NO. 101159-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent
v.
MITCHELL HENG, Appellant

FROM THE COURT OF APPEALS DIVISION II
CAUSE NO. 83280-8
CLARK COUNTY SUPERIOR COURT
CAUSE NO. 17-1-00137-6

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

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IDENTITY OF RESPONDENT

The Respondent, State of Washington, by and through Aaron Bartlett, Senior Deputy Prosecuting Attorney for Clark County, provides the following response to Mitchell Heng's Petition for Discretionary Review.

DECISION BELOW

On July 11, 2022, Division I of the Court of Appeals issued a published opinion affirming Heng's convictions and sentence in *State v. Heng*, 22 Wn.App.2d 717, 512 P.3d 942 (2022). A copy of that opinion is attached.

ISSUES PRESENTED FOR REVIEW

I. Does the decision of the Court of Appeals holding that Heng's preliminary appearance, at which bail was set, did not constitute a "critical stage" of criminal proceedings since Heng's rights or defenses were not lost, waived, or forfeited at this hearing, conflict with a published decision of the Court of Appeals or involve a significant question of law under the

Constitution?

II. **Does the decision of the Court of Appeals holding that, assuming error and that Heng's preliminary appearance was a critical stage requiring his counsel's presence, the constitutional harmless error standard applied conflict with a decision of this Court or a published decision of the Court of Appeals?**

III. **Does the decision of the Court of Appeals finding moot Heng's CrR 3.2 argument, where the bail hearing in this case happened prior to the recent, published cases providing guidance on the issue, involve a significant question of law under the Constitution?**

IV. **Does the decision of the Court of Appeals holding that Heng's counsel was not ineffective for not asking the trial court to revisit bail satisfy any of the review criteria under RAP 13.4(b)?**

V. **Does the decision of the Court of Appeals, following this Court's decision in *State v. Arndt*[1], holding that Heng's convictions for felony murder and arson did not violate double jeopardy under an "independent effects" analysis, conflict with other decisions of this Court?**

VI. **Does the decision of the Court of Appeals holding that the trial court did not abuse its discretion under ER 702 to allow certain testimony by a fire marshal satisfy any of the**

[1] 94 Wn.2d 784, 453 P.3d 696 (2019).

review criteria under RAP 13.4(b)?

STATEMENT OF THE CASE

One very early morning in January of 2017, Mitchell Heng went into the Sifton Market in which Amy Hooser was working. RP 838-840, 1207-08, 1210; Ex 9, 76. The two were the only people in the market when Heng followed Hooser into a back deli area and beat her to near-death. RP 613-614, 623, 1094-95, 1262-65, 1268, 1450-51; Ex. 9, 13.

When he emerged from the back deli area, Heng attempted to gain access to a safe and then set fire to the market. Ex. 9. The fire spread throughout the building and destroyed the Sifton Market and the multiple businesses that were attached to it. RP 473-74; Ex. 23, 24, 36, 46, 86, 192. Hooser's body was discovered in the rubble after the fire was extinguished. Ex. 36, 40.

Using the recovered surveillance footage from the Sifton Market, the police identified Heng as the suspect in Hooser's murder. RP 486-87, 491, 536-540, 806-08. Detectives

interrogated Heng, who told multiple, conflicting stories as to his presence at the market, what occurred, and who was responsible for Hooser's murder, but admitted to setting the fire and that he was aware that Hooser was incapacitated in the back deli area when he set the fire. RP 748-788, 1588-1595.

Detectives later observed stains on the driver's side floor mat of Heng's car, which he had driven to the Sifton Market that morning. RP 1102. The stains contained Hooser's DNA profile. RP 1102, 1234-37. Furthermore, shoe prints found in the deli area that tested presumptively positive for blood matched the tread pattern of Nike brand Air Force One Premium 2007 shoes, of which Heng owned three pairs, though the black pair that he was wearing during murder were never recovered. RP 901-05, 1331, 1339-1353; Ex. 105, 107, 111, 183, 184.

During the pendency of the case, Heng remained incarcerated and made jail calls to his friends and family. In these jail calls, Heng told additional, inconsistent stories about

his presence in the Sifton Markt and who was responsible for Hooser's murder. RP 1103-1123, 1596-1600, 1605-1613. At trial, the State presented the Sifton Market surveillance footage, excerpts from Heng's interrogation and his jail calls, the mentioned scientific evidence, and testimony from fire investigators, the police, and the owners and employees of the Sifton Market. Following the trial, the jury found Heng guilty of Murder in the First Degree and Arson in the First Degree.

Heng appealed his convictions and sentence. On July 11, 2022, Division I of the Court of Appeals issued a published opinion affirming in *State v. Heng*, 22 Wn.App.2d 717, 512 P.3d 942 (2022). Heng petitioned this Court for review, and this Court asked the State to respond.

ARGUMENT

This Court will grant a petition for review "only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of

> Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Heng argues that review should be granted in this case "under RAP 13.4(b)(2) and (3)" and "RAP 13.4(b)(4)." Petition for Review at 9, 15, 17, 22. This Court should deny Heng's petition for review because the decision of the Court of Appeals in this case properly applied established case law in reaching its holdings and is not in conflict with decisions of this Court or published decisions of the Court of Appeals. Furthermore, the issues raised, in the context of this case, do not amount to significant questions of law under the Constitution or issues of substantial public interest.

I. The decision of the Court of Appeals that held that Heng's preliminary appearance, at which bail was set, did not constitute a "critical stage" of the criminal proceedings since Heng's rights or defenses were not lost, waived, or forfeited at this hearing, straightforwardly follows from United States Supreme Court precedent and

Washington case law.

Heng committed the crimes of Murder in the First Degree and Arson in the First Degree on January 15, 2017. CP 10-11. He was arrested and booked into jail on January 19, 2017 and made his first appearance on January 20, 2017. CP 2-3, 5, 8. At that first appearance, the court appointed counsel. CP 9. Counsel was not present, however, and the court, following a recommendation from a prosecutor, imposed bail in the amount of two million dollars. RP 8. The court then set a date for Heng's arraignment. RP 8-9.

More specifically, both before and after setting the bail, the court told Heng that bail could be reviewed in the future. RP 7-9. As the court explained:

> I'm gonna now hear recommendations about bail and release. I will allow you to address those, but you do not want to talk at all about the alleged incidents that bring you -- brings you here today. And then the next time you're in front of the court with Mr. Hoff being present, we'll allow, if you're still in custody, bail to be reviewed with the aid of your attorney. Do you understand?

RP 7. Heng responded, "[y]eah." RP 7. After the prosecutor made his bail recommendation the court turned to Heng and said:

> Sir, if there's anything you'd like to say with regards to the issue of bail, now would be the time. . . . And again, I'll allow this to be reviewed, whatever I set bail at.

RP 8. Heng did not address the court. RP 8. Next, the court set bail and stated:

> It can definitely be reviewed. Your attorney will have a chance to work things up and have an informed discussion with the court at the next court hearing.

RP 8.

Heng's trial counsel appeared at the next hearing, the arraignment, and assisted Heng in entering pleas of not guilty. RP 13. Following the setting of the trial dates, the court inquired about the bail situation and the following discussion occurred:

> MR. HOFF: And Your Honor, again, just to address that. Counsel was not present when I was appointed to represent Mr. Heng and so bail was

> set outside the presence of counsel. At some point in the future, I may address it, but I'm not gonna address it now.
>
> THE COURT: That's what I was gonna suggest. If you're -- if you wish to then make sure we do it with some written notice to the State and –
>
> . . .
>
> THE COURT: -- I'll be willing to hear it.

RP 13. A bail review hearing was never set. See RP.

On appeal, Heng argued that that his preliminary appearance was a critical stage of trial and, as a result, that the trial court deprived him of his constitutional right to counsel by proceeding at that hearing in counsel's absence. The Court of Appeals rejected this argument.

The Court of Appeals correctly recognized that a "critical stage" is one "'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected'" and can include "'those pretrial procedures that would impair defense on the merits if the accused is required to proceed

without counsel.'" 22 Wn.App. at 739 (quoting *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009) and (quoting *Gerstein v. Pugh*, 420 U.S. 103, 122, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)). It then explained why Heng's preliminary appearance did not constitute a "critical stage:"

> Heng's preliminary appearance was limited in scope: Heng confirmed his name and date of birth, and the court appointed counsel and set bail, indicating that it would be willing to revisit the issue later. Heng did not forfeit any rights or defenses that would substantially affect the outcome of his trial. Although the trial court did set bail, it also indicated it would be willing to revisit the issue later, and Heng could have asked the court to do so at any time. Thus, Heng's counsel's absence did not cause Heng to waive any right related to bail, nor did counsel's absence "by [its] very nature cast so much doubt on the fairness of the trial process that, as a matter of law, [it] can[not] be considered harmless."

Id. at 740 (internal citations omitted) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 257, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988)) (citing *In re Sanchez*, 197 Wn.App. 686, 702, 391 P.3d 517 (2017)).

The Court of Appeals also distinguished the cases upon which Heng relied by explaining how the hearings that took place in those cases were different than Heng's preliminary appearance and how the focus of those cases was on the impact of the absence of counsel on the ability of the defendant to have a meaningful defense at trial and whether any defenses or privileges could be irretrievably lost at said hearings. *Id.* at 740-742 (citing and discussing *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); *Rothgery v. Gillespie County*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008)). Accordingly, the decision of the Court of Appeals is not in conflict with the decisions of this Court, the Supreme Court, or other decisions of the Court of Appeals. Heng barely attempts to rebut this claim, save for his focus on one opinion of the Court of Appeals, *infra*. *See* PFR at 3-10. This leads to two conclusions: (1) that the Court of Appeals correctly concluded that because Heng did not forfeit any rights or

defenses that would substantially affect the outcome of his trial at his preliminary appearance that his first appearance did not constitute a critical stage; and (2) that Heng cannot establish that review of this case is appropriate under the review criteria found in RAP 13.4(b).

Heng argues that the decision of the Court of Appeals (*Heng*) is in conflict with *State v. Charlton*, 23 Wn.App.2d 150, 515 P.3d 537 (2022). PFR at 6, 9-10. But that opinion, which was published after *Heng*, comes to the same conclusion as *Heng*: that a defendant's first preliminary appearance does not constitute a "critical stage" at which appointed counsel must be present even if bail is set. 23 Wn.App.2d at 165. *Charlton* also holds that a hearing that did not occur in *Heng*—a second preliminary appearance without counsel's presence, which occurred after the defendant had been formally charged—constituted a "critical stage" in a truncated analysis inconsistent with binding case law and its own recitation and application of that case law earlier in the opinion. *Compare* 23 Wn.App.2d at

160-163 (summarizing the "[m]eaning of 'critical stage'") *with* 23 Wn.App.2d at 165 (deciding that the hearing was critical stage because it had "very significant consequences for [defendant's] liberty").

This holding is not tantamount a conflict with *Heng* and should not be a basis on which to grant review of this case. In other words, *Charlton's* second holding—that a second preliminary appearance without counsel after charges have been filed constitutes a critical state—is conflict with other decisions, but not with *Heng* since *Heng* had no occasion to analyze a hearing that did not occur and because *Heng* and *Charlton* are in accord that a *first* preliminary appearance at which bail is set does not constitute a critical stage. 22 Wn.App. at 740; 23 Wn.App.2d at 165. As a result, this Court should not grant review of this issue under RAP 13.4(b)(2).

II. The decision of the Court of Appeals holding that, assuming error and that Heng's preliminary appearance was a critical stage requiring his counsel's presence, the constitutional harmless error standard applied

does not conflict with a decision of this Court or a published decision of the Court of Appeals.

Heng argues that the decision of the Court of Appeals applied the wrong standard of prejudice when it determined that any error in setting bail at the preliminary appearance in counsel's absence was harmless. PFR at 6-10. He seemingly argues that decision of the Court of Appeals to apply the constitutional harmless error standard rather than structural error is in conflict with *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 128 S.Ct. 2557, 165 L.Ed. 2d 409 (2006). *Id.*

This claim is belied by cases from this Court describing what kind of errors are structural errors and the fact other cases in which there are errors involving counsel, e.g., the ineffective assistance of counsel, are not considered structural error. *State v. Frost*, 160 Wn.2d 765, 780, 161 P.3d 361 (2007). As a preliminary matter, however, the portion of the Court of Appeals decision discussing the standard of prejudice assuming error is dicta because it was unnecessary to Court's decision. *Protect the Peninsula's Future v. City of Port Angeles*, 175

Wn.App. 201, 215, 304 P.3d 914 (2013) ("[a] statement is dicta when it is not necessary to the court's decision in a case"). Because the Court of Appeals concluded that no error occurred, there was no need to address prejudice. This Court should not grant review to address dicta.

In any event, even assuming error in counsel's absence from Heng's preliminary appearance, the Court of Appeals properly did not apply structural error. Structural errors are those that "'deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *In re Reyes*, 184 Wn.2d 340, 346, 358 P.3d 394 (2015) (quoting *Neder v. U.S.*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Said another way, an error is structural when "'necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *In re Meredith*, 191 Wn.2d 300, 309, 422 P.3d 458 (2018) (*quoting*

Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006)).

"Examples of structural error include improper courtroom closure, *complete lack of counsel*, and racial discrimination in grand jury selection." Id. (emphasis added) (citing cases). But not every error touching on those topics amounts to structural error. Accordingly, "constitutional harmless error analysis applies to the denial of the Sixth Amendment right to counsel" except where "'the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding.'" *Sanchez*, 197 Wn.App. at 699-700 (quoting *Satterwhite v. Texas*, 486 U.S. 249, 257, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988)); *Arizona v. Fulminante*, 499 U.S. 279, 310-11, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Gonzalez-Lopez does not require a different result. 548 U.S. 140. There, the Supreme Court of the United States held that the denial of Sixth Amendment right to *counsel of choice* amounted to structural error. But the reason for that was

because the denial of *counsel of choice* does contaminate the entire criminal proceeding since:

> Different attorneys will pursue different strategies ... [a]nd the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds.

Frost, 160 Wn.2d at 780 (quoting *Gonzalez-Lopez*, 548 U.S. at 150). Counsel being absent from the first preliminary appearance of a defendant simply is not the same. Just as with cases of ineffective assistance of counsel and other discrete claims regarding counsel "this [C]ourt is as equipped to assess whether the trial court's" error "affected the outcome . . . as it is to conduct other harmless error analyses." *Id.* at 780-81; *Gonzalez-Lopez*, 548 U.S. at 150-51. Consequently, a constitutional harmless error analysis is appropriate here and is consistent with decisions of this Court, the United States Supreme Court, and the Court of Appeals. *Sanchez*, 197

Wn.App. at 699-700. Heng cannot establish that review of this issue is appropriate under the review criteria found in RAP 13.4(b)

III. Heng's CrR 3.2 argument does not involve a significant question of law under the Constitution or an issue of substantial public importance.

Heng asks this Court to review his CrR 3.2 arguments and faults the decision of the Court of Appeals for finding them moot. PFR at 10-15. In support of his argument, Heng lists a number of cases in which he claims that courts are "simply not following" the requirements of CrR 3.2. PFR at 12.

But as the Court of Appeals recognized—aside from the fact that Heng did "not argue[[2]] that any exception to the mootness doctrine applies"—"recent published case law has provided guidance on the issues that Heng raises in this

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[2] Heng also failed to address issue preservation under RAP 2.5(a)(3). No arguments regarding bail were made to trial court judge. Because the Court of Appeals decided the issue based on mootness, it did not address issue preservation. 22 Wn.App. at 739 n.14.

appeal." 22 Wn.App. at 739-740. That recent published case law, the decisions of the Courts of Appeals in *State v. Ingram* and *State v. Huckins*, both found exceptions to the mootness doctrine applied and addressed CrR 3.2 issues raised by the defendant. 9 Wn.App.2d 482, 490, 447 P.3d 192 (2019); 5 Wn.App.2d 457, 465-69, 426 P.3d 797 (2018). Notably these decisions were both published *after* Heng's first appearance, which took place on January 17, 2017. RP 6-9.

As a result, the CrR 3.2 issues raised by Heng do not currently involve a significant question of law under the Constitution or an issue of substantial public importance. This Court should decline review of this issue.

IV. The decision of the Court of Appeals holding that Heng's counsel was not ineffective for not asking the trial court to revisit bail does not satisfy any of the review criteria under RAP 13.4(b).

The decision of the Court of Appeals concluded that Heng failed to establish the ineffective assistance of counsel because he could not establish deficient performance when his

counsel did not ask the trial court to revisit bail or, assuming deficient performance, prejudice. 22 Wn.App. 744-45. Heng disagrees and argues that "[t]his Court should grant review of this faulty holding." PFR at 15-17. But other than a claim the decision of the Court of Appeals was wrong, and a citation to RAP 13.4(b)(3), Heng advances no real argument as to why this Court should accept review.

And given the overwhelming evidence of Heng's guilt, any argument that Heng was prejudiced because he could have possibly received a different bail determination falls woefully short of establishing the requisite prejudice—a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quotation omitted). As the decision of the Court of Appeals correctly recognized, "any prejudice from the statements Heng made on those calls was the product of Heng's decision to make those statements despite warnings he was being recorded. That

prejudice cannot be laid at counsel's feet." 22 Wn.App. at 745. Accordingly, there is no basis by which this Court should accept review of Heng's claim to have received the ineffective assistance of counsel.

V. The decision of the Court of Appeals correctly followed and applied this Court's decision in *State v. Arndt* when it held that Heng's convictions for felony murder and arson did not violate double jeopardy under an "independent effects" analysis because the evidence presented by the State established that Heng's arson had victims in addition to Hooser, does not conflict with other decisions of this Court.

In this case, in addition to Murder in the First Degree, Heng was convicted of Arson in the First Degree for knowingly and maliciously causing a fire which was manifestly dangerous to human life and knowingly and maliciously causing a fire in a building in which there was at the time a human being, for setting a fire in the building that contained the Sifton Market and Amy Hooser, and the other businesses that called the strip mall home and burned down—a barber shop, "Best Friend's Grooming," and "Tails with Taylors." CP 46-47, 150, 177, 226;

RP 460, 465, 532, 1074, 1080-81, 1320, 1337-38, 1898-1900; Ex. 11, 26, 50, 86In *Arndt,* this Court held that the "independent or effect exception" to double jeopardy can apply to convictions for "aggravated first degree murder," aggravated by arson, and "first degree arson." 194 Wn.2d at 819-821. As this Court explained when considering the particular facts of that case:

> Arndt was charged with aggravated first degree murder for the death of a single victim, Darcy Veeder Jr. In contrast, her conviction for first degree arson, in addition to resulting in the death of Veeder, also destroyed the O'Neils' home and was "manifestly dangerous" to the other occupants: O'Neil, Thomas, Kriefels, and the minor children. . . . . The presence of additional victims places this case inside the "independent effect" exception to the merger doctrine that allows for the imposition of separate punishments. For this reason, allowing both of Arndt's convictions to stand does not constitute a violation of double jeopardy.

Id. at 819 (internal citations omitted). But this Court also found "that in the consideration of these two crimes, an independent purpose exists on an abstract level that also

prevents the merger of the two offenses and allows for the imposition of multiple punishments" as "the two statutes in question are located in different chapters of the criminal code and are intended to protect different societal interests." *Id.* at 819-820.

There are no meaningful distinctions to be made between this case and *Arndt*. And despite Heng's claims to the contrary, this Court's decision in *State v. Muhammad*, 194 Wn.2d 577, 451 P.3d 1060 (2019) does not call into question the "independent effect" exception in the context of felony murder. Just a year later in *In re Knight*, 196 Wn.2d 330, 336-39, 473 P.3d 663 (2020), this Court cited *Arndt* with approval before determining that that defendant's convictions for felony murder and robbery "had 'independent effects' from each other and thus do not violate double jeopardy." 196 Wn.2d at 339. Plus, as the decision of the Court of Appeals in *Heng* held, "*Muhammad* is readily distinguishable on its facts" since "[i]n *Muhammad*, the rape that served as the predicate for felony

murder could have had only one victim—the same victim as the murder" whereas "[b]y contrast, arson by its nature can have an independent effect on multiple victims, and it plainly did here." 22 Wn.App. at 737 (internal citations and parentheticals omitted).

Moreover, Heng's contention that the decision of the Court of Appeals conflicts with decisions of this Court because it "applied an improper abstract analysis" to find the "independent effects" exception applied rather than a fact-specific one is unfounded. PFR at 19, 21. For example, the State called Thomas[3] and Steven Ranck, who owned the Sifton Market and the building that held the adjoining business, as witnesses and presented evidence of the destruction of the

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[3] "[State:] Do you remember the names or at least the types of the other businesses that were in the building?

[Thomas Ranck:] Yes, there was a barber shop in the unit next to the store called Betty's Barber -- Betty Barber and then there was a dog grooming place called Best Friends and then there was a pet supply place for just three or four months and I don't recall the name of that." RP 1074

Sifton Market and those businesses. RP 1071, 1093; Ex. 11, 23, 24, 26, 27, 50. That, in addition to Hooser, there were other, independent victims of Heng's arson would have been obvious to jury based on the facts and evidence presented at trial.

The decision of the Court of Appeals holding that this Court's decision in "*Arndt* controls" and applying *Arndt* to the facts of this case, and the relevant statutes in the exact same way that *Arndt* did, straightforwardly means the decision is not in conflict with the decisions of this Court. This Court should deny review of this issue under RAP 13.4(b)(1) as well as under Heng's proffered reason, RAP 13.4(b)(3), since a faithful application of the decisions of this Court does not create a "a significant question of law under the Constitution."

VI. The decision of the Court of Appeals holding that the trial court did not abuse its discretion under ER 702 to allow certain testimony by a fire marshal fails to satisfy any of the review criteria under RAP 13.4(b).

Senior Deputy Fire Marshal Susan Anderson testified at length at Heng's trial regarding her investigation. *See* RP 522-

24, 972-1032. Amongst her testimony, she opined, over objection, that "a fire was probably ignited on [the victim's] body, clothing or near the body." RP 1012-13. Similarly, Assistant Fire Marshal Curtis Eavenson testified "that I would say that another ignition was at least attempted at" or near the location of the victim's body. RP 909-910. Heng did not object to Eavenson's testimony on this topic. Heng continues to claim that "Anderson admits to not following any of the requirements of her profession in reaching her conclusion" despite the fact that she made no such admission.[4] PFR at 22-23.

More importantly, the decision of the Court of Appeals correctly applied this Court's opinions, including *Arndt*, to note

[4] Anderson detailed her qualifications, and her observations and investigation were discussed at length, including how she came to conclude that a "fire was probably ignited on [the victim's] body, clothing or near the body." RP 522-24, 972-1032. When Anderson was questioned by Heng, she admitted she did not do any forensic testing or take exemplars of clothing to test ignition levels. RP 998. This "admission" is not akin to admitting that she did not conduct her investigation in accordance with NFPA 921.

that though those cases affirmed trial court decisions to exclude specific scientific evidence because said decisions did not amount to an abuse of discretion, the cases did not hold "that it also would have been an abuse of discretion to admit the testimony and subject it to cross examination." 22 Wn.App.2d at 747. As the Court of Appeals concluded, "Anderson was undisputedly qualified as an expert by her training and experience as a fire marshal. The trial court was within its discretion to conclude that Anderson's testimony based on her training, experience, and observations of the scene would be helpful to the jury." *Id.* at 748. The determination of whether a trial court abused its discretion in admitting scientific evidence, especially in this context, is not an issue of substantial public importance warranting review.

Nonetheless, any error in admitting this evidence was harmless. In addition to the overwhelming evidence of Heng's guilt, the complained about evidence was of minor import since it was uncontested that Heng set the fire(s) that burned down

the Sifton Market. Heng admitted, and was caught on video, setting fire to the Sifton Market, and all of the fire experts, to include the defense expert, agreed that there was likely a second fire origin in the back portion of the deli area. Ex. 94, Ex. 106; RP 887-894, 905-08, 1011-12, 1509-1512. Far from being crucial evidence, Anderson's testimony on this issue was only briefly mentioned in the State's closing argument and the truth of the matter was not necessary to establish either of the crimes for which Heng was convicted. Any error in admitting said evidence was harmless. Consequently, this Court should decline review of this issue.

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CONCLUSION

This Court should deny Heng's motion for discretionary review.

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DATED this 13th day of January 2023.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
AARON T. BARTLETT, WSBA #39710
Senior Deputy Prosecuting Attorney
OID# 91127

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MITCHELL HENG, Appellant.	No. 83280-8-I DIVISION ONE PUBLISHED OPINION

SMITH, A.C.J. — In January 2017, Mitchell Heng set fire to the Sifton Market, a convenience store located in a commercial building in Vancouver. The fire spread throughout the building and destroyed not only the Sifton Market but also neighboring businesses. The body of Amy Hooser, a Sifton Market employee, was discovered in the rubble.

A jury later convicted Heng of murder in the first degree and arson in the first degree. Heng appeals, arguing that (1) under the rule of lenity, we must assume that the murder conviction was for felony murder predicated on the same arson that was the basis for the arson conviction and (2) the trial court placed Heng in double jeopardy by punishing him for both felony murder predicated on arson and the underlying arson. Because Heng's arson had an effect independent of the murder, we hold that punishing Heng for both crimes did not place him in double jeopardy.

We also hold that Heng's rule-based and constitutional excessive bail challenges are moot, defense counsel's absence from Heng's bail setting does not require reversal, Heng fails to show that counsel was ineffective for not asking the court to revisit bail, and the trial court did not abuse its discretion by admitting a fire marshal's opinion testimony as to the origins of the fire.

Therefore, we affirm.

FACTS

On January 15, 2017, at about 5:35 a.m., firefighters responded to a fire at a commercial building in Vancouver, Washington. The fire started in the Sifton Market, a convenience store in the building, and eventually "burned pretty much the whole building down," destroying not only the Sifton Market but also a barber shop, a pet grooming business, and a pet supply store. Fire crews discovered a person's body in the market's deli area, which was situated in the part of the market farthest away from the main entrance. The body was later identified as Amy Hooser, a Sifton Market employee who had been working the morning of the fire. The Clark County medical examiner concluded that Hooser's cause of death was smoke inhalation and blunt force injuries to the head.

Surveillance videos recovered from the scene showed Hooser in the Sifton Market beginning at about 5:09 a.m.[1] on the morning of the fire, getting the store ready to open. At about 5:11 a.m., Hooser unlocked the front door. About a minute later, a newspaper delivery person entered through the front door,

[1] References herein are to "camera time," i.e., the time as shown in the surveillance footage. There was testimony at trial that camera time was "probably fast by about four minutes and thirty seconds."

unloaded a stack of newspapers onto a stand inside the store, and then exited the store. At 5:18 a.m., Hooser walked from the cash register area of the store, near the front door, across the sales floor toward the deli area, which itself was not visible on any surveillance footage. Sifton Market's general manager later testified that although there was a camera in the deli area, it was not functioning.

At 5:20 a.m., a man, later identified as Heng, entered the store through the front door. Heng was wearing a baseball cap, dark pants and shoes, and an unbuttoned flannel shirt with a white T-shirt visible underneath. Heng passed Hooser on the sales floor as she walked from the deli area back toward the front of the store.

At about 5:21 a.m., Heng approached Hooser at the front of the store, and Hooser retrieved an item, which Heng later identified as a key to the bathroom, and handed it to Heng. Hooser then walked across the sales floor into the deli area. This was the last time she was visible on any surveillance footage. A short time later, Heng also walked toward the deli area.

After Heng disappeared from the surveillance footage into the deli area, no one was seen on the video for about four minutes. At about 5:26 a.m., Heng emerged from the deli area onto the sales floor, opened and closed two cooler doors, and continued toward the front register area with a soft drink bottle in hand. He walked into the front office, where the footage showed that his white T-shirt now had a visible stain on the front—a stain that Heng later admitted was blood. Heng took a drink from the soft drink bottle and paced around the front office for a moment before taking a carton of cigarettes from the shelf. He then

picked up what appeared to be a lighter from the cash register area before walking back across the sales floor into the deli area.

At about 5:30 a.m., Heng reentered the front office holding what appeared to be coffee filters. He opened a cabinet that contained the store's safe, and according to a detective's later testimony, "look[ed] like he[ ] touched the safe and . . . use[d] kind of the coffee filters to touch the safe some more, whether he's trying to access it or wipe it down, I'm not certain." The detective also testified that at this point in the footage from the front office, flickering light could be seen in the bottom right corner, and the video "bec[a]me cloudier until you can't see anything eventually. But, it appears to be smoke filling the room." Heng then picked up a small bin with timecards in it, exited the front office area, and crossed the store again to the deli area. The video cut out a short time later, at around 5:34 a.m. Heng, Hooser, and the newspaper delivery person were the only people visible on the surveillance footage from the morning of the fire.

The State later charged Heng with murder in the first degree, robbery in the first degree, and arson in the first degree. On January 20, 2017, Heng made his preliminary appearance before the trial court. There, Heng confirmed his name and date of birth and requested that counsel be appointed for him. The court then stated,

> All right. We're going to appoint [defense counsel]. We put word out to [defense counsel] trying to get him here this morning, but just not enough time. So, he's not here right now. But he'll be – he's already been notified. So he'll be getting in touch with you very shortly.
>
> I'm gonna now hear recommendations about bail and release. I will allow you to address those, but you do not want to

> talk at all about the alleged incidents that bring you – brings you here today. And then the next time you're in front of the court with [defense counsel] being present, we'll allow, if you're still in custody, bail to be reviewed with the aid of your attorney. Do you understand?

Heng confirmed his understanding, and the prosecutor asked the trial court to set bail at $2 million, arguing, "Based on the nature of the charges obviously, this was a violent and premeditated crime, very heinous in nature." The prosecutor also represented that Heng had prior convictions for assault in the second degree and disorderly conduct, and that Heng's current address could not be verified. The trial court set bail at $2 million, indicating to Heng, "It can definitely be reviewed. Your attorney will have a chance to work things up and have an informed discussion with the court at the next court hearing."

Heng, who remained in custody, appeared for his initial arraignment on February 1, 2017. When the court inquired about the "present bail situation," Heng's counsel responded, "[J]ust to address that. Counsel was not present when I was appointed to represent Mr. Heng and so bail was set outside the presence of counsel. At some point in the future I may address it, but I'm not gonna address it now." The trial court responded, "[I]f you wish to then make sure we do it with some written notice to the State and . . . I'll be willing to hear it." Counsel did not subsequently ask the court to revisit bail, and Heng remained in custody pending trial.

A jury trial was held over approximately two weeks in September 2019. Heng testified on his own behalf. Heng's defense theory was that someone else had killed Hooser, and that Heng had set fire to the Sifton Market under duress.

According to Heng, he went to the Sifton Market the morning of the fire to collect money from Hooser, who he claimed sold cocaine for him. Heng testified that when he went into the deli area after using the bathroom, Hooser was there with "Zip," another dealer for whom Hooser sold methamphetamine. Heng testified that when Hooser paid Heng, Zip "got mad that she was giving [Heng] money" because "she obviously was not paying him and she'd owed him a pretty good debt." Heng claimed that Zip then demanded payment from Hooser, grabbed her and hit her several times, and eventually "grabbed [Hooser] by her clothing and hit her against the rack that she was right next to."

According to Heng, Zip threatened Heng that if he "tried to be a hero," Zip would "do the same to [Heng] and [Zip] knew where [Heng] lived." Heng testified that Zip then "just pretty much told [Heng] what to do and [Heng] was scared and . . . didn't want to tell [Zip] no." Heng testified that Zip told him to get him cigarettes, which Heng did after getting himself a drink "to kind of calm [him]self down." Heng testified that after he returned to the deli area and gave Zip the cigarettes and a lighter, Zip then told Heng "to go into the safe and grab whatever and to catch the front on fire." Heng testified that he complied because Zip had threatened him, and Heng was scared that Zip would "do something worse" to Heng and his family. He testified that when he returned to the deli area after starting the fire in the front office, he took the time cards with him to show Zip that nobody else was there. Heng testified that as the fire began to spread, he exited the store through the front door and went back to his apartment a couple of blocks away. He testified that on his way home, he discarded his flannel shirt

and T-shirt in a neighborhood dumpster and changed into extra clothes he had in his truck. Heng testified that he did not know Zip's real name or where he lived and could not remember what Zip was wearing the morning of the fire. But he described Zip as follows: "He's Caucasian. I think he was mixed with Mexican just because of his color of hair and all his tattoos and stuff[;] probably like 6 feet tall."

While cross examining Heng, the prosecutor played an excerpt from an interrogation detectives conducted with Heng. During the interview, Heng stated that he was told to rob the Sifton Market by a man wearing a black hoodie and standing "[o]n the corner right behind the spa" on the back side of the Sifton Market building. Heng described the man as "black [and] probably 5'10" [and] pretty stocky." Heng said he "looked like a tweaker," so Heng pulled over to ask him if he wanted to buy anything. Heng claimed during the interrogation that the man then threatened to shoot Heng unless Heng robbed the Sifton Market. Heng admitted at trial that this earlier account was not true.

The prosecutor also played excerpts of calls Heng made from jail. In some of those calls, Heng said that the person who "did it" was "a white boy" who Heng thought might have been another Sifton Market employee, who "came in through the roof and . . . came out the roof," had a "wooden paddle," and forced Heng to burn down the store by pointing a gun at his head. In other calls, Heng claimed not to know who killed Hooser. Heng testified at trial that he was lying on those calls. He also admitted to lying during another interrogation when he claimed that the person who was in the deli area with Heng and Hooser was

Hooser's boyfriend, Stephen Gephart. Heng further acknowledged lying to detectives in earlier interrogations about what he did with his clothes and shoes and why he went to the Sifton Market in the first place. On redirect, Heng testified that he lied because he was afraid of Zip and because detectives told him they could not protect him and his family.

The surveillance videos were played for the jury during trial. Additionally, the State presented testimony from a number of witnesses, including a detective who testified that although law enforcement did not find the clothes or black shoes they believed Heng was wearing the morning of the fire, they found a pair of Nike brand Air Force One Premium 2007 shoes at Heng's apartment, as well as two boxes in his truck containing Air Force One Premium 2007 shoes in colors other than black. The State presented evidence that the tread marks on this model of shoe matched shoe prints found in the deli area that tested presumptively positive for blood. The State also presented evidence that two stains from the driver's side floor mat of Heng's truck contained DNA[2] mixtures for which "a major component" matched Hooser's DNA profile.[3] And, the State presented evidence that the roof hatch to the Sifton Market was padlocked and wired to the security system, that although the store had an employee entrance and an emergency exit, a person walking from those doors into the deli area would have appeared on the surveillance footage, and while there was also a

[2] Deoxyribonucleic acid.

[3] The State's forensic scientist testified that "[t]he estimated probability of selecting an unrelated individual at random from the US population with a matching profile is . . . one in seventy-seven decillion."

window in a back office connected to the deli area, there was a motion sensor that would have triggered an alarm if someone were to enter the store through that window. The State also presented evidence that although detectives recovered a methamphetamine pipe in Hooser's purse, a search of Hooser's bedroom and car revealed no items of evidentiary value.

Additionally, the State presented testimony from Susan Anderson, a senior deputy fire marshal who investigated the fire. The prosecutor asked Anderson about, among other things, her "opinion based on [her] training and experience as to how many fires were set and the origin of where they were set." Anderson began by responding that there were multiple areas of the building that experienced the "greatest loss of material," including a shelf in the Sifton Market's front office and "on the victim herself," at which point Heng objected. Heng argued outside the presence of the jury that, if Anderson planned to opine that there was a fire origin on Hooser's body based on the flame damage to and burn patterns near her body, "there has to be some foundation under Frye[4] or Daubert[5] to establish that that conclusion is . . . admissible as evidence." Additionally, after confirming through voir dire that Anderson did not follow the method set forth in National Fire Protection Agency (NFPA) 921[6] when

[4] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[5] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[6] According to Heng's expert, "NFPA 921 is a guide put out by the National Fire Protection Agency . . . to help investigators perform fire origin and cause investigations," and is "considered kind of the state of the art for fire investigation today."

formulating her opinion as to the origins of the fire, defense counsel argued, "[T]here's nothing, there was no testing that was done, there's no sources cited. This is an eyeball analysis without any testing and . . . if she's gonna make that sort of conclusive statement, then . . . I would object."

The prosecutor responded that Heng's objection went to weight and not admissibility, arguing that Anderson could testify based on her training and experience and no Frye hearing was necessary because "she's not gonna say with any scientific certainty that any person set a fire on Ms. Hooser."

The trial court overruled Heng's objection. Anderson then testified "based on the damage to [Hooser's] body and the relative lack of damage in other combustible materials around her body that a fire was probably ignited on her body, clothing or near the body."

During the State's closing, the prosecutor argued, with regard to the charge of murder in the first degree, "There are three ways of committing Murder in the 1st Degree" and "[e]ach of those three ways is charged in this case." First, the prosecutor argued, the evidence supported a finding that Heng caused Hooser's death with the premeditated intent to do so. Second, the prosecutor argued, the evidence supported a finding that Heng committed felony murder by causing Hooser's death in the course of or in furtherance of committed or attempted robbery or arson. And third, the prosecutor argued, the evidence supported a finding that Heng committed murder in the first degree by causing Hooser's death by engaging in conduct that created a grave risk of death under circumstances manifesting extreme indifference to human life.

The jury found Heng guilty of murder in the first degree but did not specify the basis for its finding. The jury also found Heng guilty of arson in the first degree. It acquitted Heng of robbery in the first degree.

Multiple individuals, including Hooser's friends and family members, spoke at Heng's sentencing hearing. Sue Picchioni, who owned the pet grooming business that was destroyed in the fire and who had submitted a victim impact statement, also spoke at sentencing. Picchioni expressed that she hoped Heng would "think about . . . all the hurt [his] selfishness has caused," including the loss of the grooming business that she and her family "have been building for over thirty years," the death of family pets that were inside Picchioni's shop at the time of the fire, and the destruction of the businesses on either side of Picchioni's business.

The trial court sentenced Heng to a total term of confinement of 374 months, the high end of the standard range. Heng appeals.

ANALYSIS

Double Jeopardy

Heng argues that, by sentencing him for both arson in the first degree and murder in the first degree, the trial court placed him in double jeopardy by punishing him twice for the same offense. Thus, Heng contends, his conviction for arson in the first degree must be vacated. We disagree.

"The double jeopardy clause of the United States Constitution provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' " State v. Muhammad, 194 Wn.2d 577, 615, 451 P.3d 1060

(2019) (Gordon McCloud, J., concurring and dissenting) (quoting U.S. CONST. amend. V). "The Washington Constitution similarly provides that '[n]o person shall . . . be twice put in jeopardy for the same offense.' " Id. (alterations in original) (quoting WASH. CONST. art. 1, § 9). "[T]hese two provisions 'provide the same protections.' " Id. at 616 (quoting In re Pers. Restraint of Francis, 170 Wn.2d 517, 522 n.1, 242 P.3d 866 (2010)). Double jeopardy claims may be raised for first time on appeal, and we review them de novo. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

The prohibition on double jeopardy protects not only against a second trial for the same offense, but also, as relevant here, " 'against multiple punishments for the same offense.' " Muhammad, 194 Wn.2d at 616 (internal quotation marks omitted) (quoting Whalen v. United States, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)). In this latter context, " 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' " Id. (quoting Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)). Thus, " '[w]here a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.' " State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005) (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).

To do so here, we must first determine, given that the jury did not specify the basis for its verdict on the first degree murder charge, what type of murder

Heng was convicted of committing. Heng contends that, applying the rule of lenity, we must assume that he was convicted of felony murder predicated on the same arson that was the basis for the arson conviction. The State concedes this point, and we accept the State's concession. See State v. Deryke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002) ("Principles of lenity require us to interpret [an] ambiguous verdict in favor of [the defendant]."). Accordingly, our task is to determine whether the legislature intended to allow the trial court to punish Heng for both felony murder predicated on arson and the underlying arson.

Courts follow four analytical steps to determine whether the legislature intended to authorize cumulative punishment. First, we consider "any express or implicit legislative intent." State v. Arndt, 194 Wn.2d 784, 816, 453 P.3d 696 (2019). " 'If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists.' " Id. (quoting State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010)). If legislative intent is unclear, we proceed to the second step of the test and apply the Blockburger,[7] or "same evidence," test. Id. Under Blockburger, " '[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' " Id. at 818 (internal quotation marks and emphasis omitted) (quoting Orange, 152 Wn.2d at 817).

[7] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

If Blockburger is not dispositive, the third step of the analysis calls for application of the "merger doctrine." Id. at 816. " 'Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime,' " and not separately. Id. at 819 (quoting Freeman, 153 Wn.2d at 772-73). Thus, "a lesser included offense merges 'into a more serious offense when a person is charged with both crimes, so that the person is not subject to double jeopardy.' " Muhammad, 194 Wn.2d at 618 (quoting BLACK'S LAW DICTIONARY at 1184 (11th ed. 2019)).

Finally, in the fourth step of the analysis, we consider "any independent purpose or effect that would allow punishment as a separate offense." Arndt, 194 Wn.2d at 816. "[W]hen overlapping offenses have independent purposes or effects," the offenses do not merge, and "separate punishments are allowed." Id. at 819.

If legislative intent to allow separate punishments can be found in any of the four steps of the analysis, then there is no double jeopardy violation. Id. at 818.

Here, the parties agree with regard to the first three steps of the analysis that (1) there is no express or implied articulation of legislative intent, (2) felony murder predicated on arson is the same offense as the underlying arson under Blockburger, and (3) arson is a lesser included offense of felony murder predicated on arson. Heng contends, as to the fourth step of the analysis, that felony murder and its predicate felony can never be independent so as to satisfy

the exception to the merger doctrine. The State counters that because the arson in this case had an effect independent of the murder, the two offenses do not merge. We agree with the State.

Arndt is instructive. There, Shelly Arndt set fire to a house that had eight people in it, including the O'Neils, who owned the home, and Arndt's boyfriend, Darcy Veeder Jr. Id. at 790. Everyone escaped except Veeder, whose body was found in the living room. Id. at 791. Arndt was later convicted of aggravated first degree murder with the aggravating circumstance of first degree arson, as well as first degree arson. Id. at 791-92, 796.

On appeal, our Supreme Court rejected Arndt's contention that the trial court placed her in double jeopardy by punishing her twice for the same arson: once as an aggravator to first degree murder and again for the arson itself. See Id. at 821. It held that the independent purpose or effect exception applied, explaining, "Arndt was charged with aggravated first degree murder for the death of a single victim, Darcy Veeder Jr. In contrast, her conviction for first degree arson, in addition to resulting in the death of Veeder, also destroyed the O'Neils' home and was 'manifestly dangerous' to the other occupants." Id. at 819 (quoting RCW 9A.48.020(1)(a)). The court concluded, "The presence of additional victims places this case inside the 'independent effect' exception to the merger doctrine that allows for the imposition of separate punishments." Id.

In addition to considering the fact that Arndt's arson had victims other than Veeder, the Supreme Court observed that "an independent purpose exists on an abstract level that also prevents the merger of the two offenses and allows for the

imposition of multiple punishments." Id. at 819-20. Specifically, "the two statutes in question are located in different chapters of the criminal code and are intended to protect different societal interests." Id. at 820. "Because the primary purpose of the arson statute is to protect property, it is located in chapter 9A.48 RCW (consisting of offenses primarily intended to protect property)." Id. "In contrast, because the primary purpose of the aggravated murder statute is to protect human life, aggravated first degree murder is found in two different chapters dedicated to this end, chapter 9A.32 RCW (Homicide) and chapter 10.95 RCW (Capital punishment—Aggravated first degree murder)." Id. "This provides an additional indication that the legislature clearly intended separate punishments for the crimes of aggravated first degree murder with an arson aggravator and of first degree arson." Id. Thus, the court held, "the two crimes do not merge and the imposition of multiple punishments does not violate double jeopardy." Id.

Here, as in Arndt, while Heng was charged with felony murder for the death of a single victim, Hooser, his arson had victims in addition to Hooser—namely, the owners of the Sifton Market, who also owned the building, and the owners of the other businesses that were destroyed by the fire. Under Arndt, the impact of Heng's arson on these additional victims places this case within the "independent effect" exception to the merger doctrine that allows for separate punishments.

Additionally, felony murder is found in chapter 9A.32 RCW, which the Supreme Court observed in Arndt is a chapter dedicated to protecting human life. Id.; see also RCW 9A.32.030(1)(c) (defining first degree felony murder). The fact

that arson is, by contrast, found in a chapter consisting of offenses primarily intended to protect property "provides an additional indication that the legislature clearly intended separate punishments" for first degree arson and for felony murder predicated on first degree arson. Arndt, 194 Wn.2d at 820.

In short, Arndt controls. Applying Arndt, we hold that because Heng's arson had an effect independent of the murder and because the purpose of criminalizing arson is to protect property whereas the purpose of criminalizing murder is to protect human life, this case falls within the "independent purpose or effect" exception to the merger doctrine. Therefore, allowing both of Heng's convictions to stand does not place him in double jeopardy.

Heng does not meaningfully address Arndt in his briefing. At oral argument, Heng argued that Arndt is distinguishable because it involved an aggravator to murder rather than felony murder.[8] But it would be illogical to conclude that although the legislature "clearly intended" to punish arson separately as a property crime even when it elevates a resulting homicide via an aggravator, the legislature did not intend to do so when it elevates a resulting homicide via the felony murder statute.

Heng also argued that Arndt is distinguishable because there, "the fact that there were other victims was pled and proved to the jury."[9] He asserted that

[8] Wash. Court of Appeals oral argument, State v. Heng, No. 83280-8-I (Jan. 20, 2022), at 2 min., 16 sec. through 3 min., 30 sec., video recording by TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?clientID=9375922947&eventID=2022011103.

[9] Wash. Court of Appeals oral argument, supra, at 4 min., 35 sec. through 4 min. 42 sec.

here, by contrast, the prosecutor "never said anything [in closing] about the fire potentially damaging anybody else's property or harming anyone else" other than Hooser.[10]

Heng is incorrect. That Heng *set fire to the building*—which undisputedly was owned by someone other than Hooser—was part and parcel of the State's arson case as presented to the jury. Consistent with that theory, the prosecutor argued at closing, "Of course, *lighting a building on fire* with a person in it is manifestly dangerous to human life. And we know that *in the building at the time*, there was a human being and Ms. Hooser was not a participant in the crime." (Emphasis added.) The State did not present any theory to the jury on which it could have convicted Heng of arson in the first degree based on facts that did not involve a separate and distinct injury to something or someone other than Hooser.[11] See In re Pers. Restraint of Knight, 196 Wn.2d 330, 338, 473 P.3d 663 (2020) (independent purpose or effect exception is satisfied when the crime " 'injure[s] the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element' " (internal quotation marks omitted) (quoting Arndt, 194 Wn.2d at 819)); cf. State v. Kier, 164 Wn.2d 798, 812-13, 194 P.3d 212 (2008) (where assault elevated robbery to

[10] Wash. Court of Appeals oral argument, supra, at 7 min., 30 sec. through 7 min. 39 sec.

[11] Consider, in contrast, a theory under which no building was involved and Heng instead killed Hooser by setting fire to Hooser's own vehicle with Hooser in it. As the State acknowledged at oral argument, under such a theory, the arson would not have had an effect independent of the murder, and the exception to the merger doctrine likely would not apply. See Wash. Court of Appeals oral argument, supra, at 11 min., 35 sec. through 12 min, 47 sec.

first degree, the two offenses merged because the jury instructions specified Ellison as the victim of the assault but the jury could have found that the victim of the robbery "was Hudson or Ellison, or both," i.e., the jury could have found that both the assault and the robbery affected only a single victim). Heng's attempts to distinguish Arndt fail.

Heng also contends that Muhammad is the controlling case here, not Arndt.[12] But whether two offenses merge depends in large part "on the facts of the individual case," Freeman, 153 Wn.2d at 779, and Muhammad is readily distinguishable on its facts.

In Muhammad, Bisir Muhammad was convicted of felony murder predicated on rape for sexually assaulting Ina Richardson and strangling her to death. See 194 Wn.2d at 614. On appeal, Muhammad, who was also convicted of the underlying rape, argued that the trial court placed him in double jeopardy by punishing him twice for a single rape. Muhammad, 194 Wn.2d at 616. Our Supreme Court agreed, explaining that no exception to the merger doctrine applied because "[t]he exception to the merger rule and felony murder are irreconcilable and cannot coexist." Id. at 626. The court reasoned,

> When a person negligently or accidentally kills somebody in the course of, in furtherance of, or in flight from a robbery, rape, burglary, arson, or kidnapping, that person *by definition* did not commit the underlying crime to facilitate murder. It was an accident, albeit a criminal one. When it comes to felony murder, the lesser offense does not—and cannot—have a purpose

[12] See Wash. Court of Appeals oral argument, supra, at 3 min., 30 sec. through 3 min., 40 sec.

> independent from the greater; the purpose of the entire criminal endeavor is to commit the underlying felony.

Id.

To be sure, the language from Muhammad is broad, and it is unsurprising that Heng relies on it. But again, merger involves a fact-specific inquiry. See State v. Saunders, 120 Wn. App. 800, 821, 86 P.3d 232 (2004) ("Courts apply an exception to th[e] merger doctrine on a case-by-case basis; it turns on whether the predicate and charged crimes are sufficiently 'intertwined' for merger to apply." (quoting State v. Johnson, 92 Wn.2d 671, 681, 600 P.2d 1249 (1979)). In Muhammad, the rape that served as the predicate for felony murder could have had only one victim—the same victim as the murder. See 194 Wn.2d at 628 ("The underlying rape was intertwined with the killing—the jury necessarily found that the killing occurred in the course of, in furtherance of, or in immediate flight from th[e] rape and all its horrible effects."); cf. State v. Tili, 139 Wn.2d 107, 119, 985 P.2d 365 (1999) (unit of prosecution for rape is each instance of sexual intercourse). By contrast, arson by its nature can have an independent effect on multiple victims, and it plainly did here. Cf. State v. Westling, 145 Wn.2d 607, 612, 40 P.3d 669 (2002) (unit of prosecution for arson is each fire, regardless the number of victims whose property is damaged); State v. Abdi-Issa, 199 Wn.2d 163, 171, 504 P.3d 223 (2022) (where pet owner was "directly harmed as a result of [the defendant]'s violent killing of her beloved pet and companion," she was "plainly a victim" of animal cruelty even though the subject of the cruelty was the animal itself). So, even though Muhammad was a felony murder case like this

one, we are not persuaded that it controls where, as here, the predicate offense could and did independently affect victims other than the victim of the murder.

Heng's double jeopardy claim fails.

Bail Amount

Heng next contends that, by setting bail at $2 million and doing so without applying the factors set forth in CrR 3.2,[13] the trial court violated CrR 3.2 and denied Heng his constitutional right to be free from excessive bail. The State counters that Heng's contention is moot. We agree with the State.

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[13] Under CrR 3.2(c), "the court shall, on the available information, consider the relevant facts" in determining "which conditions of release will reasonably assure the accused's appearance," including but not limited to:

> (1) The accused's history of response to legal process, particularly court orders to personally appear;
>
> (2) The accused's employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
>
> (3) The accused's family ties and relationships;
>
> (4) The accused's reputation, character and mental condition;
>
> (5) The length of the accused's residence in the community;
>
> (6) The accused's criminal record;
>
> (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
>
> (8) The nature of the charge, if relevant to the risk of nonappearance;
>
> (9) Any other factors indicating the accused's ties to the community.

The rule also imposes a rebuttable presumption of release in noncapital cases, CrR 3.2(a), and states that, "[i]f the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of [the conditions provided in the rule] that will reasonably assure that the accused will be present for later hearings." CrR 3.2(b).

"An issue is moot if we can no longer provide effective relief." State v. Ingram, 9 Wn. App. 2d 482, 490, 447 P.3d 192 (2019). As we explained in Ingram, we cannot provide effective relief with regard to a pretrial bail issue to an appellant who has been convicted because "pretrial bail is no longer available to him." Id.; see also Murphy v. Hunt, 455 U.S. 478, 483-84, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (conviction moots claim that pretrial bail was excessive). While we recognize that bail setting issues are of public interest and likely to recur, Heng does not argue that any exception to the mootness doctrine applies. Cf. Ingram, 9 Wn. App. 2d at 490 (reviewing a moot bail setting issue because it involved a matter of continuing and substantial public interest, including because the issue was public in nature and likely to recur). In any case, recent published case law has provided guidance on the issues that Heng raises in this appeal. See Ingram, 9 Wn. App. 2d at 489 n.12, 493-97 (evaluating trial court's application of CrR 3.2); State v. Huckins, 5 Wn. App. 2d 457, 465-69, 426 P.3d 797 (2018) (same). We need not address them again.[14]

Right to Counsel

Heng next contends that his preliminary appearance was a critical stage of trial. Thus, he asserts, the trial court deprived him of his constitutional right to

[14] Because we conclude that Heng's challenges to the bail amount are moot, we also need not address the State's argument that Heng failed to preserve those challenges for review.

counsel by proceeding in counsel's absence, and this was a structural error requiring automatic reversal. We disagree.

"Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation." State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22. "A critical stage is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.' " Id. at 910 (quoting State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)). It includes "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel." Gerstein v. Pugh, 420 U.S. 103, 122, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); see also Satterwhite v. Texas, 486 U.S. 249, 257, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (critical stage is one where counsel's absence "affect[s]—and contaminate[s]—the entire criminal proceeding"). "A complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." Heddrick, 166 Wn.2d at 910.

Here, Heng's preliminary appearance was limited in scope: Heng confirmed his name and date of birth, and the court appointed counsel and set bail, indicating that it would be willing to revisit the issue later. Heng did not forfeit any rights or defenses that would substantially affect the outcome of his trial. Although the trial court did set bail, it also indicated it would be willing to revisit the issue later, and Heng could have asked the court to do so at any time.

See CrR 3.2(j)(1) ("At any time after the preliminary appearance, an accused who is being detained due to failure to post bail may move for reconsideration of bail."). Thus, Heng's counsel's absence did not cause Heng to waive any right related to bail, nor did counsel's absence "by [its] very nature cast so much doubt on the fairness of the trial process that, as a matter of law, [it] can[not] be considered harmless." See Satterwhite, 486 U.S. at 256. For the foregoing reasons, we conclude that Heng's preliminary appearance was not a critical stage of trial such that counsel's absence therefrom requires automatic reversal. Cf. In re Pers. Restraint of Sanchez, 197 Wn. App. 686, 702, 391 P.3d 517 (2017) (arraignment not a critical stage of trial where petitioner made no showing "that any right or defense he possessed prearraignment was forfeited or went unpreserved by his attorney's absence at arraignment").

Heng disagrees and relies on three United States Supreme Court cases for the proposition that his preliminary appearance was a critical stage because the trial court set bail during the proceeding.[15] First, Heng cites Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), for the proposition that "[a] 'critical stage' includes preliminary hearings at which bail decisions are made." But the preliminary hearing in Coleman was a hearing the primary purpose of which was to "determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury." Id. at 8. In concluding that the hearing was a critical stage, the Court did observe that

[15] We need not address the nonbinding state and lower federal court cases on which Heng also relies.

counsel could be influential at such a hearing in making arguments about bail. Id. at 9. However, the Court's focus was on the ways counsel's presence at the hearing would affect the ultimate outcome *of the trial*. Specifically, the Court also observed that

> the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. . . . [I]n any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. . . . [T]rained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.

Id.; see also id. at 12 (Black, J., concurring) ("[T]he preliminary hearing is a 'critical stage' of the proceedings during which the accused must be afforded the assistance of counsel *if he is to have a meaningful defense at trial* as guaranteed in the Bill of Rights." (emphasis added)). Coleman did not hold that counsel's absence at a bail setting alone requires automatic reversal. Indeed, despite concluding that the preliminary hearing at issue therein was a critical stage of trial, the Coleman court remanded to the state court to determine whether the absence of counsel at the hearing was prejudicial. See id. at 10-11. Heng's reliance on Coleman is misplaced.

Heng's reliance on Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961), is similarly misplaced. Heng cites Hamilton for the proposition that his bail setting was "the kind of adversarial proceeding[ ] where counsel's guiding hand is constitutionally required." In Hamilton, the Court held

that "[a]rraignment *under Alabama law* is a critical stage in a criminal proceeding." Id. at 53 (emphasis added). This was because, at an Alabama arraignment, "[a]vailable defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." Id. at 54. Hamilton does not control here because, as discussed, Heng does not show that he irretrievably lost any privilege or defense at his preliminary appearance.

Finally, Rothgery v. Gillespie County, 554 U.S. 191, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008), also does not control. There, the sole question was when the Sixth Amendment right to counsel *attaches* such that the State has a "consequent . . . obligation to appoint counsel within a reasonable time once a request for assistance is made." Id. at 198. The Court expressly recognized that the question of whether a particular proceeding signals attachment of the right to counsel " 'is distinct from the question whether the [proceeding] itself is a critical stage requiring the presence of counsel.' " Id. at 212 (quoting Michigan v. Jackson, 475 U.S. 625, 629 n.3, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986), overruled on other grounds by Montejo v. Louisiana, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009)). Rothgery has no bearing on our inquiry here.

In short, Heng fails to persuade us that his preliminary appearance was a critical stage of trial requiring automatic reversal due to counsel's absence. Thus, assuming it was nonetheless an error of constitutional magnitude for the trial court to set bail in counsel's absence, we must still determine whether that error requires reversal.

It does not. A constitutional error does not require reversal where it is harmless beyond a reasonable doubt. State v. Vazquez, 200 Wn. App. 220, 225, 402 P.3d 276 (2017). Here, as discussed, Heng could have asked the trial court to revisit bail at any time. Indeed, even Heng concedes that the trial court "repeatedly said [it] would completely reconsider bail once counsel was involved." Under these circumstances, counsel's absence when bail was *initially* set was harmless beyond a reasonable doubt.[16] Heng suggests that he was prejudiced to the extent that counsel did not in fact ask the trial court to revisit bail and, as a result, he remained in custody. But any prejudice resulting from the fact that counsel did not ask the trial court to revisit bail does not go to Heng's right-to-counsel claim. It goes to his ineffective assistance claim, which we address next.

Ineffective Assistance of Counsel

Heng argues that his defense counsel was ineffective for not asking the trial court to revisit bail. We disagree.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal."

[16] Heng asserts that the absence of counsel at his initial appearance violated not only his constitutional right to counsel but also his right to counsel under CrR 3.1(b)(1). Because Heng does not separately analyze this rule-based claim, neither do we. See State v. C.B., 195 Wn. App. 528, 535, 380 P.3d 626 (2016) (we will not review issues inadequately argued or mentioned only in passing). Nevertheless, any error under CrR 3.1(b)(1) would also be harmless.

State v. Salas, 1 Wn. App. 2d 931, 949, 408 P.3d 383 (2018). To prevail on a claim of ineffective assistance, a defendant must establish that (1) his attorney's performance was deficient and (2) the deficiency prejudiced him. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Heng establishes neither.

Heng Does Not Establish Deficient Performance

"To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome 'a strong presumption that counsel's performance was reasonable.' " State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting Kyllo, 166 Wn.2d at 862). "[A] criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.' " Id. (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Here, Heng asserts that given the trial court's failure to consider the factors set forth in CrR 3.2, there was no conceivable reason counsel would not "at least try" to ask the court to revisit bail and try to secure Heng's pretrial release. But as the State points out, it is at least conceivable that counsel reasonably believed the court would not have lowered bail or released Heng even upon consideration of the CrR 3.2 factors. Cf. Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("[W]hen a defendant has given counsel reason to believe that pursuing certain [strategies] would be fruitless or even harmful, counsel's failure to pursue those [strategies] may not later be challenged as unreasonable."). Heng points to nothing in this record to show otherwise, and we will not presume deficient performance from a

silent record. See State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) ("Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.").

Heng Does Not Show Prejudice

Independently fatal to his ineffective assistance claim, Heng does not show that he was prejudiced by counsel's decision not to ask the court to revisit bail.

To establish prejudice resulting from counsel's allegedly deficient performance, Heng must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." Kyllo, 166 Wn.2d at 862. Heng correctly points out that the reasonable probability standard does not require proof on a "more likely than not" basis. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Nevertheless, the probability must be " 'sufficient to undermine confidence in the outcome.' " Grier, 171 Wn.2d at 34 (quoting Strickland, 466 U.S. at 694). Heng "must affirmatively prove prejudice and show more than a 'conceivable effect on the outcome' to prevail." State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (internal quotation marks omitted) (quoting State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006)).

Heng does not satisfy this standard. He asserts that "[h]ad counsel raised the issue [of bail] and argued the requirements of CrR 3.2, there is more than a reasonable probability that the court would have eliminated or significantly

reduced the 'bail' " such that he would have been released pretrial. But Heng's assertion that there was a reasonable probability of a different bail outcome is entirely conclusory. While he points out that the trial court repeatedly indicated it would reconsider bail, this shows, at most, that it is *conceivable* that counsel might have affected the outcome. It does not establish *a reasonable probability* that Heng—who does not dispute he is indigent—could have posted even a reduced bail, much less that the trial court would have released him after considering all of the factors set forth in CrR 3.2.

Heng also asserts that "[t]he prejudice is especially acute here, because the State used calls Mr. Heng made while in jail as evidence against him at trial." But any prejudice from the statements Heng made on those calls was the product of Heng's decision to make those statements despite warnings he was being recorded. That prejudice cannot be laid at counsel's feet.

Heng's ineffective assistance claim fails.

Anderson's Testimony

Finally, Heng argues that the trial court erred under ER 702 by admitting Anderson's testimony that a fire originated on or near Hooser's body. We disagree.

ER 702 provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "Expert testimony is usually admitted under ER 702 if it will be helpful to the jury in

understanding matters outside the competence of ordinary lay persons." Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011). "Unreliable testimony does not assist the trier of fact and is properly excluded under ER 702." In re Det. of McGary, 175 Wn. App. 328, 339, 306 P.3d 1005 (2013). We review a trial court's evidentiary rulings under ER 702 for abuse of discretion. Arndt, 194 Wn.2d at 797. " 'A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.' " Id. at 799 (quoting State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)).

Here, Heng contends that Anderson's testimony should have been excluded as unreliable because Anderson did not follow NFPA 921 in reaching her conclusion that a fire originated on or near Hooser's body. The State counters, as an initial matter, that because Heng invoked only Frye below and did not mention ER 702, we should consider his ER 702 argument waived. The State is correct that Heng's counsel did not refer specifically to ER 702 when objecting to Anderson's testimony. Instead, counsel appears to have conflated the Frye analysis with the ER 702 analysis, arguing that Anderson's investigation was a novel scientific theory subject to a Frye analysis because it was a "conclusive statement" based on nothing more than "an eyeball analysis without any testing." But despite this conflation, the clear thrust of counsel's argument was that Anderson's testimony was inadmissible because it was unreliable.[17]

[17] Heng does not renew the Frye aspect of his argument on appeal.

Thus, we do not consider that argument waived. We do, however, conclude that the argument is without merit.

Heng relies on Arndt and Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 296 P.3d 860 (2013), for the proposition that Anderson's testimony was inadmissible because she did not follow NFPA 921. But in Arndt, "there was *no dispute* at trial that fire causation *must be determined* using the NFPA 921 origin and cause methodology." 194 Wn.2d at 802 (emphasis added). Given the lack of any dispute in this regard and the "large degree of freedom" a trial court is given in determining whether testimony will assist the trier of fact, our Supreme Court held that it was not an abuse of discretion to exclude certain testimony that did not comport with NFPA 921 as unreliable. Id. at 799, 802. In Lakey, our Supreme Court held that it was not manifestly unreasonable for the trial court to exclude an expert's testimony linking electromagnetic fields to disease given that the expert's "admission that he selectively used data created the appearance that he attempted to reach a desired result, rather than allowing the evidence to dictate his conclusions." 176 Wn.2d at 921.

Although both Arndt and Lakey held that it was not an abuse of discretion to exclude the challenged testimony, neither held, as Heng suggests, that it also would have been an abuse of discretion to *admit* the testimony and subject it to cross examination. Cf. State v. Gentry, 125 Wn.2d 570, 586, 888 P.2d 1105 (1995) (whether a generally accepted methodology was followed on a given occasion goes to weight, not admissibility). And neither holds that testimony regarding the origin of a fire is per se unreliable if it does not comport with

NFPA 921. Heng fails to show that the trial court abused its discretion by admitting Anderson's testimony merely because Anderson did not follow NFPA 921.

To the contrary, Anderson was undisputedly qualified as an expert by her training and experience as a fire marshal. The trial court was within its discretion to conclude that Anderson's testimony based on her training, experience, and observations of the scene would be helpful to the jury. Furthermore, any error in admitting Anderson's testimony that a fire originated on or near Hooser's body was harmless. Another fire marshal, Curtis Eavenson, also testified that on a more probable than not basis, "another ignition was at least attempted" near Hooser's body. Heng did not object to Eavenson's testimony, and Heng himself admitted to setting a fire in another part of the Sifton Market. Reversal is not required. Cf. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (erroneous admission of merely cumulative evidence was harmless).

We affirm.

Smith, A.C.J.

WE CONCUR:

Andrus, C.J.

CLARK COUNTY PROSECUTING ATTORNEY

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