match those DNA profiles to any of the known reference samples. 3RP 114-16, 129. Williams was excluded as a DNA contributor to the sunglasses. 3RP 116, 122, 129.

Police could not determine when the DNA was placed on the clothing. 3RP 139, 146-47. Police also acknowledged that

the DNA could have been transferred among items if all the clothing was placed into a common bag. 3RP 125. Nakanishi had, in fact, placed all the clothing into a single bag. 1RP 397.

Multiple items were tested for fingerprints, including the PT Cruiser, taser found in Clute's car, pistol magazine and purple bullets found in Williams's wife's car, and the purple shell casing found at the car wash. Williams's fingerprints were not found on any of the items. 3RP 57, 59, 62-6-65, 67-71, 76-77.

The purple tinted shell casing was determined to have been fired from a .40 caliber pistol. 3RP 15-16. The gun used during the incident was not recovered so police could not conclusively determine that the bullet recovered from Clute was fired from purple tined shell casing found at the car wash. 3RP 22, 38. Police also could not confirm the pistol magazine found in Williams's wife's car worked with the gun used during the incident. 3RP 38.

About one year after his arrest, Naylor decided to cooperate with the police investigation. 1RP 597-98; 2RP 35. In exchange for providing information and testifying against Williams, Naylor was given a favorable plea offer. 1RP 598-600. Naylor pled guilty to reduced charges of second degree robbery and second degree unlawful possession of a firearm. 1RP 596-599, 628.

Naylor testified that he had observed Williams purchase purple tinted bullets at a Big 5 Sporting Goods about one month before the shooting. 1RP 665-66; 2RP 162-65, 167-68. There was no surveillance video of the alleged purchase. 2RP 164. Naylor later watched Williams load the bullets into a .40 caliber pistol. 1RP 667-68. There was no information as to how many purple tinted bullets were produced or sold. 3RP 198-99.

Naylor explained that on August 4 he met his friend, Amy Chavez, to use methamphetamine and heroin. 1RP 605-08; 2RP 89-91, 95. Chavez purchased drugs from Clute and mentioned to Naylor that Clute "had a significant amount of

money and heroin." 1RP 607; 2RP 95-96, 98-99. Naylor told Williams that he had a "good money making opportunity." 1RP 606, 611. When Williams arrived to meet Naylor, he was dressed like the person depicted in the car wash surveillance video. 1RP 612.

Chavez informed them that Clute would be at the car wash. Williams and Naylor decided to rob Clute of his drugs and money. 1RP 602, 613-14; 2RP 96-97. The men planned to tase Clute and then go through his pockets and car looking for drugs and money. 1RP 616-17, 629, 634. They did not intend to shoot Clute. 1RP 602.

Naylor drove Williams to the car was in his orange PT Cruiser. 1RP 610, 616, 630; 2RP 91, 93, 99-100. Chavez followed them in her car. 1RP 614; 2RP 101. Clute was still washing his car when the men arrived. 1RP 634-35. Naylor gave Williams gloves to wear while he used the taser on Clute. 1RP 631, 651-52; 2RP 41. Williams approached Clute while he was seated in his car and attempted to tase him. 1RP 636.

Williams fled after Clute took the taser from him. 1RP 636-37; Ex. 1. Naylor believed the unsuccessful robbery was over and returned to the PT Cruiser. 1RP 636-37. Naylor did not witness the shooting but saw Clute's car drive off the embankment. 1RP 637, 639-30.

Naylor and Williams left the car wash after the shooting. 1RP 639-40. Naylor denied seeing Clute with a gun. 1RP 640. Williams first told Naylor that Clute had a gun, before acknowledging that he had fired a "warning shot." 1RP 640. Naylor and Williams parked the PT Cruiser on a residential side street with the intention of abandoning it. 1RP 640-44. Naylor attempted to remove identifying information from the car, including fingerprints and personal items. 1RP 649-57. At Naylor's request, Chavez picked up the men. 1RP 644; 2RP 101-02. Naylor told Chavez that Williams had shot Clute. 1RP 649; 2RP 104. Chavez did not see anyone with a gun or purple tinted bullets. 2RP 107. She could not recall what Williams looked like or what he was wearing. 2RP 106.

Based on this evidence, Williams was charged with first degree assault, attempted first degree robbery, and first degree unlawful possession of a firearm. The state alleged the assault and attempted robbery were committed with a firearm. CP 176-77. A jury convicted Williams as charged. 1RP 699-713; CP 95-99.

Williams was sentenced to concurrent prison sentences of 236 months on the assault, 48 months on the attempted robbery, and 48 months on each of the unlawful possession convictions. 1RP 745-46; CP 35-49. The trial court also imposed two consecutive firearm enhancements; 120 months on the assault conviction and 72 months on the attempted robbery. 1RP 745-46. Williams was sentenced to a total prison term of 428 months. 1RP 746; CP 35-39.

1. Impeachment Evidence.

Williams sought to cross-examine Fontenot about two instances which occurred in 2005 during his prior employment as a Clallam County Sheriff's deputy. 1RP 185-87. One on

occasion, Fontenot had taken evidence from a storage facility without logging it into evidence. On a separate occasion, Fontenot signed an affidavit attesting to having served a seizure notice which he had not actually done so. Both instances were internally investigated by the sheriff's department and "Fontenot was given a two week suspension for violating department policy for failing to perform basic duties in a competent manner. Fontenot was allowed to buy back one of the weeks with 40 hours of vacation time. In addition to the suspension, he was placed on a six month period of performance monitoring." Ex. 712 at 18. Ultimately, Fontenot resigned from the Sheriff's Department based on this internal investigation and another involving claims of sexual harassment. Id.

As part of its disclosure to Williams of the investigations involving Fontenot, the prosecutor included a memorandum issued by the prosecutor's office, which read:

> On January 10, 2014, this office made a determination that certain information if heard by a reasonable person such as a judge or a juror could lead that person to conclude that Deputy Dave Fontenot was dishonest in the performance of his office duties in May 2005 while a sergeant with the Clallam County Sheriff's Office. Deputy Dave Fontenot signed a return of service on a seizure notice that had not yet been served. He had instructed a fellow deputy to serve it earlier that day and may well have believed it had been served. Nonetheless, it had not, so when he attested to by signing the return describing that, so what he attested to by signing the return was untrue. No property was lost and the deputy served the notice the next morning. A reasonable person could conclude that what Fontenot wrote was untruthful, although his explanation is plausible. This memorandum has been generated to provide the Defense notice of this potential impeachment issue.

1RP 185.

Williams argued the instances were relevant to Fontenot's untruthfulness under ER 608(b). 1RP 184-87. The prosecution argued the instances were not material to Williams's case, not indicative of untruthfulness, and too remote in time to be relevant. 1RP 183, 187-88.

The trial court agreed with the prosecution, concluding that the instances went to a collateral issue and were too remote in time to be probative of Fontenot's truthfulness. 1RP 188-89; 2RP 176-77. Thus, Williams was prohibited from inquiring into Fontenot's prior employment finding concerning his veracity.

2. Court of Appeals.

Williams raised several arguments on appeal. First, Williams argued that attempted first degree robbery was an alternative means crime and challenged the sufficiency of the evidence that he was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon as charged. The Court of Appeals declined to reach the merits of Williams's arguments, instead concluding that he invited the error by proposing an instruction defining all three of the alternative means of committing first degree robbery set out in RCW 9A.56.200(1)(a) and the charging information. Op. at 4-8.

In his motion for reconsideration, Williams argued that whether evidence supports the charged alternative means of

attempted first degree robbery was an issue of sufficiency, not instructional error. Alternatively, Williams asked the Court of Appeals to address whether defense counsel was ineffective in proposing jury instructions that were unnecessary and relieved the state of satisfying its burden of proof.

Williams also argued that the trial court erred by failing to count the first degree assault and attempted first degree robbery as the same criminal conduct for sentencing purposes. Finally, Williams argued he was deprived of his constitutional right to confront witnesses and present a defense when evidence probative of Fontenot's untruthfulness was excluded. The trial court rejected both arguments. Op. at 8-18.

By motion, Williams also sought to file a supplemental brief challenge the sufficiency of the evidence that Williams was armed with a firearm during commission of the attempted first degree robbery for purposes of the sentence enhancement. Williams's motion was denied, and he subsequently attempted to raise the issue in the motion to reconsider.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court should grant review and hold that attempted first degree robbery is an alternative means crime, and whether evidence supports a charged alternative means is an issue of sufficiency, not instructional error.

a. Insufficient evidence supports the alternative means that Williams was armed with a deadly weapon and/or displayed a firearm or other deadly weapon.

Due process requires the State to prove each element of a charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012), cert. denied, 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013). Additionally, the accused has a constitutional right to a unanimous jury verdict. U.S. Const., amend. VI; Wash. Const., art. 1, § 22. This right includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

First degree robbery is an alternative means crime under RCW 9A.56.200 (1)(a). In re Personal Restraint of Brockie, 178 Wn.2d 532, 538, 309 P.3d 498 (2013); State v. Emery, 161 Wn. App. 172, 198-99, 253 P.3d 413, aff'd, 174 Wn.2d 741, 278 P.3d 653 (2012); State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). To prove an attempt to commit a crime, the State must prove the defendant, while acting "with intent to commit a specific crime," performed "any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). The intent required is the intent to accomplish the criminal result of the base crime. State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012).

As charged, the state was required to prove that Williams took a substantial step toward the crime of first degree robbery with intent to commit that offense, either by inflicting bodily injury *or* being armed with a deadly weapon *or* displaying what appeared to be a firearm or other deadly weapon. CP 18, 176-77; RCW 9A.56.190; RCW 9A.56.200(1)(a)(i-iii).

Williams argued there was insufficient evidence to support a finding of guilt on the alternative means that he was armed with a deadly weapon and/or displayed what appeared to be a firearm or other deadly weapon during the commission or in immediate flight therefrom. As Williams argued, if the State need only prove whether Williams acted with intent to commit theft of personal property and whether he took a substantial step toward accomplishing that result and not the means by which he attempted to do so, the State could obtain a conviction of attempted first degree robbery by proving nothing more than attempted second degree robbery. Thus, the means by which an individual commits first degree robbery are necessary to a charge of attempt because the jury's unanimous agreement as to the means of first degree robbery are what allows for a conviction on the greater charge. BOA at 18-35.

While acknowledging that whether first degree robbery is an alternative means crime was "by no means clearly established under the law," the Court of Appeals declined to

reach the merits of the argument, instead concluding that Williams invited the error by proposing an instruction defining all three of the alternative means of committing first degree robbery set out in RCW 9A.56.200(1)(a) and the charging information. Op. at 5-6.

Under State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998), the Court of Appeals was incorrect when it viewed Williams's argument as mere instructional error. Reply Brief of Appellant (RBOA) at 7-9. Hickman argued on appeal that the State failed to offer evidence that the crime occurred in Snohomish County. 135 Wn.2d at 101. This Court held that under the law of the case doctrine, the agreed upon instructions added a venue element and Hickman could challenge the sufficiency of evidence of this element. Id. at 104-05. Thus, Hickman did not turn on the propriety of the instruction listing the county as an element. Instead, the court followed the law of the case doctrine and reversed for insufficiency of the evidence. 135 Wn.2d at 99. The same result is mandated here.

The Court of Appeals nonetheless attempted to distinguish Hickman on the basis that there, both parties agreed to the "to convict" jury instructions that included the element that the charged crime of insurance fraud occurred in Snohomish County. Op. at 7 (citing Hickman, 125 Wn.2d at 101). But, like Hickman, here both parties also proposed identical instructions in this case. See CP 329, 331. Notwithstanding Williams's proposed instructions, the state also acquiesced to the jury instructions which included alternative means of committing attempted first degree robbery. See also, State v. Weaver, 198 Wn.2d 459, 465, 496 P.3d 1183 (2021) (rejecting application of invited error doctrine where definitional instruction was proposed by the state, included "what the defense proposed," and appellant did not assign error to the specific instruction).

The instructions here were also consistent with the elements listed in the amended information. See CP 176-77. Defense counsel is not required to object to an instruction that

that works to the benefit of his client. "Defense counsel is an advocate for her client, not a 'law clerk' for the prosecutor." State v. Hobbs, 71 Wn. App. 419, 424, 859 P.2d 73 (1993).

The Court of Appeals' reliance on and State v. Corbett, 158 Wn. App. 576, 591, 242 P.3d 52 (2010) and State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005) to invoke invited error is also misplaced. Op. at 6. In Corbett, Division Two concluded that invited error prevented the appellant from challenging the trial court's failure to give a unanimity instruction, where Corbett had not included such an instruction as part of his proposed instructions. 158 Wn. App. at 591-92. Similarly, in Winings, Division Two also concluded that the defendant had invited the error where despite not proposing the instruction ultimately given and challenged on appeal, he did propose an instruction with language nearly identical to the language objected to on appeal. 126 Wn. App. at 89. Unlike those cases however, Williams does not challenge the jury

instructions, he challenges the sufficiency of the evidence supporting his conviction.

This is an important distinction because insufficiency of the evidence is not waived and can be raised for the first time on appeal. State v. Sweany, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011) aff'd, 174 Wn.2d 909 (2012) (discussing Hickman). "[W]hether the evidence is sufficient to support a conviction is an issue of law." State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2012) (citing State v. Knapstad, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986)). In Drum, this Court was "troubled" by the Court of Appeals' failure to address a sufficiency of the evidence claim, by instead concluding that the defendant had stipulated and therefore waived his right to a determination of guilt beyond a reasonable doubt. Id. at 34. As in Drum, here, the Court of Appeals also failed to recognize the legal nature of Williams's sufficiency of the evidence argument, and erred when it failed to address it on the merits. Id. at 33-34.

The evidence was insufficient to satisfy each of the alleged alternative means contained in the jury instructions. Because Williams's case concerns a sufficiency challenge, it was properly raised for the first time on appeal. The Court of Appeals' refusal to review the merits of Williams's sufficiency challenge warrants review under RAP 13.4(b)(1)-(4), and Williams's conviction for attempted first degree robbery should be reversed.

b. If the error was invited, then defense counsel was ineffective in proposing jury instructions that were unnecessary and relieved the state of satisfying its burden of proof.

If a sufficiency challenge can be waived by invited error, then this Court should also accept review to address whether defense counsel was deficient in proposing jury instruction 18 which set forth each alternative means of committing attempted robbery in the first degree.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, §

22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) defense counsel's performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9,

162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

To the extent defense counsel thought he was required to propose an entire set of jury instructions, he was mistaken. CrR 6.15(a) sets forth the timing and procedure for proposing instructions. However, the rule "does not impose an obligation to propose jury instructions." State v. Hood, 196 Wn. App. 127, 134, 382 P.3d 710 (2016), rev. denied, 187 Wn.2d 1023, 390 P.3d 331 (2017). Such is the case because "a defendant has no duty to propose the instructions that will enable the State to convict him." Id.; see also State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987) (noting court would not sustain interpretation of court rule that contravened the constitution).

There is no reasonable defense tactic in foreclosing a client's future appellate arguments by proposing an entire, duplicative set of jury instructions. The only effect of doing so is to burden or foreclose a client's future claims under the

invited error doctrine. No reasonable defense attorney would or could ever reasonably wish to harm his or her client in this way. See State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007) (recognizing the invited error doctrine generally forecloses review of an instructional error created by defense counsel, "but does not bar review of a claim of ineffective assistance of counsel based on such instruction").

There was also no legitimate strategic decision for proposing an instruction which relieved the prosecution of its burden of proving beyond a reasonable doubt, each of the charged alternative means of committing attempted first degree robbery. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct); Woods, 138 Wn. App. at 199-202 (counsel ineffective for offering a faulty self-defense instruction). Williams's counsel was plainly deficient for doing so.

"When one alternative means of a committing a crime has evidentiary support and another one does not, courts may not assume the jury relied unanimously on the supported means." State v. Woodlyn, 188 Wn.2d 157, 162, 392 P.3d 1062 (2017). Because defense counsel's proposed instruction relieved the State of its burden of proving that Williams took a substantial step toward committing first degree robbery while "armed with a firearm" or "displayed what appeared to be a firearm or other deadly weapon," counsel's performance was deficient.

This deficient performance was also highly prejudicial. "An instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). "From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Brown, 147 Wn.2d at 344. The State cannot meet its burden here.

Counsel's performance in failing to ensure the jury was unanimous on which alternative means of committing first degree robbery Williams took a substantial step toward, was prejudicial. There was no special verdict specifying which of the alternative means the jury found. "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing Ortega-Martinez, 124 Wn.2d at 708).

Because the evidence is insufficient to prove that Williams took a substantial step toward committing first degree robbery while "armed with a firearm" or "displayed what appeared to be a firearm or other deadly weapon," a properly instructed jury would likely have found reasonable doubt and acquitted Williams of attempted first degree robbery.

Because the Court of Appeals opinion conflicts with prior precedent from this Court and presents significant

questions of law and substantial public interest, review is appropriate under RAP 13.4 (b)(1), (3), and (4).

2. This Court should grant review and hold the prosecution failed to prove Williams was armed with a firearm during commission of the first degree attempted robbery for purposes of the sentence enhancement.

Defendants "armed" with a deadly weapon or firearm at the time of the commission of their crimes receive an enhancement to their standard range sentence. RCW 9.94A.825; RCW 9.94A.533(3), (4). A "firearm" is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(11); CP 116 (instruction 14). Whether a defendant was armed with a firearm is a fact specific determination. State v. Neff, 163 Wn.2d 453, 462, 181 P.3d 819 (2008).

A defendant is armed with a firearm if (1) the firearm was easily accessible and readily available for use either for offense or defensive purposes, and (2) there was a nexus

between the defendant, the firearm, and the crime. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.2d 116 (2007).

To be "easily accessible and readily available," "[t]he presence, close proximity, or constructive possession of a firearm at the scene of the crime, by itself, is insufficient." State v. Sassen Van Elsloo, 191 Wn.2d 798, 826, 425 P.3d 807 (2018). The State "need not establish with mathematical precision the specific time and place that a weapon was readily available and easily accessible, so long as it was at the time of the crime," Id. at 826-27. "The use may be either for offensive or defense purposes, whether to facilitate the commission of the crime, escape from the scene of the crime, protect contraband or the like, or prevent investigation, discovery, or apprehension by the police. State v. Gurske, 155 Wn.2d 134, 139, 118 P.3d 333 (2005).

There must also be a connection between the defendant and the weapon and a connection between the weapon and the crime. Gurske, 155 Wn.2d at 141-42. Whether there is a

connection between the weapon and the crime may depend "on the nature of the crime, the type of weapon, and the circumstances under which the weapon is found. Id. at 142.

This Court reviews a jury's special verdict that a defendant was armed to determine whether any rational trier of fact could so find. Eckenrode, 159 Wn.2d at 494. A claim that the evidence is insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the jury was instructed for purposes of the special verdict that the state was required to "prove beyond a reasonable doubt that there was a connection between the weapon and the crime." CP 130 (instruction 26). The instruction also directed the jury to consider, "among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the type of weapon." Id.

Even viewed in the light most favorable to the State, the evidence fails establish the required nexus between the firearm and attempted first degree robbery. As discussed in argument 3, infra, Williams was not armed with a firearm during the attempted first degree robbery because under Washington's transactional view of robbery, the use or threatened use of force must be to retain the property or effect an escape. BOA at 31-35; State v. Handburgh, 119 Wn.2d 284, 292-93, 830 P.2d 641 (1992); State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990).

Here, the attempted robbery had already been completed when Williams retrieved the gun and fired a shot. The prosecutor conceded this point to the jury during closing argument, telling them "[t]hat shot had nothing to do with the robbery." 3RP 267, 270, 278. As the prosecutor explained, "There was an attempt at a robbery when that Taser was used; but the robbery didn't occur. It didn't happen. It ended. And

that's when Mr. Naylor got back into his vehicle. It was done." 3RP 266-67.

Thus, as the prosecutor recognized, the evidence presented by the State demonstrated that once Clute took the taser from Williams, the unsuccessful robbery attempt was over. Williams had taken no property from Clute that he needed to retain. Nor did Williams need the gun to effect an escape, because Clute did not confront Williams, give chase, attempt to detain him, or try and report the incident. Both Clute and Williams were unhindered in their ability to escape.

In short, Williams's was not armed with a gun during commission of the attempted robbery because the gun was unrelated to the taking or retention of property (either as force used directly in the attempted taking or retention) *or* as force used to prevent or overcome resistance to the attempted taking *or* to effect an escape. RCW 9A.56.190; CP 122.

Because there is insufficient evidence to establish a nexus between the gun and the attempted robbery, this Court

should accept review, and reverse the special verdict and Williams's 72-month firearm enhancement sentence.

3. This Court should grant review and hold that the first degree assault and attempted first degree robbery constituted the same criminal conduct for sentencing purposes.

Where a defendant has multiple prior convictions, those convictions count in the current offender score unless they satisfy the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Whether two crimes constitute the same criminal conduct involves a determination of fact as well as the exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-20, 997 P.2d 1000 (2000). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003).

The trial court rejected Williams's argument that the attempted robbery and assault constituted same criminal conduct, finding the shooting was more indicative of a revenge act rather than a continuing course of conduct. CP 50-56; 1RP 736-38, 740-41. The Court of Appeals agreed and concluded that even if Williams's attempted robbery continued through his flight from the scene, that did not mean he could not form the intent to commit a different crime in the process of his escape. Op. at 10.

Given the transactional view of robbery, and the mere seconds that passed between Williams fleeing Clute's car and firing the shot, however, the evidence demonstrates that robbery was still in progress at that time.

The robbery statute requires that the "force or fear must be used to obtain or retain possession of the property, or the prevent or overcome resistance to taking." RCW 9A.56.190; CP 122. Thus, under Washington's transactional view of robbery, the use or threatened use of force must be to retain the property

or effect an escape. Handburgh, 119 Wn.2d at 292-93; Manchester, 57 Wn. App. at 770. The transaction is not complete "until the assailant has effected his escape." Id.; see also State v. Truong, 168 Wn. App. 529, 535-536, 277 P.3d 74 ("The taking is ongoing until the assailant has effected an escape."), rev. denied, 175 Wn.2d 1020, 290 P.3d 994 (2012). The shot was fired immediately before Williams and Naylor fled the scene. Because Williams had not successfully effected his escape when he fired the shot, this use of force was still part and parcel of the ongoing robbery. Both crimes occurred at the same time.

Moreover, the assault most certainly furthered the attempted robbery, as it was a means by which to ensure that Clute made no effort to flee before the robbery could be completed. As Williams explained to Naylor at the time of the incident, his intent in firing the shot was as a warning for Clute to stop fleeing. 1RP 640, 736-37. It was still part of the force used to try and force Clute to relinquish the drugs and money in

his car.

In this regard, Williams's case is akin to State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999). Tili was convicted of three counts of first degree rape for three penetrative acts that occurred in quick succession. 139 Wn.2d at 112. First, Tili penetrated the complaining witness's anus with his finger. He then used his finger to penetrate her vagina, "separately, and not at the same time." Id. After forcing the complaining witness to say that she liked the penetrations, Tili inserted his penis into her vagina. Id. at 117.

Though this Court held these "three independent acts of rape" did not violate double jeopardy, they did constitute same criminal conduct. Id. at 117. The court explained the three penetrations were continuous, uninterrupted, and took place over approximately two minutes. Id. at 124. "This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed," the court held, "render[ed] it unlikely that Tili formed an independent criminal intent

between separate penetration." Id.

The opinion fails to mention Tili, much less address it. Because the Court of Appeals reasoning is not supported by the record and conflicts with prior precedent from this Court, review is appropriate under RAP 13.4 (b)(1).

4. This Court should grant review and hold Williams was erroneously deprived of his constitutional right to confront witnesses and present a defense.

Under the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution, Williams is guaranteed the rights to compulsory process and to confront the witnesses against him. U.S. Const. Amend. VI; Const. art. I, § 22. The accused's right to "an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). These rights amount to the fundamental due process right to "a fair opportunity to defend

against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

When an accused person claims a violation of this right to present a defense, courts analyze first whether the trial court abused its discretion in applying the rules of evidence. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022) (citing State v. Arndt, 194 Wn.2d 784, 798-812, 453 P.3d 696 (2019)). If the court did not abuse its discretion, the court goes on to consider, under a de novo standard, whether the constitutional right to present a defense was violated. Id.

When the evidence is minimally relevant, the state must identify a compelling interest in exclusion. State v. Chicas-Carballo, 17 Wn. App. 2d 337, 346, 486 P.3d 142, rev. denied, 198 Wn.2d 1030 (2021). Relevant evidence may only be excluded if the court balances the probative value and finds it outweighed by prejudice so significant as to disrupt the truth-finding function of the trial. Id. (citing Jones, 168 Wn.2d at 719). When the evidence is of great probative value or consists

of the essence of the defense, no interest is sufficiently compelling as to permit exclusion. Id.

Williams argued the trial court erred in prohibiting him from cross-examining Fontenot about prior employment instances where he had taken evidence without logging it and had falsely stated on an affidavit that he had served a seizure notice when he had not. 1RP 185; Ex. 712 at 18. As the lead detective on the case, evidence that Fontenot had previously been reprimanded for lying while working as police officer was highly relevant to the defense case. BOA at 44-63; RBOA at 27-31.

In rejecting Williams's argument, the Court of Appeals concluded that even if error occurred, exclusion of the evidence was harmless because other evidence, "completely unrelated to the credibility of Detective Fontenot's testimony," demonstrated Williams was the shooter. Op. at 16, 18. In particular, the court cited the security camera footage capturing the shooting, the DNA linking Williams to the abandoned

clothing, and the purple shell casing recovered at the scene, which matched bullets found in William's possession. Op. at 18.

Contrary to the court's reasoning, however, this other evidence is not "completely unrelated" to Fontenot's credibility. Op. at 18. It was Fontenot who oversaw other officer's collection of evidence, determined what pieces of evidence to submit for DNA and fingerprint testing, and he initially suspected that someone other than Williams was the shooter. BOA at 44-63 (citing 1RP 340, 443, 511-15, 583-85; 2RP 49-50, 133-36, 151-52; 3RP 40-42). In short, he was the lead detective and testified over multiple days of trial. His willingness to lie in his official capacity was relevant to his credibility, and as the Court of Appeals appeared to recognize, "would support [Fontenot's] lack of veracity in regards to his procedures" as it related to evidence gathering in Williams's case. Op. at 17.

The denial of these constitutional rights corrupted and distorted the fact-finding process. Because the Court of Appeals reasoning is not supported by the record and conflicts with prior precedent from this Court, review is appropriate under RAP 13.4 (b)(1).

E. CONCLUSION

Review is appropriate under RAP 13.4(b)(1)-(4). Williams respectfully asks this Court to grant review and reverse the Court of Appeals.

I certify that this document contains 7,268 words, excluding those portions exempt under RAP 18.17.

DATED this 17th day of June, 2022.

Respectfully submitted,

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APPENDIX A

FILED
4/11/2022
Court of Appeals
Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TONY JOSEPH WILLIAMS, Appellant.	No. 81504-1-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — Tony Williams appeals his convictions for attempted first degree robbery and first degree assault following the 2018 shooting of Wade Clute. He argues that attempted first degree robbery is an alternative means crime and that insufficient evidence supports his conviction on each of the three alternative means. He further argues that the trial court denied him the constitutional right to present a defense when it precluded cross examination of a police witness on instances of past misconduct and that it erred in concluding that the assault and attempted robbery crimes did not constitute the same criminal conduct. We affirm his conviction and sentence except for the imposition of community custody fees. We remand to strike that fee from Williams's judgment and sentence.

FACTS

Tony Williams and Nicholas Naylor devised a plan to rob Wade Clute at a Brown Bear car wash in Lynnwood, Washington, in the early hours of August 5,

2018. Naylor's friend, Amy Chavez, told Naylor that her drug dealer, Clute, carried large quantities of cash and heroin and did not carry a gun. Naylor asked Chavez to call Clute pretending she wanted to buy drugs and Naylor and Williams planned to subdue Clute with an electric stun device and take his drugs and money.

Naylor drove Williams to the car wash in a maroon or burnt orange PT Cruiser. While Clute was washing his car, Williams, wearing a black hoodie, hat, and sunglasses, approached and attempted to stun him. Clute wrestled the stun gun from Williams, got into his car, and started to drive off. Williams retreated a few steps, pulled a gun, and fired one shot at Clute's car. The bullet pierced the back window, passed through Clute's headrest, and struck him in the neck, severing his spinal cord. Clute lost control and his car ran up and over an embankment and struck an adjacent building.

Williams and Naylor fled the scene in the PT Cruiser and parked in a nearby residential neighborhood. Williams abandoned his black hoodie, hat, and gloves in a nearby yard. Naylor called Chavez to pick them up and they abandoned the vehicle. Naylor did not realize he left his temporary driver's license inside the car.

Police and paramedics arrived at the scene of the shooting and transported Clute to Harborview Medical Center where he underwent surgery to remove the bullet from his spine. The gunshot wound paralyzed Clute from the neck down.

Responding officers and detectives from the Snohomish County Sherriff's Office recovered footage from the car wash's security camera and a purple Smith and Wesson .40 caliber bullet casing from the ground. They also located the PT Cruiser and Williams's abandoned clothing the next day. Officers collected

fingerprints from the vehicle and found Naylor's driver's license. They arrested Naylor in Lynnwood on September 3, 2018, after confirming Naylor's fingerprints were inside the PT Cruiser.

Williams initially came to law enforcement's attention when he made jail video calls to Naylor. In December 2018, investigators received the results of DNA tests linking Williams to the clothing abandoned near the PT Cruiser. Police arrested Williams on December 6, 2018, while he was riding in the passenger seat of his wife's Jeep. A search of the Jeep produced a handgun, various rounds of ammunition, including purple Smith and Wesson .40 caliber bullets and a magazine for a .40 caliber semi-automatic pistol loaded with the same bullets.

The State charged Williams with first degree assault with a firearm, attempted first degree robbery with a firearm, and two counts of first degree unlawful possession of a firearm. One of the firearm possession charges related to the handgun police discovered in Williams's Jeep when he was arrested in December 2018. Before trial, the court severed that count from the remaining charges and Williams later pleaded guilty to that charge.[1]

Naylor subsequently agreed to testify against Williams in exchange for a plea deal. Although originally charged with first degree assault, Naylor pleaded guilty to second degree robbery and second degree unlawful possession of a firearm. He testified at Williams's trial and described how the two had planned the robbery. He said he did not know that Williams had a gun until after the incident

[1] Information about his possession of a handgun in December 2018 was excluded at trial because the police confirmed the gun was not the one used to shoot Clute and the court severed that count.

and, after the shooting, Williams told him Clute had a gun[2] and he fired his gun at Clute as a "warning shot."

A jury convicted Williams as charged. The jury also returned special verdicts finding that Williams committed the assault and attempted robbery with a firearm.

At sentencing, Williams argued the attempted robbery and assault constituted the same criminal conduct thereby lowering his offender score. The trial court rejected Williams's argument, concluding that the shooting was more indicative of a revenge act rather than a continuing course of conduct. The trial court sentenced Williams to a total prison term of 428 months and 54 months of community custody.[3]

ANALYSIS

A. Jury Unanimity

Williams first argues that the State violated his right to jury unanimity by failing to present sufficient evidence of each alternative means of committing attempted robbery in the first degree. We reject this claim under the invited error doctrine.

Under article I, section 21 of the Washington Constitution, criminal defendants have a right to a unanimous jury verdict. "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed

[2] Police found no weapon in Clute's car. Clute testified he had no firearm in his possession that night. Williams did not raise self-defense at trial.

[3] The court sentenced Williams to 236 months on Count 1, with a 120-month firearm enhancement, and 48 months on Counts 2, 3 and 4, with a 72-month firearm enhancement on Count 2.

on) an alternative means crime." State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). "In reviewing this type of challenge, courts apply the rule that when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required. If, however, there is insufficient evidence to support any means, a particularized expression of jury unanimity is required." Id.

The court instructed the jury that to convict Williams of attempted first degree robbery, the State had to prove the following elements beyond a reasonable doubt: (1) that on or about the 5th day of August, 2018, the defendant did an act that was a substantial step toward the commission of first degree robbery; (2) that the act was done with the intent to commit first degree robbery; and (3) that the act occurred in the State of Washington. Instruction 18 provided the jury with the elements of first degree robbery: "A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon or inflicts bodily injury." This instruction contained all three of the alternative means of committing first degree robbery set out in RCW 9A.56.200(1)(a).

Williams concedes that substantial evidence supports his conviction under the "inflicts bodily injury" alternative, but argues the State failed to prove he took a substantial step toward committing first degree robbery while "armed with a deadly weapon" or "display[ing] what appeared to be a firearm or other deadly weapon." Even if attempted first degree robbery is an alternative means crime—by no means

clearly established under the law—Williams's argument fails because he invited the error by proposing an instruction identical to instruction 18.

The invited error doctrine applies to unanimity instructions. State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), aff'd, 184 Wn.2d 207, 357 P.3d 1064 (2015). Specifically, where a defendant's proposed instructions do not include a unanimity instruction, the invited error doctrine precludes the defendant from appealing the trial court's failure to give such an instruction. State v. Corbett, 158 Wn. App, 576, 591-92, 242 P.3d 52 (2010). See also State v. Holt, 119 Wn. App. 712, 718, 82 P.3d 688 (2004), disapproved of on other grounds by State v. Barboza-Cortes, 194 Wn.2d 639, 451 P.3d 707 (2019) (applying invited error in the context of a unanimity challenge to an alternative means crime).

Williams argues that the invited error doctrine does not apply because he is challenging the sufficiency of the evidence, not the jury instructions themselves. But he specifically contends the jury instructions failed to ensure his constitutional right to jury unanimity. This court has repeatedly held that the invited error doctrine bars a defendant from raising a jury unanimity argument based on instructions the defendant proposed. See State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (defendant invited error of assault "to convict" instruction by offering instruction that included attempted battery as alternative means of committing assault).

Instruction 18 is identical to the defense's proposed instruction 13 and is taken from WPIC 37.01. WPIC 37.01 states:

> A person commits the crime of robbery in the first degree when in the commission of a robbery [or in immediate flight therefrom] he or she

> [is armed with a deadly weapon] [or] [displays what appears to be a firearm or other deadly weapon] [or] [inflicts bodily injury] [or] [commits a robbery within and against a financial institution].

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 37.01, at 772 (5th ed. 2021). The "Note on Use" to this instruction states: "Use bracketed material as applicable." Id.

Williams proposed an instruction that included the bracketed language for all three alternative means: "is armed with a deadly weapon, or displays what appears to be a firearm or inflicts bodily injury." By doing so, he tacitly agreed there was sufficient evidence as to each of these means to submit the issue to the jury. He did not argue below that the evidence was insufficient to instruct the jury on any of these alternative means and thus invited the error of which he now complains.

Williams argues that invited error does not apply under our Supreme Court's decision in State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), but that case is inapposite. In Hickman, both parties agreed to the "to convict" jury instructions that included the element that the charged crime of insurance fraud occurred in Snohomish County. Id. at 101. On appeal, Hickman argued that the State failed to offer evidence that the crime occurred in Snohomish County. Id. The Supreme Court held that under the law of the case doctrine, the instructions added a venue element and Hickman could challenge the sufficiency of evidence of this element. Id. at 104-05. The case contains no discussion of invited error and does not support Williams's contention that he may raise a jury unanimity issue on appeal

where he proposed the relevant "to convict" instruction. The invited error doctrine thus bars Williams's jury unanimity claim.

B. Same Criminal Conduct

Williams next argues that the trial court erred when it declined to treat his convictions for first degree assault and attempted first degree robbery as the same criminal conduct. We disagree.

We review a trial court's ruling on whether multiple offenses constitute the same criminal conduct for an abuse of discretion or misapplication of the law. State v. Latham, 3 Wn. App. 2d 468, 479, 416 P.3d 725 (2018).

"Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The defendant bears the burden of establishing that his convictions amount to the same criminal conduct, and if any element is missing, the sentencing court must count the offenses separately. State v. Aldana Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). We construe RCW 9.94A.589(1)(a) narrowly to reject most assertions of same criminal conduct. Id. To determine if two crimes share a criminal intent, we focus on whether the defendant's intent, viewed objectively, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

The trial court ruled that the two crimes did not constitute the same criminal conduct because they involved different intents and occurred at different times:

> Mr. Clute entered his vehicle and was leaving the scene of the attempted scene of the robbery when Mr. Williams steps back into view, positions himself behind the car, raises his weapon, aims it and physically and purposefully fires the gun. It shatters the window of

> the vehicle, strikes Mr. Clute causing immediate and irreparable serious bodily injury. Much like the Grantham case cited by the State, the evidence reflects one criminal act, the attempted robbery before the second began, the assault 1. Mr. Williams ran from the scene after Mr. Clute defended himself. Seconds passed. It is after Mr. Clute has entered his car and is driving away that Mr. Williams returns to view and assaults Mr. Clute by shooting at him. The second act was in furtherance of the first. Mr. Williams' behavior is far more consistent with a person returning to a scene to exact revenge with a final word, this became his gun to speak for him.

The trial court's reliance on State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), was reasonable. In that case, the defendant was charged and convicted of two counts of second degree rape. On appeal, Grantham argued that the two rapes constituted the same criminal conduct. Division Two recognized that, as is the case here, "the crimes were committed against the same victim, at the same place, but not simultaneously, although relatively close in time." Id. at 858.

> Thus, the question is whether the combined evidence of a gap in time between the two rapes and the activities and communications that took place during that gap in time, and the different methods of committing the two rapes, is sufficient to support a finding that the crimes did not occur at the same time and that Grantham formed a new criminal intent when he committed the second rape.

Id. The court went on to conclude that

> [t]he trial court heard evidence that Grantham completed the first rape before commencing the second; that after the first and before the second he had the presence of mind to threaten L.S. not to tell; that in between the two crimes L.S. begged him to stop and to take her home; and that Grantham had to use new physical force to obtain sufficient compliance to accomplish the second rape.

Id. at 859.

In this case, as reflected by its oral ruling, the trial court also based its conclusion on evidence that Williams retreated from the crime of attempted robbery before commencing a new crime and intended to inflict physical injury on

Clute. The surveillance video footage and Naylor's testimony provided the court with sufficient evidence to conclude that Williams had time in between the two crimes to reflect and form a new criminal intent.

Williams argues that Grantham is distinguishable because he had not completed the attempted robbery when he shot Clute. He asserts that under Washington's transactional view of robbery, his crime was not complete until he escaped, citing State v. Handburgh, 119 Wn.2d 284, 290, 830 P.2d 641 (1992). We reject this argument because even if Williams's crime of attempted robbery continued through his flight from the scene, that does not mean he could not form the intent to commit a different crime in the process of his escape.

Washington courts have repeatedly rejected the argument that whenever a perpetrator commits new crimes during the course of an ongoing robbery, those crimes must be the same criminal conduct. See State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) (where defendant shot victim during robbery, his conviction for first degree robbery and first degree assault did not constitute the same criminal conduct); State v. Tanberg, 121 Wn. App. 134, 87 P.3d 788 (2004) (where defendant physically attacked victim and took her purse, his conviction for second degree assault did not merge with his conviction for first degree robbery).

The Freeman case is particularly instructive. There, the defendant demanded the victim's property at gunpoint. When the victim hesitated, the defendant shot him. The defendant threatened him again, and the victim handed over his property. 118 Wn. App. at 367-69. On appeal, this court upheld the trial court's conclusion that Freeman's resulting convictions for first degree assault and

first degree robbery did not constitute the same criminal conduct. Id. at 378-79. The court reasoned that the evidence was sufficient to support the trial court's finding that the shooting went "far beyond what was necessary to merely further the robbery." Id. at 378. The court noted that objectively, the intent for the two crimes differed and "[t]he trial court was not legally bound to accept Freeman's self-serving depiction of his subjective intent merely to further the robbery." Id.

The same can be said of this case. Regardless whether the attempted robbery was ongoing when Williams shot Clute, the evidence at trial was sufficient to persuade a rational trier of fact that the shooting was a gratuitous use of violent force, far beyond what was required to accomplish the intended robbery. We affirm the trial court's ruling that the crimes did not constitute the same criminal conduct.

C. Right to Present a Defense

Williams next argues that the trial court's exclusion of evidence relating to the lead detective violated his right to present a defense and confront witnesses. We reject this argument as well.

Prior to trial, the State provided the defense with a "potential impeachment disclosure memorandum" concerning Detective Fontenot, chief investigator in Williams's case. The impeachment disclosure stated:

> On January 10, 2014, [the Snohomish County Prosecuting Attorney's Office] made a determination that certain information, if heard by a reasonable person (such as a judge or a juror), could lead that person to conclude that Deputy David Fontenot was dishonest in the performance of his official duties.
>
> In May of 2005 while a sergeant with the Clallam County Sheriff's Office, Deputy Dave Fontenot signed a return of service on a seizure notice that had not yet been served. He had instructed a fellow deputy to serve it earlier that day, and may well have believed that it

> had been served. Nonetheless, it had not, so what he attested to by signing the return was untrue. No property was lost, and the other deputy served the notice the next morning. A reasonable person could conclude that what Fontenot wrote was untruthful, though his explanation is plausible.

Williams also obtained documents through a public disclosure request regarding the circumstances leading to Detective Fontenot's resignation from the Clallam County Sheriff's Office. The documents included a confidential questionnaire submitted to the Snohomish County Sheriff's Office in response to Detective Fontenot's application with that agency. The responding Chief Criminal Deputy from Clallam County Sheriff's Office indicated that Detective Fontenot had been "forced to resign" from the agency. He stated that Detective Fontenot "became embroiled in an internal investigation within this agency involving the unapproved possession of evidence and the filing of a notary document." According to personnel records, the Clallam County Sheriff's Office investigated allegations that Detective Fontenot had taken a pair of antique aviator goggles from a storage facility without logging them into evidence and signed an affidavit that he had served a seizure notice when he did not do so. He was given a two week suspension for violating department policy and placed on a six month period of performance monitoring. The Sheriff's Department later investigated Detective Fontenot for allegations of sexual harassment. An external investigator concluded that "Fontenot was engaged in behavior in the workplace that was at least unprofessional and inappropriate," and found the allegations substantiated.

Williams sought to admit this evidence and cross-examine Detective Fontenot about these incidents on the basis that the evidence was relevant to Detective Fontenot's untruthfulness under ER 608(b). The trial court prohibited

this line of questioning, concluding that the instances went to a collateral issue and were too remote in time to be probative of Detective Fontenot's truthfulness. Williams contends on appeal that this evidentiary ruling violated his right to present a complete defense.

In analyzing whether a trial court's evidentiary decision violated a defendant's Sixth Amendment right to present a defense, we first review the court's evidentiary ruling for abuse of discretion. State v. Jennings, no. 99337-8, slip op. at *4 (Wash. Feb. 3, 2022)[4] (citing State v. Arndt, 194 Wn.2d 784, 798-812, 453 P.3d 696 (2019)). If we conclude that the evidentiary ruling was not an abuse of discretion, we then consider de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. Id.

1. ER 608(b)

Williams contends the trial court abused its discretion in finding that the excluded evidence was irrelevant and of low probative value. ER 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Generally, evidence is relevant to attack a witness's credibility. State v. Lee, 188 Wn.2d 473, 488, 396 P.3d 316 (2017). Credibility evidence is particularly relevant when a witness is central to the prosecution's case. Id. "Relevant credibility evidence may include specific instances of lying, though their admission is highly

[4] https://www.courts.wa.gov/opinions/pdf/993378.pdf.

discretionary under ER 608(b)." Id. (quotations omitted). But "evidence of a witness'[s] prior false statement is not always relevant, particularly when that evidence is unrelated to the issues in the case." Id. at 489. Evidence generally intended to paint a picture of a witness as untrustworthy is less probative than evidence establishing a witness's bias or motive to lie in a particular case. Id. Washington courts typically disfavor evidence intended to suggest that because a person lied in the past, they must be lying now. Id. at 490 (citing ER 404(b)).

The trial court had a tenable basis for excluding the evidence here. First, it did not establish that Detective Fontenot had a motive to lie in Williams's case and Williams did not allege he had done so. Second, it did not cast doubt on the chain of custody of any specific piece of the State's evidence and Williams did not allege that Detective Fontenot mishandled evidence here. Third, the evidence was fairly dated, describing events that occurred 15 years earlier. The court did not abuse its discretion in deciding the evidence had low probative value.

Williams cites State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), in which Division Three reversed York's conviction for two counts of delivery of a controlled substance concluding the trial court erred in precluding him from introducing evidence regarding prior misconduct on behalf of the undercover investigator who arrested him after a controlled sale of marijuana. But York is distinguishable. In that case, the testimony of the investigator, Smith, was vital to the prosecution's case. Division Three reasoned:

> [t]he importance of Smith's testimony cannot be overstated. He was the only witness to have allegedly seen York sell the marijuana. . . .
>
> His credibility, based on his apparent unsullied background and the total lack of meaningful impeachment, was stressed heavily by the

> prosecution. In short, his credibility was crucial to the state and to the defense; it was simply a contest between the word of Gary Smith and Kineth York's alibi witnesses.

Id. at 35. The court concluded, "as a matter of fundamental fairness, the defense should have been allowed to bring out the only negative characteristics of the one most important witness against York." Id. at 37.

In stark contrast to York, although Detective Fontenot was the lead investigator in this case, he was not a witness to the alleged crime, and his testimony was not the most important piece of the prosecution's case. The State did not rely on Detective Fontenot to provide any direct evidence of Williams's actions on the night of the shooting. Instead, the State called Naylor, Williams's accomplice, who described in detail the plan to rob Clute, the trip to and from the car wash, Williams's act of shooting Clute, and Williams's disposal of the clothing he wore during the attempted robbery. Amy Chavez testified about calling Clute to set up an ostensible drug buy and Naylor's request that she pick him and Williams up from the neighborhood where they abandoned the PT Cruiser. Clute testified and gave his account of the shooting and attempted robbery, which was consistent with the plan Naylor described. Finally, video footage from the car wash and from the residential neighborhood where the PT Cruiser was found corroborated each eyewitness's account.

Because Detective Fontenot was not a crucial witness and the excluded testimony was not directly related to the case at hand, the trial court did not abuse its discretion in precluding cross examination of the impeachment materials.

2. Williams's right to present a defense

Williams contends that even if the court did not abuse its discretion in excluding the evidence under ER 608(b), its decision nevertheless prevented him from presenting a defense. We conclude that, if error occurred, the exclusion of this evidence was harmless.

Both the federal and state constitutions protect the rights of criminal defendants to present a complete defense and to confront adverse witnesses. U.S. CONST. amend. VI; WASH CONST. art. I, § 22; Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "The primary and most important component" of the confrontation right "is the right to conduct a meaningful cross-examination of adverse witnesses." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Neither the right to confront nor the right to present a defense are without limitation. Darden, 145 Wn.2d at 621. For example, "the Constitution permits judges to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quotations omitted).

In assessing whether the exclusion of evidence violates a defendant's right to present a defense, we ask: "(1) whether the excluded evidence was at least minimally relevant, (2) whether the evidence was 'so prejudicial as to disrupt the fairness of the factfinding process at trial,' and, if so, (3) whether the State's interest in excluding the prejudicial evidence outweighs the defendant's need to present it."

State v. Orn, 197 Wn.2d 343, 353, 482 P.3d 913 (2021) (quoting State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

While Orn held that a witness's bias is always relevant because it affects the weight of their testimony, 197 Wn.2d at 353, Lee held that the fact that a witness testified untruthfully in the past is not always relevant to assess that witness's credibility in the trial at hand. 188 Wn.2d at 489. Defense counsel argued below that evidence of Detective Fontenot's mishandling of evidence in prior cases "would support [Fontenot's] lack of veracity in regards to his procedures." But Williams did not challenge the veracity of the detective's testimony as to how he handled evidence in this case. And we fail to see the connection between the prior negligent handing of evidence and a witness's character for truthfulness. It appears that the only actual purpose Williams had for offering this evidence was to make an improper propensity argument—that if Detective Fontenot lied in the past, he must be untruthful now.

But even if we assume that the incidents leading to Detective Fontenot's resignation from the Clallam County Sheriff's Office in 2005 were minimally relevant and that Williams's need for this evidence outweighed the prejudice to the State in having to respond to such propensity evidence, we nonetheless conclude the trial court's exclusion was harmless beyond a reasonable doubt.

The exclusion of relevant and nonprejudicial evidence constituting a violation of a defendant's Sixth Amendment right to present a defense is subject to constitutional error analysis. Orn, 197 Wn.2d at 359. A constitutional error is harmless and not grounds for reversal if the State shows beyond a reasonable

doubt that the jury would have reached the same verdict without the error. State v. Romero-Ochoa, 193 Wn.2d 341, 347, 440 P.3d 994 (2019). Where impeachment evidence has been erroneously excluded, the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, we can nonetheless say that the error was harmless beyond a reasonable doubt. Orn, 197 Wn.2d at 359 (quotations omitted). We must find the error harmless if, in light of the entire trial record, we are convinced that the jury would have reached the same verdict absent the error. Id. (quotations omitted).

Williams argues that the error was not harmless because this court "cannot speculate whether the jury would have weighed a witness's testimony differently had proper cross-examination as well as extrinsic impeaching evidence been allowed." But Williams's defense at trial was that he was not the shooter and that Naylor lied about his involvement. Even if the jury had found Detective Fontenot to lack any credibility at all, Naylor's and Chavez's testimony, the security camera footage that captured the shooting, the DNA evidence linking Williams to the abandoned clothing, and the rare purple shell casing recovered at the scene and its matching bullets found in Williams's possession—evidence completely unrelated to the credibility of Detective Fontenot's testimony—demonstrated beyond a reasonable doubt that Williams was the shooter. We therefore reject Williams's Sixth Amendment claim.

D. Community Custody Fee

Finally, Williams argues the trial court erred in imposing a community custody fee in Williams's judgment and sentence. We agree.

At sentencing, the trial court clearly stated orally that it intended to waive all discretionary legal financial obligations (LFOs). Williams's judgment and sentence mistakenly includes a discretionary community custody fee. The inclusion of this fee was procedural error and it must be stricken. See State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021) (when trial court clearly intends to impose only mandatory LFOs, community custody supervision fee should be stricken as procedural error).

We affirm Williams's convictions but remand for the trial court to strike the DOC supervision fee from his judgment and sentence.

Andrus, C.J.

WE CONCUR:

Coburn, J.

Bowman, J.

APPENDIX B

FILED
5/24/2022
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. TONY JOSEPH WILLIAMS, Appellant.	No. 81504-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Tony Williams, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Andrus, C.J.
Judge

NIELSEN KOCH & GRANNIS P.L.L.C.

June 21, 2022 - 1:14 PM

Filing Petition for Review

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