Supreme Court No. 102534-3
(Court of Appeals No. 83243-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER GATES,

Petitioner.

PETITION FOR REVIEW

Amended per Court's ruling of November 13, 2023

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A. INTRODUCTION

> So what we have, Your Honor, just on the face of this case is a man charged with murder in the first degree who went essentially a year and a half, if not more, with no representation, with no work done in this case.

1RP 347. These are the words of the Deputy Director of the King County Department of Public Defense, acknowledging the county's failure to provide counsel for Christopher Gates.

The government charged Mr. Gates with a serious crime but did not provide him counsel as guaranteed by the Constitution. For two years, Mr. Gates begged the court to appoint attorneys who would work on his case, but the court denied his motions and left him with lawyers who were over caseload limits and did next to nothing.

The court should have dismissed the case for government mismanagement under CrR 8.3(b). Instead, the trial court and Court of Appeals blamed *Mr. Gates* for insisting that his rights be respected.

Mr. Gates, a young Black male, filed respectful motions for appointment of available counsel. In court, he politely made the same request. But although every level of DPD management eventually admitted Mr. Gates's motions had merit, the courts treated him with contempt, dismissing his valid motions as baseless "complaining." This Court should grant review and order dismissal under CrR 8.3(b).

This Court should also grant review to address the prosecutor's racist misconduct. After defense counsel correctly told the jury it had to consider Mr. Gates's experience as a young, Black male in Seattle when evaluating self-defense, the prosecutor expressed indignation and falsely accused Mr. Gates of asking for a "different law" for different people based on "who they are." The prosecution's response brief on appeal doubled down on the racist rhetoric, and implied that the "reasonable person" is a middle-aged white person in privileged communities. The Court of Appeals affirmed anyway, minimizing the racist misconduct as "unartful" argument.

The court also wrongly ruled a Lyft driver's nonconsensual recording of a conversation with his sole passenger did not violate the Privacy Act. This issue is of substantial public importance in an age where technological advances threaten to eradicate privacy rights.

Finally, this Court should take the opportunity to revisit the constitutionality of ER 609, or at least the question of whether robbery is a crime of dishonesty. Robbery has nothing to do with truthful testimony, and the use of a prior conviction to impeach violates a defendant's right to testify under article I, section 22. Moreover, as trial counsel explained, the use of a prior conviction to impeach preys on jurors' tendencies to view Black men as dangerous and vitiates any chance of a fair trial.

This Court should grant review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Christopher Gates asks this Court to review the opinion of the Court of Appeals filed October 10, 2023. Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. CrR 8.3(b) provides for dismissal of charges where government mismanagement prejudices a defendant. King County DPD management admitted that Mr. Gates was constructively without counsel for at least a year and a half, causing his trial to be continued for almost two years before the pandemic even started.

Did the subsequent substitution of counsel and trial over three years after charging fail to cure the violation, requiring dismissal of charges under CrR 8.3(b)? And did the Court of Appeals improperly read CrR 8.3(b) out of existence by holding that dismissal under that rule is not available unless dismissal is required under CrR 3.3? RAP 13.4(b)(3), (4).

2. Race-based prosecutorial misconduct violates a defendant's right to a fair trial and requires automatic reversal. In this self-defense case, defense counsel correctly told the jury that it had to assess the reasonableness of Mr. Gates's actions in light of his circumstances and experiences as a young, Black

male in a community where everyone is armed (including the decedent in this case). In rebuttal, the prosecutor expressed outrage and falsely told the jury Mr. Gates was arguing that Black people "get a different law." Did prosecutorial misconduct deprive Mr. Gates of a fair trial, and did the Court of Appeals err in dismissing race-based misconduct as merely "unartful" argument? RAP 13.4(b)(1), (3), (4).

3. Washington's robust Privacy Act prohibits the nonconsensual recording of private conversations, and "any information obtained" in violation of the Act must be suppressed, including associated "visual observations." Here, a Lyft driver recorded audio and video during a three-minute conversation with his sole passenger, who was sitting next to him in the front seat. Did the trial court err in concluding that this conversation between two people who were alone in a moving vehicle was not private, and in ruling that regardless, the portion of the recording capturing the gunshots was admissible? RAP 13.4(b)(1), (4).

4. Article I, section 22 of the Washington Constitution explicitly guarantees the right to testify. Const. art. I, § 22. Did the admission of Mr. Gates's prior robbery conviction to impeach his testimony violate his rights under article I, section 22, and should this Court overrule its contrary holding in *State v. Ruzicka,* 89 Wn.2d 217, 570 P.2d 2108 (1977)? Regardless of constitutional concerns, was the admission of a robbery conviction to impeach improper because robbery is not a crime of dishonesty, and should this Court overrule its contrary holdings in *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991) and *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996), which themselves overruled prior cases that were correctly decided? RAP 13.4(b)(3), (4).

5. Did the trial court's refusal to instruct the jury on the lawful use of force in resistance of a felony violate Mr. Gates's Fourteenth Amendment right to due process? RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

1. After seeing another man retrieve a gun and walk toward him, Mr. Gates shot and killed the man.

Christopher Gates was a stellar student in high school and at the University of Washington, until he was forced to withdraw for financial reasons. CP 489-90, 515.[1] As a young adult, he served as a team director for the Urban League of Metropolitan Seattle's homeless outreach program. CP 489, 509, 532, 535; 7/15/21RP 13. When Mr. Gates wasn't working, he enjoyed spending time with his girlfriend. 7/15/21 RP 17.

One night in April 2018, Mr. Gates and his girlfriend went to the Cedar Room, a club in Seattle, where they met up with some other friends. 7/15/21RP 25-27. After they left the club, they noticed two men were staring at them. 7/15/21RP 36.

[1] Mr. Gates cites most volumes of the VRPs by date. However, the two volumes transcribed by court reporter Donley each contain numerous dates, so Mr. Gates cites these transcripts as "1RP" and "2RP," corresponding to title pages designating "Volume I" and "Volume II."

One of the men grabbed something from his car. 7/15/21RP 42. Mr. Gates thought it might have been a weapon. 7/15/21RP 44.

The man passed the object to his companion, and they both looked around as if they were trying to conceal something. 7/15/21RP 45; Ex. 43 at 4:58-5:02. This action confirmed Mr. Gates's suspicion that the object was a weapon. 7/15/21RP 45-46; *see also* 7/12/21RP 1339-40 (man testifies he passed his friend a gun).

The armed man started walking in the direction of Mr. Gates and his group. 7/15/21RP 46. The man's friend kept "intently staring" at them. 7/15/21RP 48.

It was really dark, and Mr. Gates saw the armed man's "silhouette moving … down the street" toward them. 7/15/21RP 49. "It was clear" to Mr. Gates "that what was happening was directly in response to noticing [his group] in the street." 7/15/21RP 49.

The armed man's friend started tailing him. 7/15/21RP 49; Ex. 43 at 5:10-5:18. The friend had left the car door open, "like he's not planning on being away from his car that long, but he's coming down the street to do something or watch something." 7/15/21RP 49; Ex. 43 at 5:10-5:18. Mr. Gates "start[ed] to get really nervous." 7/15/21RP 49. This fear was exacerbated by the fact that he couldn't watch both men at once because they were too far apart from each other. 7/15/21RP 51-52.

The man with the gun looked over at Mr. Gates and his friends and then looked away quickly, signaling to Mr. Gates that he was paying close attention to them while trying to act as if he was not. 7/15/21RP 57-58. Mr. Gates was worried that "the reason why he [was] paying attention to us [was] connected to the reason why he just armed himself with this weapon and put it in his pocket." 7/15/21RP 58.

Mr. Gates backed up to the other side of the street. 7/15/21RP 60.

The man with the gun kept looking at them and then looking away. 7/15/21RP 61. Mr. Gates was "getting more scared." 7/15/21RP 62.

The armed man appeared to swivel toward Mr. Gates and start to draw his arm out of his pocket. 7/15/21RP 64.

Mr. Gates was afraid of being shot and afraid of one of his friends being shot. 7/15/21RP 64. When he perceived the armed man start to "draw from his pocket," Mr. Gates drew his own gun and fired to the man's side as a deterrent. 7/15/21RP 65, 72. But the man finished drawing his gun and pointed it at them, so Mr. Gates continued to fire as he was running away. 7/15/21RP 66-67. Mr. Gates wanted "to protect [himself] and [his] friends and to make sure that [they] were not hurt or killed." 7/15/21RP 69.

Although Mr. Gates did not know if he had hit the man, the man died that evening as a result of a bullet wound. 7/15/21RP 68; 7/12/21RP 1347.

2. The Government charged Mr. Gates with murder, but it appointed attorneys who were over caseload limits and did not work on the case. The case sat for nearly two years <u>before</u> the pandemic.

The King County Prosecuting Attorney's Office did not view the shooting as self-defense. Instead, on May 2, 2018, the State charged Mr. Gates with murder. CP 1-2.

The King County Department of Public Defense ("DPD") assigned Lin-Marie Nacht and Andrew Repanich to represent Mr. Gates. CP 595-605. These attorneys worked in the "SCRAP" division of DPD. *Id.*

Attorney Repanich met with Mr. Gates in July of 2018. CP 612. Repanich told Mr. Gates he would be leaving SCRAP soon because the caseloads were too high. CP 612.

On September 20, 2018 Mr. Gates moved for new counsel. CP 9. He explained his attorneys were too busy, had barely communicated with him, and had made little progress in the case. 1RP 20. Attorney Nacht agreed she was "extremely busy," but insisted she could continue on the case. 1RP 21. The

court denied the motion for substitution. CP 9; 1RP 23. Around the same time, attorney Repanich left SCRAP. 1RP 20-21, 27.

In October 2018, Mr. Gates again asked to discharge counsel because of the lack of communication and lack of work done on his case. 1RP 27-30. Attorney Nacht explained "it took [DPD] a little while to figure out" who would replace attorney Repanich, but that Colleen O'Connor would be Mr. Gates's second attorney. 1RP 27. However, Ms. O'Connor hadn't met Mr. Gates yet because she was in another murder trial. 1RP 28.

Mr. Gates was concerned because he was told attorney O'Connor's schedule "was nearly as crazy as Ms. Nacht's." 1RP 28. Mr. Gates said Nacht "revealed to me that she has been over case load for at least the last couple months, and I feel like that is very -- having a very detrimental effect on my defense thus far." 1RP 29.

On November 1, 2018, the attorneys requested a trial date at the end of March, 2019. 1RP 34. But Mr. Gates did not want to waive his speedy trial rights again. He asked the court to

address the problems with counsel "immediately," so he could have both prepared counsel and a speedy trial. 1RP 34-36. The court set a hearing on these issues for November 5, 2018. 1RP 38.

On November 5, Mr. Gates again asked to discharge counsel, explaining the problems were "not obviated because of the appointment of Ms. O'Connor" and that his attorneys still had not reviewed the discovery. 1RP 49, 51, 56. The court asked O'Connor if she would be ready for trial "within the current speedy expiration on the 25th of December," and she said, "No." 1RP 56. The court continued trial to January 16, 2019. 1RP 56.

On November 18, 2018, Mr. Gates again requested new counsel, stating his attorneys were not communicating with him, were not prepared, and "I've been in King County Correctional Facility for over six months." 1RP 81-88. The court again denied the request, but it ordered the attorneys to have a face-to-face meeting with Mr. Gates. 1RP 87-88.

Ten days later, Mr. Gates moved to proceed pro se "under duress." 1RP 92. He stated, "I was forced to elect to go pro se in that I've been constructively denied counsel." 1RP 91. "I can either go pro se and not have an attorney or move forward with my attorney and constructively not have an attorney anyway." 1RP 96.

The court ultimately denied the motion after Mr. Gates was unable to answer the question of what the standard ranges were for the charges in his case. 1RP 147-48.

In January 2019, attorney Nacht withdrew because she was being reassigned from Seattle to Kent. 1RP 113, 117. Mr. Gates did not object because Nacht had not had time to work on his case. 1RP 114. She "had been audited by her office and was found to be over the Washington State Supreme Court's mandated case load limit." CP 614. But Mr. Gates objected to simply replacing Nacht with another SCRAP attorney. 1RP 114-15. He requested removal of the SCRAP office in light of the mismanagement of his case. 1RP 114-15. The court denied

the request, and appointed Victoria Freer as co-counsel. 1RP 117, 125-26.

Since Ms. Freer was new to the case and Ms. O'Connor had been in other trials, the attorneys requested another continuance. 1RP 117-18. The court asked Mr. Gates if he agreed to the continuance, and he explained he had no choice. He said, "I have objected to continuing my trial date. At the same time, I acknowledge that … neither of my attorneys … are ready for trial." 1RP 127. The court granted a continuance. CP 632; 1RP 127-29.

In March, defense counsel requested another continuance. CP 633. Mr. Gates again objected, but the court granted the request. CP 633.

The next hearing occurred in May of 2019. 1RP 133. More than a year had passed since King County charged Mr. Gates, but defense counsel still was not ready for trial.

Mr. Gates again moved to discharge counsel. CP 650-60. This time, the attorneys joined in his motion, stating there was

an irreconcilable conflict because of their caseloads. 1RP 145. Following Freer's appointment in January, neither attorney visited Mr. Gates until April. CP 642; 1RP 139. Attorney O'Connor explained to Mr. Gates that both counsel had been in other trials since January and were too busy to visit him. CP 642-44. She expressed sympathy for Mr. Gates, but explained her schedule was out of her control. CP 643-44. Mr. Gates moved to discharge the SCRAP office due to the lack of resource allocation to his case. CP 634-60.

The court blamed Mr. Gates. The judge opined that "the irreconcilable differences in this case basically flows one way, and it's from Mr. Gates." 1RP 146. Although the court's comments were disrespectful and inaccurate, Mr. Gates maintained his composure, stating, "Your Honor, I'd have to disagree with your characterization of the situation." 1RP 146.

Defense counsel still was not ready for trial in the summer of 2019, and trial was continued again to September. CP 684. Mr. Gates moved to discharge counsel again, averring

his attorneys agreed that "my concerns and grievances are warranted and that there has been not enough time and attention paid to my case by my counsel due largely I believe to their schedules." 1RP 170. Mr. Gates stated, "The mismanagement of my case has been cumulative and continual since its inception…" CP 688. The court again refused to substitute counsel. CP 685.

Trial did not occur in September 2019. The court ordered a continuance to October 28. But on October 22, attorney O'Connor moved for another continuance because attorney Freer was in another trial and the two were not prepared for Mr. Gates's trial. 1RP 202.

In November, defense counsel again moved to continue. O'Connor stated, "Since Ms. Freer and I took over Mr. Gates's representation, Ms. Freer has pretty consistently been in trial and I myself was in trial quite a bit of time." She provided a declaration stating:

> [W]e are the second team of lawyers appointed to represent Mr. Gates. Prior to our appointment, little work had been done in preparation. Since our appointment, Ms. Freer and I have been in trial on other cases.

CP 708.

The court expressed exasperation given that a year and a half had passed since the State charged Mr. Gates, but the court granted the motion to continue trial to January 6, 2020. 1RP 220-26.

In December, defense counsel again moved to continue. O'Connor stated, "I have not been available in having the time I need to sit down with Mr. Gates and prepare this case, and Ms. Freer has not been available at all." 1RP 230. The court granted a continuance to February 3, 2020. CP 712.

In January 2020, defense counsel moved for another continuance because they had to do more investigation and they were in trials for other cases. 1RP 263-64, 281. Counsel requested a trial date of April 6, nearly two years after Mr. Gates had been arrested. 1RP 283-84. When the court asked

Mr. Gates whether he agreed with the request, he said, "Yes….With a standing objection to the way things have been going thus far." 1RP 284. The court granted the motion but said, "[t]his case needs to launch and get to trial. It is very old." 1RP 285. The court noted defense counsel's supervisors were in the courtroom, and ordered them to apply the necessary resources to the case. 1RP 286.

On March 11, 2020, defense counsel requested another continuance because they did not expect to be ready by April 6. 1RP 314. The State objected, noting, "This case is almost two years old. These lawyers, in some form or another, have been on it from the beginning. At least SCRAP has been on it from the beginning." 1RP 315.

Attorney O'Connor explained, "as the Court knows, Ms. Freer and myself have had complex felony trials the whole time. It's not like this is our only case." 1RP 316. She assured the Court, "We've been talking to management, I don't know if the Court's aware, but DPD has finally reached the point where

they're listening to us and they're in a position where we might not be able to take any more cases." 1RP 316.

The court denied the motion to continue, but noted the coronavirus might disrupt their plans. 1RP 318-20.

None of the problems up to this point had anything to do with COVID-19, which the World Health Organization declared a pandemic on the very day of this hearing,[2] causing King County to suspend jury trials two days later.[3]

3. Twenty-eight months after the State charged Mr. Gates, and after denying seven requests for new counsel, the court granted Mr. Gates's eighth motion to substitute counsel after DPD acknowledged he had been constructively denied counsel.

Between March 11, 2020 and September 4, 2020, there were no hearings in this case due to the coronavirus. Mr. Gates

[2] https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says.

[3] https://kingcounty.gov/~/media/courts/superior-court/docs/COVID-19/FILED-Emergency-Order3-KCSC-200120505.ashx?la=en.

wrote a document in July, filed September 4, stating, "the mismanagement of this case has been an egregious miscarriage of my own right to justice and the Due Process I am entitled to ensure it." CP 717. He noted the resultant delays not only undermined his constitutional rights but were also disrespectful to the family of the decedent. CP 714-17. He lamented the "selective application of law in our criminal justice system," and wondered if any real change would occur following the "recent reckoning in our nation." CP 716.

The court held an extraordinary hearing on September 4, 2020. In announcing the case, the prosecutor noted that six defense attorneys had appeared: (1) Mr. Gates's assigned attorney Colleen O'Connor, (2) Mr. Gates's assigned attorney Victoria Freer, (3) their supervisor Seth Conant, (4) SCRAP Division managing attorney Alena Ciecko, (5) King County DPD Deputy Director Gordon Hill, and (6) DPD Director Anita Khandelwal. 1RP 333.

King County DPD had filed a motion seeking withdrawal of the entire department from the case and reassignment to an attorney on the conflict panel due to their constructive denial of counsel for Mr. Gates. CP 17-61. The motion acknowledged attorney O'Connor's statement in December of 2019, more than a year and a half after arraignment, that she still "had not been able to prepare Mr. Gates' case." CP 22. O'Connor attached a declaration to the motion, again acknowledging that counsel had not prepared for Mr. Gates's trial because their "caseloads and trials were demanding throughout 2019." CP 44.

At the hearing on the motion, Director Khandelwal said, "Your Honor has not seen me here before in a position like this... [a]nd hopefully [will] not see us here in a position like this again, but we do think that it is imperative that we – that the Court grant the motion." 1RP 342-43. Deputy Director Hill concurred, acknowledging Mr. Gates "went essentially a year and a half, if not more, with no representation, with no work done in this case." 1RP 347. Mr. Hill noted:

> Your Honor, again, as Ms. Khandelwal pointed out, I've never been in this position before. She's never been in this position before. I've never seen an individual in Mr. Gates' position before. What I do know, Your Honor, is that you can't put a murder on the back burner for a year and a half.

1RP 349.

Managing attorney Ciecko echoed Deputy Director Hill's observations. She said, "for almost a year and a half a murder case sat and no work was done on it." 1RP 355. Thus, Mr. Gates's "reason for dissatisfaction is a legitimate one." 1RP 355.

The court expressed shock. It stated it was in "the extraordinary position" of hearing all levels of DPD management aver that "the representation has been ineffective for Mr. Gates." 1RP 362-63. The court granted the motion for the entire King County Department of Public Defense to withdraw. CP 62-64.

Twenty-eight months had passed since King County charged Mr. Gates with a crime, and multiple levels of King

County management had acknowledged a failure to provide counsel for Mr. Gates for at least a year and a half. But the trial court did not dismiss the case for prejudicial mismanagement, despite having the authority and duty to do so sua sponte under CrR 8.3(b). Instead, the court simply ordered that new counsel be appointed the following week. CP 62-64.

The next hearing occurred in March, 2021, with Peter Geisness representing Mr. Gates. Before addressing other issues, the court reiterated what had happened at the previous hearing:

> I think everyone on this call and in the courtroom is familiar with what happened just a few months ago, where there was an extraordinary motion, in my mind, to have Mr. Gates's prior lawyers removed from the case. The head of the public defense agency here in King County made a personal plea and representation. Her assistant also was here. And based on remarks they made about what an entire division had not done on this case, I very reluctantly allowed withdrawal. I have to say, in all the time I was chief criminal judge here in King County, I have never had a request framed and postured like the one that occurred earlier.

1RP 372.

4. Trial occurred more than three years after charging. Over Mr. Gates's objections, the trial court admitted a nonconsensual recording and a prior conviction for robbery.

Trial occurred over three years after King County incarcerated and charged Mr. Gates.

The prosecution planned to introduce a recording of the incident that a Lyft driver had provided. CP 148. The driver automatically recorded both audio and video during every rideshare trip, including on the evening in question. CP 474; Pretrial Ex. 5.

But the driver's passenger was not aware their conversation was being recorded. CP 474-75; Pretrial Ex. 5; Pretrial Ex. 7 at 15-16. Mr. Gates thus moved to suppress the recording because it violated the Washington Privacy Act. CP 148-200; 6/17/21RP 188-98, 207-18. The court nevertheless denied the motion, concluding that the conversation between the driver and his sole passenger in an enclosed moving vehicle was not private. CP 473-77; 1RP 218-21.

Mr. Gates also moved to exclude evidence of his 2011 robbery conviction, which the State had advised it would use "to impeach Mr. Gates… if he were to testify." CP 127; *see also* 6/17/21RP 227-30. Defense counsel noted that this prior crime had no relevance to Mr. Gates' credibility, that it would be inherently prejudicial, and that "prejudice is heightened when the defendant is a young African-American male, as is Mr. Gates." CP 127-28. The court denied Mr. Gates's motion, stating the conviction was "per se admissible pursuant to ER 609." CP 233; 6/17/21RP 232-33.

5. The prosecutor told the jury that Mr. Gates's self-defense claim amounted to requesting a "different law" for Black people. The jury convicted Mr. Gates.

At trial, the prosecution presented its witnesses and introduced the Lyft driver's recording and testimony. Exs. 4, 43; 6/24/21RP 714-36; 6/30/21RP 1221. One of the State's witnesses, the friend of the decedent who passed a gun to him,

mentioned that he had been shot and hospitalized the week before the Cedar Club incident. 7/12/21RP 1312.

Mr. Gates testified and explained why he felt he had to shoot in self-defense. 7/15/21RP 25-72. Among other things, he noted that he had lost friends and family members to gun violence at clubs. 7/15/21RP 32. On cross-examination, the prosecutor asked, "around 2011, maybe a little bit later, you were convicted of a crime of dishonesty?" 7/15/21RP 122. Mr. Gates responded "Correct." 7/15/21RP 122.

In closing argument, defense counsel explained that in assessing self-defense, the jurors had to put themselves in Mr. Gates's shoes and consider the facts and circumstances known to him as a young, Black man in a heavily armed community where one must be on high alert to danger. 7/19/21RP 1749-53. In rebuttal, the prosecutor expressed outrage at the defense argument, and falsely described Mr. Gates's correct statement of the law as seeking "different standards for different people." 7/19/21RP 1773. The jury convicted Mr. Gates. CP 258-62.

On appeal, Mr. Gates explained that reversal was required because of several serious violations of his rights. Br. of Appellant at 40-109; Reply Br. at 1-45. The Court of Appeals nevertheless affirmed. Appendix A.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case was a travesty of justice in multiple respects. The court treated Mr. Gates with dismissive contempt rather than providing him counsel; the prosecutor made racist arguments both at trial and on appeal; the Privacy Act's robust protections were disregarded; and the application of ER 609 undermined Mr. Gates's right to testify. This Court should grant review.

1. The trial court described this case as "extraordinary" because Mr. Gates was constructively without counsel for at least a year and a half. Dismissal is required, but the Court of Appeals read CrR 8.3(b) out of existence.

The trial court and all levels of management at King County DPD agreed that this case was "extraordinary" because DPD admitted that an indigent, jailed accused person was constructively without counsel for at least a year and a half. Twenty-eight months after the prosecutor charged Mr. Gates, the court finally granted the remedy Mr. Gates himself had

sought for two years: the appointment of available counsel. At that point, this remedy was too little, too late. The court should have dismissed the case under CrR 8.3(b).

a. *Under CrR 8.3(b), the court had the authority and duty to dismiss the case.*

The rule provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair trial.

CrR 8.3(b).

The phrase "arbitrary action or governmental misconduct" is not limited to intentional malfeasance; "simple mismanagement" is enough to trigger the rule. *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). Moreover, "governmental" mismanagement is not limited to the prosecutor's office. The rule applies to all government departments. *See State v. Jieta*, 12 Wn. App. 2d 227, 231-33, 457 P.3d 1209 (2020) (affirming dismissal where court

administration mismanagement deprived the defendant of effective interpreter services); *State v. Irby*, 3 Wn. App. 2d 247, 262, 415 P.3d 611 (2018) ("the trial court properly determined that the jail guards constituted state actors" for purposes of a CrR 8.3(b) motion). Thus, the court should have ordered dismissal due to the King County Department of Public Defense's prejudicial mismanagement of the case.

The Court of Appeals refused to reverse and remand with instructions to dismiss the charges. The court noted Mr. Gates did not request dismissal in the trial court, and stated that he therefore could not raise it on appeal. App. A at 10. But there are three problems with this argument.

First, the State did not make this argument in its response brief, and therefore they have waived any such claim. *See State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) (failure to argue an issue constitutes concession).

Second, Mr. Gates could not move for dismissal in the trial court because he was *without counsel* at the hearing during

which the court should have dismissed the case on its own motion. DPD told the court they had a conflict of interest due to their failure to provide counsel, and that they had to withdraw from the case. They no longer represented Mr. Gates, and no one in the courtroom did. He is not required to raise an issue on his own when he never waived his right to counsel.

Third, the rule itself grants the court the authority and duty to act sua sponte. While subsection (a) of the rule provides for dismissal upon motion of the prosecution, and subsection (c) of the rule provides for dismissal upon motion of the defendant, subsection (b) provides for dismissal "On Motion of [the] Court." CrR 8.3. The court should have dismissed the charges on its own motion due to the egregious violation of the right to counsel.

b. *The Court of Appeals read CrR 8.3(b) out of existence by stating dismissal is not permitted under CrR 8.3(b) unless it is permitted under CrR 3.3.*

The Court of Appeals, however, held Mr. Gates was not entitled to dismissal under CrR 8.3(b) because he was not

entitled to dismissal under the speedy trial rule, CrR 3.3. App. A at 10-18. The State did not make this argument, either, and with good reason.[4] The court's holding improperly reads CrR 8.3(b) out of existence. Like statutes, court rules must not be read to be superfluous. *State v. George*, 160 Wn.2d 727, 735, 738-39, 158 P.3d 1169 (2007).

In ruling that the charges in Mr. Gates's case could not be dismissed under CrR 8.3(b), the court relied on the following portion of the speedy trial rule: "No case shall be dismissed *for time-to-trial reasons* except as expressly required by this rule, a statute, or the state or federal constitution." CrR 3.3(h) (emphasis added); *see* App. A at 11. But Mr. Gates does not seek dismissal "for time-to-trial reasons." He seeks dismissal under CrR 8.3(b), not CrR 3.3(h), because government mismanagement deprived him of his right to *counsel* for at least

[4] *See* https://tvw.org/video/division-1-court-of-appeals-2023061199/?eventID=2023061199 (court chastises State for not making this argument).

a year and a half, during which he asked the court at least seven times to appoint an available attorney but the court refused.

While the court was refusing to appoint available counsel, Mr. Gates was caged like an animal despite being presumptively innocent. He had to acquiesce to continuances because neither the court nor the county would give him lawyers who were actually available, and the lawyers he was assigned needed more time because they were in other trials. Therefore, Mr. Gates could not insist the court set trial within the allotted period under CrR 3.3(d)(3). Instead, he requested the appointment of attorneys who could work on his case, but his request fell on deaf ears until after he had already been caged for 28 months.

The appointment of available counsel *28 months into a case* is unacceptable. Dismissal is the only sufficient remedy for the egregious violation that occurred here.

c. *The courts and prosecutors treated Mr. Gates with contempt rather than respect. This is not how our justice system is supposed to work.*

Finally, this Court should be concerned with the disrespectful way the trial court, appellate prosecutor, and Court of Appeals treated Mr. Gates.

Mr. Gates politely requested the appointment of attorneys who were available to work on his case. The assigned attorneys, who were over caseload limits and always in trial on other cases, filed declarations agreeing with Mr. Gates that virtually nothing had been done on his case for a year and a half. Ultimately, the director, deputy director, and two additional managers agreed that Mr. Gates's concerns were well-founded and that he had been wrongly deprived of counsel for at least that long.

Despite all of this, the trial court stated, "the irreconcilable differences in this case basically flows one way, and it's from Mr. Gates." 1RP 146. The appellate prosecutor, in turn, characterized Mr. Gates as "a remarkably difficult client

[sic] to deal with." Br. of Resp't at 82. The prosecutor even stated, "It is perhaps understandable why DPD was so anxious to not only terminate SCRAP's representation, but also that of any of the other public defense agencies they supervised." *Id.*

The trial court's and appellate prosecutor's statements were false and offensive, yet the Court of Appeals refused to disavow them and instead endorsed the narrative. *See* Reply Br. at 15-18 (asking Court of Appeals to disavow prosecutor's statements and explaining why it should do so).

The Court of Appeals repeatedly characterizes Mr. Gates's requests for counsel as baseless "complaining," even though Mr. Gates did nothing more than respectfully request that to which he was constitutionally entitled. For example, in a motion detailing the deprivation of counsel, Mr. Gates states, "I hope my sentiments are not seen to contradict the utmost respect with which I view and consider the Courts and the esteemed individuals who preside over them." CP 638. Likewise, when the court blamed Mr. Gates for problems after

his attorneys had explained caseload issues were to blame, Mr. Gates maintained his composure and politely responded, "Your Honor, I'd have to disagree with your characterization of the situation." 1RP 146. *See also* 1RP 170 (Mr. Gates's attorneys agree his "concerns and grievances are warranted"); 1RP 355 (SCRAP managing attorney concurs that Mr. Gates was not the problem and that his "reason for dissatisfaction [was] a legitimate one."); 1RP 357 (DPD's deputy director states, "he's never been anything but polite to me.").

At all levels, the courts and prosecutors failed to afford Mr. Gates the dignity and respect to which due process and basic human decency entitle him. This Court should grant review. RAP 13.4(b)(3), (4).

2. The prosecutor committed racist misconduct.

This Court should also grant review because the prosecution committed race-based misconduct in rebuttal closing argument.

a. *After Mr. Gates correctly told the jury it had to assess the reasonableness of his actions in light of his experiences as a young, Black male in Seattle, the prosecutor falsely described Mr. Gates as seeking "a different law" for Black people.*

In his closing argument, Mr. Gates supported his self-defense claim by correctly calling on the jury to assess the reasonableness of his actions in light of the totality of circumstances, including his experiences as a young, Black male in a community where gun possession and shootings are common. This argument is set forth in part below, and in full in the Brief of Appellant:

> [DEFENSE COUNSEL]: A homicide is justifiable as is the case here when, specifically to the facts of this case, Mr. Gates had a reasonable belief that Mr. Baker intended to inflict death or great personal injury upon him. Mr. Gates reasonably believed that there was intent of such harm being accomplished, and Mr. Gates employed such force as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to Mr. Gates … taking into consideration all the facts and circumstances as they appeared to Mr. Gates at the time….
>
> You have to place yourself into the shoes of

Mr. Gates, right? And knowing everything that he knew at that time in terms of observations of what conduct is going on and also taking into effect his personal experiences and his personal knowledge about how situations like this unfold; when you do so and you incorporate and include his observations, his knowledge, and his experience in those two minutes out on 17th Avenue, it is clear … that he was justified, that his use of force was reasonable, and that his assessments were correct. …
So how do you assess all the facts and circumstances as they appeared to Chris Gates? … He has spoken to you and -- about how he has … seen things occur at nightclubs that create a very unsafe environment. He has told you that he has had a cousin that was killed, he had a friend … that was killed, and he's been shot at himself. ... And people that don't have the life experience and knowledge that Christopher Gates has, they can walk into the Cedar Room and everything to them is going to seem real happy-go-lucky, right? …

But, nonetheless, you have to take into consideration that experience and that knowledge that he has in assessing -- whether his assessment of the threat was reasonable. … Those shared experiences amongst the parties in this case are why Adam Smith had a gun in the first place. Those shared life experiences are why Adam Smith took the gun into the club himself. ...

Those shared experiences are why Adam Smith was shot the week before and suffered a potentially mortal injury, but for the grace of his telephone in

> his pocket according to his testimony. Those shared experiences are why Robert Baker armed himself with Adam Smith's gun at the car on April 22nd. Those shared experiences are why Christopher Gates took a gun to the club. Those shared experiences are why so many people have lost friends and loved ones because it is a lot more common, the threat and the danger does exist out there, and just because you may not have the life experience or the personal knowledge to see it when it is occurring does not mean that it is not occurring right before your very face.
>
> And Christopher Gates on April 22nd saw that unfold. And he didn't … sit here on the stand and tell you as soon as I saw that gun passed, I was afraid and I knew I had to fire my gun at that point. No. He continued to assess and continued to see how it would or would not unfold and it continued to unfold into the negative way, right?

7/19/21RP 1749-53.

Mr. Gates's argument was a correct statement of the law, but the prosecutor falsely told the jury that Mr. Gates's explanation was wrong. 7/19/21RP 1773. Worse yet, she claimed he was seeking a "different standard" for Black people, and expressed outrage at his audacity:

> The problem with Defense's argument about self-defense is this. He wants different standards for

> different people. He wants you to look at Mr. Gates and look at Mr. Baker and look at Adam and figure because they were up to something or because they are from a different background that they get a different law. Wow. Wow. That because of who they are, it's okay to just shoot somebody for walking down the street out the back of a club. It's okay to assume that they're armed when you didn't even see exactly what was handed. It's a different standard for Robert and a different standard for the defendant because they're different. Wow. The law applies to everyone equally and the law says that you can't kill somebody because you think they have a gun.

7/19/21RP 1773.

b. *The response brief on appeal was equally problematic.*

Although this racist rebuttal closing argument was shocking, the prosecution's response brief on appeal was equally offensive. The response brief doubled down on the racist interpretation of the defense closing argument, describing it as "disturbing," and mischaracterizing the argument as being that "young African American males should be held to a different standard in self-defense cases—one that ignores a determination of whether the defendant's actions were

'objectively reasonable.'" Br. of Resp't at 132. The Court of Appeals similarly claimed the prosecutor's comments "accurately described the objective component of the reasonableness standard, [and] were made in response to defense counsel's invitation to the jury to consider the reasonableness of Gates's conduct from a purely subjective standpoint." App. A at 34.

Implicit in the prosecutor's response and the court's opinion is the assumption that the objective "reasonable person" standard means a middle-aged white person with experiences in privileged white communities. Only by assuming white normativity can the prosecution argue that Mr. Gates is asking for a "different standard." He did not ask for a different standard; he asked the jury to follow the law.

c. *Like gender, race is relevant to self-defense. The prosecution's mocking of this argument is racist.*

No matter the context, any time the law requires an assessment of what an "objective" "reasonable person" would

do, feel, or perceive, that inquiry must take into account the totality of circumstances. The totality of circumstances includes the person's race, gender, age, and life experiences. *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 271-72, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (age relevant in objective reasonableness inquiry in Fifth Amendment custodial interrogation cases); *State v. Sum*, 199 Wn.2d 627, 641, 511 P.3d 92 (2022) (race relevant in objective reasonableness inquiry in article I, section 7 seizure cases); RCW 9A.36.080 (race, religion, gender, sexual orientation, disability, and other characteristics relevant to issue of "fear that a reasonable person would have under all the circumstances.").

This is as true in self-defense cases as in other contexts. As the Court of Appeals noted, the self-defense standard "incorporates both objective and subjective elements." *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). But the court misunderstood the interplay between these elements. "The subjective portion requires the jury to stand in the shoes of the

defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use *this information* to determine what a reasonably prudent person *similarly situated* would have done." *Id.* (emphases added).

For example, in a case where the defendant had been abused, the jury was required to take that history of abuse into account in assessing reasonableness, even if the jurors themselves had not been abused and therefore would have reacted to the situation differently. *State v. Janes*, 121 Wn.2d 220, 239, 850 P.2d 495 (1993). This is because "evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, *knowing all the defendant knows and seeing all the defendant sees*." *Id.* at 238 (emphasis added). "[T]he jury is to consider the defendant's actions in light of *all* the facts and circumstances known to the defendant, even those substantially predating the killing." *Id.*

Similarly, this Court held a person's experience as a woman subjected to "battered woman syndrome" was relevant

to assess the reasonableness of her actions in a self-defense case. *State v. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984). And in another seminal case involving a female murder defendant arguing self-defense, this Court excoriated the trial court's "persistent use of the masculine gender [because it] leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men." *State v. Wanrow*, 88 Wn.2d 221, 240, 559 P.2d 548 (1977).

This Court went so far as to suggest that this narrow, male-normative view of objective reasonableness would violate the Equal Protection Clause. *Id.* "The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination.'" *Id.* (citation omitted).

Here, Mr. Gates was entitled to have the jury consider the reasonableness of his actions in light of his experience as a young, Black male in a community of young Black people for

whom gun violence is a persistent reality. *See* 7/12/21RP 1312 (State's witness, who passed gun to eventual decedent, describes having been shot and hospitalized the previous week); 7/15/21RP 32 (Mr. Gates testifies about having lost loved ones to gun violence at clubs). He did not ask for a "different standard" any more than the woman in *Wanrow* asked for a "different standard" or the abused defendant in *Janes* asked for a "different standard." Mr. Gates correctly explained the law in his closing argument, and the prosecutor committed race-based misconduct by arguing otherwise and expressing outrage in rebuttal.

d. *The Court of Appeals dismissed the race-based misconduct as merely "unartful argument."*

Unbelievably, the Court of Appeals opined, "contrary to Gates's suggestion, the prosecutor's remarks did not imply that defense counsel was seeking a different standard because Gates is a Black man." App. A at 40.

The court is wrong, but even if the prosecutor's rebuttal was not intentionally racist, a knowledgeable objective observer could view the prosecutor's rebuttal as an appeal to racial prejudices. Accordingly, reversal is required under *State v. Zamora*, 199 Wn.2d 698, 718, 721, 512 P.3d 512 (2022). *See* Reply Br. of Appellant at 41-45.

The Court of Appeals dismissed the *Zamora* argument in a footnote, and ruled that, at worst, the prosecutor's rebuttal was "unartful." App. A at 37, 39, 41, n. 20. The use of such language is a common minimization technique. *See, e.g.*, Steve Kraske, *Delegates see Donald Trump as 'inartful,' not racist*, Kansas City Star (July 20, 2016).[5]

This Court may feel it has "done enough" to address race-based misconduct in recent years, but such misconduct continues despite this Court's pronouncements. Mr. Gates, like Mr. Zamora and Mr. Monday, has a right to a trial free from

[5] Available at: https://www.kansascity.com/news/politics-government/article90867297.html.

racism, and the racism that occurred here should not be swept under the rug. Const. art. I, § 22. This Court should grant review. RAP 13.4(b)(1), (3), (4).

3. The admission of the Lyft driver's nonconsensual recording violated the Privacy Act.

This Court should also review the violation of the Privacy Act. As technological advances threaten to create a surveillance society, it is ever more important to hold the line on privacy protections. The trial court ruled that a three-minute conversation between a Lyft driver and his sole passenger was not private, and that the driver's recording of the conversation without the passenger's consent did not violate the Privacy Act. The court was wrong, and this Court should grant review.

"Our state has a long history of statutory protection of private communications and conversations." *State v. Kipp*, 179 Wn.2d 718, 724, 317 P.3d 1029 (2014) (quoting *State v. Clark*, 129 Wn.2d 211, 222, 916 P.2d 384 (1996)). Indeed, "Washington's privacy act is one of the most restrictive in the

nation." *State v. Faford*, 128 Wn.2d 476, 481, 910 P.2d 447 (1996). It forbids the recording of any "[p]rivate conversation … without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030.

Not only does Washington require all-party consent, it also provides a strong remedy for a violation of the Act. "*Any information* obtained in violation of RCW 9.73.030 *shall be inadmissible* in any civil or criminal case." RCW 9.73.050 (emphases added). This strict exclusionary rule applies regardless of whether the defendant was a participant in the conversation that was recorded unlawfully. *State v. Williams*, 94 Wn.2d 531, 534, 617 P.2d 1012 (1980).

The Privacy Act "tip[s] the balance in favor of individual privacy at the expense of law enforcement's ability to obtain information in criminal proceedings." *Kipp*, 179 Wn.2d at 725.

Here, the trial court tipped the balance the wrong way. It ruled the conversation was not "private" and that even if it was,

the portion of the recording showing the shooting was admissible. CP 473-77.

The court was wrong. Any reasonable person would consider a three-minute conversation between a driver and a lone front-seat passenger in an enclosed moving vehicle to be private, not public. *See* Pretrial Exs. 5, 7; CP 151-53, 474-75; *Kipp*, 179 Wn.2d at 723 (conversation between two people in kitchen private even though others were in the house, and even though topic was one a person would expect would be reported to law enforcement); *Clark*, 129 Wn.2d at 214 (conversations on street in "bazaar-like setting" not private).

Moreover, where a recording violates the Privacy Act, the statue mandates exclusion of *any information* obtained, not just the private portion of the recording in question. RCW 9.73.050. For example, a violation of the Act "require[s] exclusion of any simultaneous visual observation as well"—even though only "conversations" or "communications" are covered by the Privacy Act's prohibitions. *Faford*, 128 Wn.2d

at 488; *see* Br. of Appellant at 65-67 (discussing *Faford* and other cases).

This Court should grant review to prevent the erosion of privacy rights in Washington. RAP 13.4(b)(1), (4).

4. This Court should grant review to revisit decades-old case law that is incorrect and harmful. The application of ER 609 to criminal defendants violates article I, section 22, and regardless, robbery is not a crime of dishonesty.

This Court should also grant review to address the constitutionality of ER 609 or at least its application to robbery. This issue was *preserved* in the trial court, despite contrary binding authority from this Court. Accordingly, it is the perfect vehicle to revisit decades-old case law that is incorrect and harmful. RAP 13.4(b)(3), (4); *see* Br. of Appellant at 92-109.

a. *Mr. Gates raised this issue, but the trial court was bound by cases from 1977 and 1991.*

The trial court admitted Mr. Gates's prior conviction for robbery, permitting the State to describe it as "a crime of dishonesty" to attack his credibility during his testimony. CP

233. The court did so pursuant to ER 609(a), which provides, "For the purpose of attacking the credibility of a witness …, evidence that the witness has been convicted of a crime shall be admitted … if the crime … involved dishonesty or false statement."

Although the court correctly observed ER 609's language is mandatory and that courts had ruled robbery is a "per se" crime of dishonesty, Mr. Gates properly noted that a prior conviction for robbery has nothing to do with credibility, that its admission would simply prejudice the jury against him, and that this prejudice would be exacerbated by the fact that he is a young, Black male. CP 127-28, 233. He argued the admission of this prior crime would violate his right to a fair trial. CP 127-28.

Mr. Gates was correct. The admission of a prior robbery conviction to attack his credibility violated Mr. Gates's right to a fair trial. Specifically, it violated his rights under article I, section 22 of the Washington Constitution, which guarantees

the rights to appear and defend in person and to testify. The admission of the prior conviction also violated ER 609 under a proper reading of the rule, because robbery is not a crime of dishonesty.

This Court's precedent is to the contrary. *See Ruzicka*, 89 Wn.2d at 225-35 (statute permitting use of prior convictions to impeach does not violate article I, section 22); *Ray*, 116 Wn.2d at 545 (overruling earlier cases and holding crimes of theft are per se admissible for impeachment purposes under ER 609(a)(2)); *Rivers*, 129 Wn.2d at 705 (applying *Ray* to robbery).

Because these cases are incorrect and harmful, this Court should grant review.

b. *Article I, section 22 guarantees the right to testify.*

Article I, section 22 explicitly provides an accused person the rights "to appear and defend in person" and "to testify in his own behalf." Const. art. I, § 22. These rights are more robust than the implicit rights afforded under the federal

constitution. *State v. Martin*, 171 Wn.2d 521, 529-33, 537, 252 P.3d 872 (2011).

In *Martin*, the defendant testified in his own behalf and the prosecutor on cross-examination accused him of tailoring his testimony to what he had heard from other witnesses and read in discovery. *Id.* at 523. The defendant argued these accusations of tailoring violated his article I, section 22 rights to appear, defend, and testify. *Id.* at 526, 529.

The defendant acknowledged the federal constitution did not prohibit prosecutorial allegations of tailoring, but he argued the state constitution provided greater protection in this context. *Id.* at 526. This Court agreed after performing an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Martin*, 171 Wn.2d at 528-33, 537. Br. of Appellant at 94-96.

c. *The admission of Mr. Gates's prior robbery conviction to impeach his testimony violated his rights under article I, section 22, and this Court's 1977 opinion rejecting the argument is wrong and harmful.*

The *Martin* analysis applies with equal force here. This Court should grant review and hold that article I, section 22 prohibits the use of any prior conviction to impeach a defendant, or at least any conviction other than one for a true crime of dishonesty like fraud or perjury.

The Hawai'i Supreme Court held that state's constitution prohibits the use of prior convictions to impeach a defendant's testimony. *State v. Santiago*, 53 Haw. 254, 492 P.2d 657, 661 (Haw. 1971). Although this Court in *Ruzicka* declined to follow *Santiago*, *Ruzicka* should be reconsidered for three reasons.

First, the 1977 *Ruzicka* decision predated the era of independent state constitutional analysis initiated in the early 1980's and formalized in *Gunwall*, 106 Wn.2d at 58. Thus, the Court did not have the benefit of subsequent opinions like *Martin* holding our state constitution is more protective.

Second, the *Ruzicka* Court was reviewing a *statute* that permitted impeachment by prior conviction, and therefore the Court applied the rule of legislative deference. *Ruzicka,* 89 Wn.2d at 226 (citing former RCW 10.52.030). But that statute was repealed and replaced by ER 609. Laws of 1984, Ch. 76, § 31; *State v. Burton,* 101 Wn.2d 1, 3-4, 676 P.2d 975 (1984), *overruled on other grounds by Ray*, 116 Wn.2d at 543. Because this Court promulgates court rules, it can now evaluate the constitutional question without the constraint of legislative deference. *See Ray*, 116 Wn.2d at 545 (Court drafts rules).

Third, subsequent academic research has undermined the premises this Court relied on to reject the arguments. The Court believed it was "at least debatable" that "there is a nexus between a person having committed crimes and that person's propensity to lie." *Ruzicka*, 89 Wn.2d at 226. And it was "not convinced" that limiting instructions failed to prevent the forbidden propensity inference. *Id.* at 229.

Scholars have concluded otherwise. "[P]rior convictions and other bad acts admissible under the impeachment rules are poor predictors of truthfulness in the courtroom." Julia Simon-Kerr, *Credibility by Proxy,* 85 Geo. Wash. L. Rev. 152, 156 (2017). Moreover, despite limiting instructions, empirical research demonstrates that "jurors seem to use the information as evidence of guilt rather than untruthfulness." *Id.* at 188.

Systemic racism also renders ER 609 constitutionally questionable. "[D]ue to uneven distributions of criminal convictions, and because of race-based assumptions of guilt, the rule disproportionately affects people of color." Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 576 (2014).

The Court should grant review, overrule *Ruzicka,* and hold that the admission of a prior robbery conviction to impeach violates article I, section 22 of the Washington Constitution. Br. of Appellant at 92-104.

d. *The admission of the prior robbery conviction was also improper under a correct reading of ER 609, and this Court's 1991 opinion rejecting the argument is wrong and harmful.*

In the alternative, this Court should overrule *Ray* and *Rivers* and reaffirm prior cases holding theft and robbery are not per se crimes of dishonesty under ER 609(a)(2).

The case *Ray* overruled correctly analyzed the issue. *Burton*, 101 Wn.2d at 3-10; *see Ray*, 116 Wn.2d at 543 (overruling *Burton*). *Burton* noted that the language of Washington's rule was taken verbatim from Fed. R. Evid. 609, which courts had interpreted as limiting per se crimes of dishonesty to those which "bear *directly* on a defendant's propensity for truthfulness." 101 Wn.2d at 7. That interpretation excludes theft and robbery from the rule of per se admissibility. *Id*. at 10.

Ray's rejection of *Burton* was not only incorrect, it was also harmful. Mandating admission of a broad range of prior convictions burdens constitutional rights and exacerbates

systemic racism. This Court should return to the rule of *Burton* and hold that only crimes bearing directly on truthfulness are per se admissible for impeachment. Br. of Appellant at 104-08.

5. The trial court violated Mr. Gates's right to due process by refusing to instruct the jury on the lawful use of force to resist an attempted felony.

Finally, this Court should grant review because the trial court violated Mr. Gates's Fourteenth Amendment right to due process by denying his request to instruct the jury on the lawful use of force in resistance of an attempted felony. Statement of Additional Grounds for Review ("SAG") at 15-17, 55-62.

Due process requires the State to prove every element of the crime beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 685, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); U.S. Const. amend XIV. Because justifiable homicide negates the intent element of murder, the State must disprove justifiable homicide beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 617, 683 P.2d 1069 (1984).

A homicide is justifiable when committed "[i]n the actual resistance of an attempt to commit a felony upon the slayer [or] in his or her presence." RCW 9A.16.050(2). A homicide is also justifiable if committed "[i]n the lawful defense of the slayer" or another person. RCW 9A.16.050(1).

The trial court instructed the jury on justifiable homicide in defense of self or others, but refused to instruct the jury on justifiable homicide in resistance of an attempted felony. CP 142; 7/16/21RP 1607-19, 1681-82. This ruling allowed Mr. Gates to be convicted of a crime even if he lacked the requisite culpable mental state, violating the general rule that "wrongdoing must be conscious to be criminal." SAG at 55 (citing *Ruan v. United States*, 597 U.S. ___, 142 S. Ct. 2370, 2376, 213 L. Ed. 2d 706 (2022)). For this reason, too, this Court should grant review. RAP 13.4(b)(3), (4).

F. CONCLUSION

This is a highly unusual case that presents several compelling issues of urgent import. This Court should grant review.

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains approximately 9,985 words consistent with this Court's ruling of November 13, 2023.

Respectfully submitted this 16th day of November, 2023.

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Attorney for Petitioner

APPENDIX A

FILED
10/9/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER MILES GATES, Appellant.	DIVISION ONE No. 83243-3-I UNPUBLISHED OPINION

DWYER, J. — Christopher Gates was found guilty by jury verdict of second degree intentional murder and second degree felony murder, both with a firearm enhancement, for the homicide of Robert Baker. Gates was also found guilty of unlawful possession of a firearm. In numerous pretrial motions, Gates sought to discharge his counsel. He additionally objected to multiple continuances granted by the trial court, although he frequently informed the court that he did not wish to proceed to trial at that time.

On appeal, Gates contends that government mismanagement resulted in delays proceeding to trial. He asserts that, pursuant to CrR 8.3(b), his murder conviction must be reversed and the charges against him dismissed due to the purported government mismanagement. We disagree. Washington's time-for-trial rule, set forth in CrR 3.3, governs the time limits within which criminal charges must be brought to trial. The rule provides that no case may be dismissed for time-to-trial reasons unless expressly required by the rule, by

statute, or by our state or federal constitution. CrR 3.3(h). Gates asserts neither a claim pursuant to CrR 3.3 nor a claim pursuant to a statute or constitutional provision. Accordingly, he fails to assert a cognizable claim regarding the time within which his case was brought to trial.

In the alternative, Gates contends that he is entitled to a new trial on numerous grounds, including that the trial court erroneously admitted video evidence in violation of the privacy act, the trial court erroneously declined to instruct the jury regarding justifiable homicide in resistance of a felony, the prosecutor committed misconduct in closing argument, and the admission of his prior robbery conviction violated his right to testify and was improper pursuant to ER 609. On all accounts, we disagree. Gates has demonstrated neither trial court error nor prosecutorial misconduct that would entitle him to a new trial. Nor do we find merit in the claims asserted by Gates in his statement of additional grounds.

We conclude, however, that Gates is entitled to relief on his final claim of error. Gates asserts, and the State concedes, that the inclusion of the second degree felony murder conviction in the judgment and sentence violates the protection against double jeopardy. We accept the State's concession and remand to the superior court to vacate the second degree felony murder conviction. In all other respects, we affirm.

I

On May 2, 2018, the State charged Gates with premeditated murder in the first degree with a firearm allegation and unlawful possession of a firearm in the

first degree. The charges were premised on the April 22, 2018 shooting death of Robert Baker, which occurred outside of the Cedar Room nightclub in the Ballard neighborhood of Seattle. The State subsequently amended the information to add a charge of felony murder in the second degree with a firearm allegation.

An extended period during which Gates filed numerous pretrial motions ensued. As described by the presiding judge, the "constant theme" during this time was Gates's "dissatisf[action] with the attorneys who were appointed to represent him," notwithstanding that he "had really good attorneys on his case." Between September 2018 and September 2020, Gates filed "repeated motions either for a new lawyer or to represent himself" and "constantly complain[ed]" regarding his counsels' representation. Indeed, Gates filed at least seven motions to discharge counsel in one year alone.

In ruling on one such motion, in which Gates had asserted "irreconcilable conflict" with his counsel, the trial judge explained that he had "heard Mr. Gates repeatedly" and had concluded that the "irreconcilable differences . . . flow[ed] one way, and it's from Mr. Gates." The trial court denied the motion, ruling that Gates's attempt to "control the minutia of [the] case [had] led to [the] irreconcilable differences" and was "not a sufficient basis to grant new counsel." Gates also objected to multiple continuances granted by the trial court at defense counsel's request, although he frequently informed the trial court that he did not wish to proceed to trial at that time.

On September 4, 2020, defense counsel brought a motion to withdraw and substitute counsel. The managing attorney of the Society of Counsel

Representing Accused Persons explained to the court that Gates "[felt] very strongly that . . . he [had] not received effective assistance of counsel" and that a breakdown in communication with Gates had rendered counsel unable to present an adequate defense. The director of the Department of Public Defense similarly informed the court that the department was unable to provide effective representation due to a conflict resulting from Gates's repeated complaints regarding purported mismanagement.

The trial court granted the motion. In so doing, the court noted Gates's repeated motions to discharge counsel, which "universally, . . . [had] been denied." The court explicitly warned Gates that, "in the future," he would not be provided with representation at public expense if he continued to "engag[e] in a pattern of complaining or unwillingness to work with [his] lawyer." The court found that Gates's consistent complaints about his counsel were without merit.

New counsel was appointed on September 8, 2020. On March 26, 2021, Gates's counsel requested to delay trial until November 29, 2021. Gates submitted a declaration in support of the motion to continue. The trial court denied the motion and set a trial date of June 14, 2021.

Trial commenced for purposes of motions in limine on June 15, 2021. Gates moved to exclude video footage from an outward-facing dash-mounted camera on a rideshare vehicle that had captured footage of the incident resulting in the charges against him. The video footage was obtained from a vehicle driven by Chad Voorhis, who was working in his capacity as a Lyft driver on the date of the offense. Voorhis had picked up a passenger, Aaron Mitchell, in

Ballard. The recording includes audio of Voorhis and Mitchell engaging in conversation during the drive about "drinking with old friends," the air conditioning in the vehicle, and Voorhis's shifts as a rideshare driver. Shortly after Voorhis parked the vehicle to pick up additional passengers, the recording captured audio of gunshots and video of Gates shooting Baker across the public street.

The State offered into evidence "only the video recording of the shooting along with the sound of the gunshots," not "the audio of the conversation between [Mitchell] and [Voorhis] that occurred in the minutes leading up to the shooting." Gates sought to have the entirety of the recording, and also testimony by Voorhis, suppressed because, he asserted, the recording violated our state's privacy act, chapter 9.73 RCW. After reviewing both versions of the recording, the trial court ruled that the proffered evidence did not violate the privacy act and denied Gates's motion to suppress. The court determined that Mitchell "had no expectation of privacy in a Lyft vehicle," and that the three-minute and twelve-second conversation between Mitchell and Voorhis was not a "private conversation." The court noted that Mitchell and Voorhis were "complete strangers" and that their conversation was "innocuous and surface-level," not a "secret conversation." The court additionally ruled that "[a]lthough the audio recording of the inside of the vehicle and the video recording of the public street came from the same device, there is no connection between the conversation inside the Lyft [vehicle] and the events that were occurring out on a public street."

Gates additionally moved to suppress evidence of his August 2012 conviction of robbery in the first degree with a firearm. Alternatively, he

requested that the evidence be "sanitize[d]" and the State be ordered to refer to the incident solely as "conduct of theft." The State agreed to limit impeachment to the question of whether Gates had "been convicted of a crime of dishonesty." Pursuant to ER 609, the trial court denied Gates's motion to exclude the evidence. The court ruled that, in the event that Gates testified at trial, the State would be permitted to question him in the limited manner that it had proposed.

Seven days of witness testimony commenced on June 24, 2021. Gates testified that he, his girlfriend, and two friends were at the Cedar Room nightclub in Seattle's Ballard neighborhood in the early morning hours of April 22, 2018. After leaving the nightclub, they stood outside the back door on the sidewalk talking and "hanging out." Shortly thereafter, Gates's attention was redirected to "two guys that were apparently standing and looking at" him and his friends. The two individuals were Robert Baker and Adam Smith.

According to Gates, Smith stopped near the driver side of a vehicle while Baker walked toward the passenger side. Baker motioned to Smith to turn around to look toward Gates and his friends, which Smith quickly did. It then appeared to Gates that Smith grabbed something out of the vehicle. According to Gates, Baker then approached Smith on the driver side of the vehicle, and Smith passed something to Baker. Although Gates could not identify that the object was a weapon, he believed that it was. Baker then put the object in his right jacket pocket and began walking down the street in the direction of Gates and his friends. Gates testified that, during this time, Smith continued to closely

watch their group. Gates believed that Baker had a gun by the way he was holding his arm in his pocket, although Gates was unable to see any weapon.

Gates testified that Smith continued watching Gates and his friends as Baker proceeded down the street. According to Gates, he was afraid that the gun he believed Baker possessed would be used against him or one of his friends. When Baker reached a car parked on the other side of the street from Gates and his friends, Baker stopped walking. Gates testified that he "perceived [Baker] start to draw his arm out of his pocket." Gates then drew his own gun and fired "a few rounds" to the right of Baker. According to Gates, he fired these "deterrent shots" because he believed that Baker was about to fire on him. Gates testified that Baker then pulled out his own gun and aimed it across the street. Gates continued firing at Baker as Gates and his friends ran down the street. Baker died at the scene from a single gunshot wound to the right side of his chest.

Following trial testimony, defense counsel requested that the jury be provided with modified justifiable homicide jury instructions based on both criminal Washington Pattern Jury Instructions (WPIC) 16.02 and 16.03.[1] Gates argued that an instruction regarding justifiable homicide in resistance of a felony was appropriate because Baker "was attempting to commit a felony upon" Gates when Gates shot him. The trial court ruled that WPIC 16.02, the instruction regarding justifiable homicide in defense of self, reflected Gates's testimony that

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (4th ed. 2016) (WPIC).

he fired deterrent shots because he "was afraid that his friends or he would be injured or would be killed." The court explained that additionally providing the jury with WPIC 16.03, regarding justifiable homicide in resistance of a felony, "would unnecessarily confuse the jury." The court concluded that WPIC 16.02 "accurately reflect[ed] . . . the facts of this case and will allow [Gates] to argue [his] theory . . . and is an accurate reflection of the law." Thus, the trial court refused to provide the jury with the proposed modified WPIC 16.03 instruction.

Much of closing argument reflected Gates's self-defense theory of the case. Defense counsel urged the jury to consider Gates's life experiences in evaluating the reasonableness of his actions. In closing argument, counsel stated:

> A homicide is justifiable as is the case here when, specifically to the facts of this case, Mr. Gates had a reasonable belief that Mr. Baker intended to inflict death or great personal injury upon him. Mr. Gates reasonably believed that there was intent of such harm being accomplished, and Mr. Gates employed such force as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to Mr. Gates taking into all – taking into consideration all the facts and circumstances as they appeared to Mr. Gates at the time, as they appeared to him.
>
> You have to place yourself into the shoes of Mr. Gates, right? And knowing everything that he knew at that time in terms of observations of what conduct is going on and also taking into effect his personal experiences and his personal knowledge about how situations like this unfold; when you do so and you incorporate and include his observations, his knowledge, and his experience . . . it is clear that he was justified, that his use of force was reasonable, and that his assessments were correct.
>
> . . . .
>
> So how do you assess all the facts and circumstances as they appeared to Chris Gates? Different life experiences of people do not make one's heightened ability to and danger any less reasonable than those experiences of people who have not shared the same life experience as Christopher Gates, all right? We all

> come from different places and we all bring different experiences into how we view situations. But looking at where Mr. Gates comes from and his experiences and his knowledge is how you have to view and assess was he reasonable in reaching the conclusions that he did.

In rebuttal, the prosecutor stated:

> The problem with Defense's argument about self-defense is this. He wants different standards for different people. He wants you to look at Mr. Gates and look at Mr. Baker and look at Adam [Smith] and figure because they were up to something or because they are from a different background that they get a different law. Wow. Wow. That because of who they are, it's okay to just shoot somebody for walking down the street out the back of a club. It's okay to assume that they're armed when you didn't even see exactly what was handed. It's a different standard for Robert [Baker] and a different standard for the defendant because they're different. Wow. The law applies to everyone equally and the law says that you can't kill somebody because you think they have a gun.

On July 22, 2021, the jury acquitted Gates of murder in the first degree but returned a guilty verdict for the lesser included crime of intentional murder in the second degree. The jury also found Gates guilty of felony murder in the second degree. On both counts, the jury found that Gates was armed with a firearm when the offenses were committed. Gates was additionally found guilty of unlawful possession of a firearm in the first degree. In the judgment and sentence, the sentencing court listed both murder convictions in the findings but vacated the conviction of felony murder "for sentencing purposes only, in order to avoid multiple punishments for one criminal act." The court sentenced Gates to 300 months in prison.

Gates appeals.

II

Gates asserts that, pursuant to CrR 8.3(b), his convictions must be reversed and the charges against him dismissed because "government mismanagement forced [him] to waive his right to a speedy trial in order to obtain his right to counsel."[2] We disagree. As an initial matter, Gates cannot raise for the first time on appeal his rule-based claim of error. RAP 2.5(a). More significantly, Gates fails to raise a cognizable claim. The plain and unambiguous language of CrR 3.3 prohibits dismissal of criminal charges due to trial delay unless the defendant can demonstrate violation of the rule, a statute, or the state or federal constitution. Gates asserts no such claim. Accordingly, we reject his meritless assertion that he is entitled to the requested remedy.

Criminal Rule 3.3 governs time-to-trial requirements in Washington. The rule provides that when a charge is not brought to trial within the time limits set forth therein, that charge "shall be dismissed with prejudice." CrR 3.3(h). However, "this procedural right is not self-executing and requires that a motion be filed to exercise it in accordance with the procedure outlined in the rule." State v. Walker, 199 Wn.2d 796, 804, 513 P.3d 111 (2022). Pursuant to the rule, "[a] party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits." CrR

[2] Br. of Appellant at 2.

3.3(d)(3).[3] Significantly here, rule 3.3 provides that "[n]o case shall be dismissed for time-to-trial reasons *except as expressly required by this rule, a statute, or the state or federal constitution*." CrR 3.3(h) (emphasis added).

Our Supreme Court amended the time-for-trial rule in 2003 based on the recommendations of the Time-for-Trial Task Force.[4] State v. Kone, 165 Wn. App. 420, 435, 266 P.3d 916 (2011). The 2003 amendments include a provision regarding construction of the rule, which states:

> The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1,[5] the pending charge *shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated*.

CrR 3.3(a)(4) (emphasis added); see State v. George, 160 Wn.2d 727, 737, 158 P.3d 1169 (2007) (discussing identical amendments made to CrRLJ 3.3).

> In explaining the purpose of this provision, the Time-for-Trial Task Force stated:
>
> "Task force members are concerned that appellate court interpretation of the time-for-trial rules has at times expanded the rules by reading in new provisions. The task force believes that the rule, with the proposed revisions, covers the necessary range of time-for-trial issues, so that additional provisions do not need to be read in. Criminal cases should be dismissed under the time-for-trial rules only if one of the rules' express provisions have been violated; other time-for-trial issues should be analyzed under the speedy trial provisions of the state and federal constitutions."

George, 160 Wn.2d at 737 (quoting WASHINGTON COURTS TIME-FOR-TRIAL TASK

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[3] "[O]nce the time-for-trial period has expired, a party cannot object to the untimely trial date under CrR 3.3(d)(3) because it is no longer reasonably possible to comply with the rule's requirement to 'object' in the prescribed manner, i.e., by moving to set the trial date within the time-for-trial period." Walker, 199 Wn.2d at 802.

[4] The final report of the task force is available at https://www.courts.wa.gov/programs_orgs/pos_tft/.

[5] Criminal Rule 4.1 sets forth the requirements for time to arraignment. CrR4.1(a).

FORCE, FINAL REPORT II.B at 12-13 (Oct. 2002) (on file with Admin. Office of Courts), *available at* http://www.courts.wa.gov/programs_orgs/pos_tft). The task force additionally recommended, and our Supreme Court adopted, the provision of the rule prohibiting dismissal of a case for time-to-trial reasons "except as expressly required by this rule, a statute, or the state or federal constitution." CrR 3.3(h).[6] Thus, "the task force concluded that a court should assume that a defendant is not entitled to dismissal with prejudice unless he or she establishes a violation of the expressed rules or the constitutional right to a speedy trial." George, 160 Wn.2d at 738.

Gates nevertheless contends that, due to trial delays resulting from purported government mismanagement in assigning his defense counsel, he is entitled to reversal of his convictions and dismissal of the charges against him. According to Gates, the alleged government mismanagement "forced [him] to waive his right to a speedy trial."[7] However, notwithstanding Gates's repeated references to his "right to a speedy trial" and "right to counsel," he nowhere asserts a constitutional claim of error.[8] Gates does not assert a speedy trial claim pursuant to either the Sixth Amendment or article I, section 22 of our state constitution. Moreover, he nowhere asserts that he was either completely deprived of counsel, see United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), or that his counsel was ineffective. See Strickland v.

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[6] See WASHINGTON COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT III.A, *available at* https://www.courts.wa.gov/programs_orgs/pos_tft/report/pdf/CrR3.3.pdf.

[7] Br. of Appellant at 41.

[8] Gates's contention that he waived his right to a speedy trial is also factually inaccurate. No such waiver occurred.

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Instead, Gates's claim of error is premised on CrR 8.3(b). This rule provides that "[t]he court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b). However, because Gates asserts a rule-based claim, this assertion of error may not be raised for the first time on appeal. RAP 2.5(a). See also Kone, 165 Wn. App. at 434 (defendant could not argue for the first time on appeal that the trial court should have granted his CrR 8.3(b) motion to dismiss due to purported CrR 3.3 time-to-trial violations); State v. Nowinski, 124 Wn. App. 617, 630, 102 P.3d 840 (2004) (holding that CrR 8.3(b) argument not presented to the trial could would not be considered as a basis for dismissal on appeal).

Additionally problematic is Gates's attempt to obtain reversal of his convictions and dismissal of the charges against him by characterizing a claim of error regarding trial delay as one of "government mismanagement." Indeed, we have previously rejected the assertion that dismissal of charges was warranted for purported government mismanagement prejudicing a defendant's so-called "right to a speedy trial" pursuant to CrR 3.3. Kone, 165 Wn. App. at 435-37. There, the defendant argued on appeal that the trial court should have granted his CrR 8.3(b) motion to dismiss for time-to-trial violations pursuant to CrR 3.3. Kone, 165 Wn. App. at 434-35. In addressing this contention, we looked to the

plain language of CrR 3.3(h).[9] Kone, 165 Wn. App. at 435. This "plain and unambiguous language," we concluded, "prohibits dismissal of a case under CrR 8.3(b) for violation of a defendant's time-to-trial rights under CrR 3.3 unless a defendant can show a violation of CrR 3.3, a statute, or the state or federal constitution." Kone, 165 Wn. App. at 436. Thus, we rejected the defendant's attempt to obtain dismissal pursuant to CrR 8.3(b) on the basis of a purported time-for-trial violation. Kone, 165 Wn. App. at 436-37. "CrR 3.3(b),"[10] we held, "provides the exclusive means to challenge a violation of the time-for-trial rule." Kone, 165 Wn. App. at 437.

Similarly, here, Gates attempts to characterize a time-to-trial claim of error as one of "government mismanagement" pursuant to CrR 8.3(b). However, a case may be dismissed for time-to-trial reasons only if such dismissal is "expressly required" by CrR 3.3, a statute, or the state or federal constitution. CrR 3.3(h). Although Gates's claim of error is premised on time-to-trial reasons, he nowhere asserts a violation of CrR 3.3, a statute, or the state or federal constitution. The plain and unambiguous language of CrR 3.3(h) precludes Gates from obtaining the relief requested pursuant to CrR 8.3(b). See Kone, 165 Wn. App. at 435-37. Accordingly, Gates has asserted no cognizable claim of error.

The judicial authority relied on by Gates, as it preceded our Supreme Court's 2003 amendments to the time-to-trial rule, is unavailing. See State v.

[9] Again, CrR 3.3(h) provides that "[n]o case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution."

[10] CrR 3.3(b) sets forth the time-for-trial requirements, which, when violated, are the basis for dismissal of a case pursuant to the rule.

Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997); State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990). In Sherman, the trial court dismissed a criminal prosecution for theft pursuant to CrR 8.3(b) after the State failed to provide the defendant with records pertinent to the case. 59 Wn. App. at 765-67. We affirmed the dismissal of the charge, noting that "the speedy trial expiration date had been extended a total of seven times." Sherman, 59 Wn. App. at 769. Thus, we reasoned, to require the defendant to request a continuance to obtain the records "would be to present her with a Hobson's choice: she must sacrifice either her right to a speedy trial or her right to be represented by counsel who had sufficient opportunity to prepare her defense." Sherman, 59 Wn. App. at 769.

In Michielli, our Supreme Court held that dismissal of a criminal prosecution was warranted pursuant to CrR 8.3(b) when the State added new charges against the defendant "without any justification for the delay in amending the information." 132 Wn.2d at 245. Because defense counsel needed additional time to prepare to defend against the new charges, the court determined that the State's actions "forced [the defendant] either to go to trial unprepared, or give up his speedy trial right." Michielli, 132 Wn.2d at 245. The court held that "[t]he State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b)." Michielli, 132 Wn.2d at 245.

Gates relies on this authority, however, without addressing our Supreme Court's subsequent amendment of the time-for-trial rule to include CrR 3.3(h). Because Gates fails to even address the pertinent rule, he nowhere asserts that Michielli and Sherman remain good law following the 2003 amendments. In any event, we have rejected such an argument concerning other decisional authority preceding the 2003 amendments to the rule. See State v. Thomas, 146 Wn. App. 568, 191 P.3d 913 (2008). In Thomas, we considered whether the amendments to CrR 3.3 superseded our Supreme Court's decision in State v. Fulps, 141 Wn.2d 663, 9 P.3d 832 (2000), in which the court relied on standards of the American Bar Association "to supplement CrR 3.3's speedy trial requirements" in determining the beginning date of a "speedy trial period." 146 Wn. App. at 570. We held that "the 2003 amendments to the time-for-trial rule supersede[d] the Fulps decision" and affirmed the superior court's reversal of the district court's dismissal of the criminal charge therein. Thomas, 146 Wn. App. at 570.

In determining whether decisional authority was superseded by the subsequent amendments, we considered the Time-for-Trial Task Force's explication of its concerns regarding prior interpretations of the rule:

> "Task Force members are concerned over the degree to which the time-for-trial standards have become less governed by the express language of the rule and more governed by judicial opinions. To address this concern, the task force has tried to fashion a rule that is simpler, has fewer ambiguities, and covers more of the field of time-for-trial issues, with the hope that a reader of the rule will have a better understanding of the overall picture than currently exists. The Task Force also recommends adopting a provision in CrR 3.3 expressly stating that the rule is intended to

> cover all the reasons why a case should be dismissed under the rule. Courts should not read into the rule any other reasons beyond those that are expressly stated in the rule. Any other reasons should be analyzed under the corresponding constitutional provisions (Wash. Const. Art. I, § 22, and U.S. Const., Amend. 6)."

Thomas, 146 Wn. App. at 573 (quoting WASHINGTON COURTS TIME-FOR-TRIAL TASK FORCE, FINAL REPORT I(B)(1) at 6 (Oct. 2002) (on file with Admin. Office of the Courts), *available at* http://www.courts.wa.gov/programs_orgs/pos_tft). We concluded that, pursuant to the plain language of the amended rule, "dismissal is not a permissible remedy unless the defendant's constitutional right to a speedy trial is violated" if trial was delayed by circumstances not addressed in the rule itself. Thomas, 146 Wn. App. at 575. "Thus," we held, "the amended rule unambiguously prohibit[ed] the supplementation engaged in by the Fulps court." Thomas, 146 Wn. App. at 575-76.

Similarly, here, Gates relies on decisional authority that preceded the 2003 amendments to the time-to-trial rule. These decisions, because they preceded the adoption of CrR 3.3(h), permitted the dismissal of a criminal prosecution for time-to-trial reasons other than those "expressly required by [CrR 3.3], a statute, or the state or federal constitution." CrR 3.3(h). See Michielli, 132 Wn.2d 229; Sherman, 59 Wn. App. 763. As we held in Thomas, 146 Wn. App. at 575-76, such decisional authority is superseded by the court's amendment of the rule. Accordingly, the authority cited by Gates is unavailing.

Gates nowhere asserts that his trial was delayed due to a violation of CrR 3.3, a statute, or the state or federal constitution.[11] The plain and unambiguous

[11] Indeed, Gates insisted at oral argument that he was not asserting any such claim.

language of the time-to-trial rule prohibits the dismissal of criminal charges due to trial delay unless the defendant can demonstrate such a violation. CrR 3.3(h). Accordingly, Gates has failed to assert a cognizable claim of error. We thus reject his meritless assertion that he is entitled to reversal of his convictions and dismissal of the charges against him.

III

Gates next asserts that the trial court erred by admitting into evidence the recording from the rideshare vehicle that captured video footage of the shooting. According to Gates, the recording violated our state's privacy act and, thus, is inadmissible in any civil or criminal trial. We disagree. Because the recording included no "private conversation" pursuant to the act, the trial court did not err by admitting the proffered evidence.

Washington's privacy act, chapter 9.73 RCW, "is designed to protect private conversations from governmental intrusion." State v. Clark, 129 Wn.2d 211, 232, 916 P.2d 384 (1996). The act provides in pertinent part:

> Except as otherwise provided in this chapter, it shall be unlawful for any individual . . . to . . . record any:
>
> . . . .
>
> [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation . . . without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(b). The privacy act mandates that "[a]ny information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case." RCW 9.73.050. Additionally, and significantly, any person found to have

recorded a private conversation in violation of the act is liable for civil damages and is guilty of a gross misdemeanor. RCW 9.73.060, .080.

Gates asserts that the trial court erred by admitting into evidence the video recording of the shooting, along with the audio recording of the gunshots, which was obtained from the dash-mounted camera of the Lyft vehicle driven by Chad Voorhis on the night of the offense. According to Gates, the conversation between Voorhis and Aaron Mitchell, the Lyft passenger, was a "private conversation" pursuant to the privacy act. Thus, Gates contends, the evidence was improperly admitted at trial.[12] We disagree.

Washington's privacy act protects only "private" communication and conversation. RCW 9.73.030. "Private," as employed by the act, means "'belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public.'" Clark, 129 Wn.2d at 225 (alterations in original) (internal quotation marks omitted) (quoting Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 189-90, 829 P.2d 1061 (1992)). "A communication is private (1) when the parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." State v. Kipp, 179 Wn.2d 718, 729, 317 P.3d 1029 (2014).

[12] Gates asserts that the proffered evidence was inadmissible, notwithstanding that it did not include any of the conversation between Voorhis and Mitchell, because RCW 9.73.050 provides that "[a]ny information obtained in violation of [the act]" is inadmissible. Because we conclude that the conversation between Voorhis and Mitchell was not a private conversation, we need not address this contention.

"Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the presence or potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party." Kipp, 179 Wn.2d at 729. The reasonable expectation standard requires "a case-by-case consideration of all the surrounding facts." State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996). "[T]he presence or absence of any single factor is not conclusive for the analysis." Clark, 129 Wn.2d at 227. When, as here, the facts are undisputed, whether a conversation is "private" pursuant to the act is a matter of law we review de novo. Kipp, 179 Wn.2d at 728.

Consideration of the pertinent factors leads us to conclude that Mitchell had no reasonable expectation of privacy within the rideshare vehicle. The conversation between Voorhis and Mitchell lasted a mere three minutes and concerned the trivial subjects of "drinking with old friends," the air conditioning in the vehicle, and Voorhis's shifts as a rideshare driver. Such "'inconsequential, nonincriminating' conversations generally lack the expectation of privacy necessary to be protected under the act." Kipp, 179 Wn.2d at 730 (quoting Faford, 128 Wn.2d at 484).

The location of the conversation similarly indicates that it was not a "private conversation" within the meaning of the act. As our Supreme Court has held, "the ordinary person does not reasonably expect privacy in a stranger's car." Clark, 129 Wn.2d at 230. Such expectation is less reasonable still in a rideshare vehicle, in which the service of transporting persons for compensation

is provided.[13] Indeed, as the trial court found, the Lyft vehicle driven by Voorhis had posted signs that audio and video recording was in progress, and the dash-mounted camera could be easily observed from within the vehicle. That the conversation occurred in a rideshare vehicle indicates that Mitchell had no reasonable expectation of privacy.

Further demonstrating that the conversation between Voorhis and Mitchell was not private is the role of Mitchell, the "nonconsenting party" to the recording, and his relationship with Voorhis. Mitchell was a passenger in Voorhis's rideshare vehicle, and the two were complete strangers. A nonconsenting party's "willingness to impart the information to a stranger evidences that the communication is not private." Kipp, 179 Wn.2d at 732 (holding that, in contrast, a conversation between brothers-in-law regarding a sensitive matter indicated a reasonable expectation of privacy). See also Clark, 129 Wn.2d at 228 (concluding that the conversations there "were not private because they were routine conversations between strangers on the street concerning routine illegal drug sales"). For each of these reasons, we conclude that the conversation between Voorhis and Mitchell was not a "private conversation" subject to the exclusionary provision of the privacy act.

Moreover, when engaging in this analysis, we are cognizant that the privacy act creates criminal liability for those who unlawfully record private

[13] Indeed, our legislature has, in a separate statute, recognized as a "'place of public resort, accommodation, assemblage, or amusement' . . . any place . . . kept for . . . hire . . . where charges are made for . . . service," including "for public conveyance or transportation on land, water, or in the air." RCW 49.60.040(2). This evidences legislative recognition that rideshare vehicles, such as the one driven by Voorhis on the night of the offense, constitute public spaces.

conversation. See RCW 9.73.080(1) ("Except as otherwise provided in this chapter, any person who violates RCW 9.73.030 is guilty of a gross misdemeanor."). In discerning our legislature's intent, we consider the statutory scheme of the privacy act as a whole. See, e.g., Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). Because our legislature criminalized violations of the privacy act, its applicability should be viewed as we view the applicability of criminal laws, to which we give a "literal and strict interpretation." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). In asserting that the recording was required to be suppressed, Gates alleges that Voorhis, the rideshare driver, acted criminally by recording video and audio within his vehicle to promote his own safety and that of his passengers. Nowhere does the privacy act demonstrate an intent to criminalize such conduct.

The recording admitted into evidence included no content of the conversation between Voorhis and Mitchell that occurred in the minutes prior to the shooting. Gates nevertheless asserts that the evidence was improperly admitted because the complete version of the recording had been obtained in violation of the privacy act. The conversation between Voorhis and Mitchell, however, was not a "private conversation" pursuant to the act, as Mitchell had no reasonable expectation of privacy in the rideshare vehicle where the conversation occurred. Accordingly, the recording did not violate the privacy act, and the trial court properly admitted the proffered evidence.

IV

Gates next contends that the trial court erred by declining to instruct the jury on justifiable homicide in resistance of a felony. He asserts that he was denied due process due to this alleged error, thus necessitating reversal of his conviction. We disagree. The trial court's instructions to the jury, which included an instruction on justifiable homicide in defense of self, correctly stated the law and allowed Gates to argue his theory of the case. Because an additional instruction regarding justifiable homicide in resistance of a felony would have been repetitious, Gates was not entitled to such an instruction. Gates's related assertion that the State was relieved of its burden to disprove self-defense is also without merit. Accordingly, the trial court did not err by refusing to instruct the jury regarding justifiable homicide in resistance of a felony.

We review de novo a trial court's refusal to give a justifiable homicide instruction if the decision was based on a ruling of law. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). If the court's decision was based on a factual dispute, we review the refusal to issue the instruction for an abuse of discretion. Brightman, 155 Wn.2d at 519.

Homicide is justifiable in Washington when committed either:

> (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

RCW 9A.16.050.[14]

> RCW 9A.16.050(1) contemplates justifiable homicide where the defendant reasonably fears the person slain is *about to* commit a felony upon the slayer or inflict death or great personal injury, and there is *imminent* danger that the felony or injury will be accomplished. In contrast, RCW 9A.16.050(2) considers a homicide justifiable where the defendant acted in *actual resistance* against an attempt to commit a felony on the slayer.

Brightman, 155 Wn.2d at 520-21 (citation omitted). "Thus, RCW 9A.16.050(2) addresses situations in which a felony or attempted felony is already in progress." Brightman, 155 Wn.2d at 521.

When a defendant has raised "some credible evidence . . . to establish that the killing occurred in circumstances that meet the requirements of RCW 9A.16.050," the defendant is entitled to an instruction on justifiable homicide. Brightman, 155 Wn.2d at 520. A defendant is not, however, entitled to repetitious instructions. State v. Bogdanov, No. 56202-2-II, slip op. at 12 (Wash. Ct. App. July 25, 2023), http://www.courts.wa.gov/opinions/pdf/562022.pdf (citing State v. Brenner, 53 Wn. App. 367, 377, 768 P.2d 509 (1989)); see also State v. Boisselle, 3 Wn. App. 2d 266, 291, 415 P.3d 621 (2018), rev'd on other grounds, 194 Wn.2d 1, 448 P.3d 19 (2019). "'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" State v.

[14] Our state's pattern jury instructions correspond to the sections of RCW 9A.16.050. See WPIC 16.02 ("Justifiable Homicide—Defense of Self and Others"); WPIC 16.03 ("Justifiable Homicide—Resistance to Felony").

Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064 (2012) (internal quotation marks omitted) (quoting State v. Gerdts, 136 Wn. App. 720, 727, 150 P.3d 627 (2007)).

Here, the trial court instructed the jury regarding justifiable homicide in self-defense. The court determined that this instruction would allow Gates to argue his theory of the case, based on Gates's testimony that he fired at Baker "because he was afraid that his friends or he would be injured or would be killed." However, the court refused to provide to the jury Gates's proposed modified instruction regarding justifiable homicide in resistance of a felony, concluding that the instruction would "unnecessarily confuse the jury" given the testimony at trial. Gates asserts that the trial court erred by refusing to instruct the jury regarding justifiable homicide as defined in RCW 9A.16.050(2). We disagree.

Gates testified at trial that he believed that Baker possessed a gun and that he was afraid that the weapon would be used against him or his friends. In closing, defense counsel argued that the homicide was justifiable because "[w]hen someone is *about to* commit a felony upon you, when they are *about to* assault you with a firearm," a response such as that carried out by Gates is reasonable. (Emphasis added.) Counsel further argued in closing that Gates's conduct was justifiable because Baker was "intending to commit an assault" against him and his friends.

The trial court instructed the jury:

> It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

> Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:
>
> (1) the slayer reasonably believed that the person slain or others whom the defendant reasonably believed were acting in concert with the person slain intended to inflict death or great personal injury;
>
> (2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
>
> (3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

Instruction 25 (WPIC 16.02).

This instruction was a correct statement of the law that allowed Gates to argue his theory of the case. As our Supreme Court articulated in Brightman, "RCW 9A.16.050(1) contemplates justifiable homicide where the defendant reasonably fears the person slain is *about to* commit a felony upon the slayer or inflict death or great personal injury, and there is *imminent* danger that the felony or injury will be accomplished." 155 Wn.2d at 520-21. Both Gates's testimony and closing argument were premised on his alleged apprehension that Baker intended to inflict harm on Gates and his friends and that the infliction of such harm was imminent. Thus, the instruction provided to the jury allowed Gates to fully argue this theory of the case. See Bogdanov, No. 56202-2-II, slip op. at 13-14.

Moreover, an additional instruction regarding justifiable homicide in resistance of a felony would have been repetitious. In Brenner, we determined that the defendant was not entitled to an instruction regarding justifiable homicide in resistance of a felony when the self-defense instruction provided to the jury

permitted the defendant to argue his theory of the case. 53 Wn. App. at 376. We held that "[b]ecause justifiable homicide is limited to felonies where the attack on the defendant's person threatens life or great bodily harm," the proposed instruction "simply repeat[ed] the substance" of the self-defense instruction provided to the jury. Brenner, 53 Wn. App. at 377. Similarly, in Boisselle, we held that an instruction regarding justifiable homicide in resistance of a felony would have been repetitious when the defendant "was already arguing that he was resisting death or great bodily harm" pursuant to RCW 9A.16.050(1). 3 Wn. App. 2d at 291. The same is true here. Gates argued that the homicide he committed was justified because he reasonably feared that Baker was about to do harm to him or his friends. Given Gates's theory of the case, the proposed instruction would have been repetitious. "A defendant is not entitled to repetitious instructions." Bogdanov, No. 56202-2-II, slip op. at 12. Moreover, because the trial court instructed the jury regarding justifiable homicide in defense of self, the State was not relieved of its burden to disprove self-defense.

Gates nevertheless asserts that the trial court's refusal to instruct the jury regarding justifiable homicide in resistance of a felony is inconsistent with decisional authority. We disagree. Contrary to Gates's assertion, our Supreme Court's decision in Brightman, 155 Wn.2d 506, does not hold that a defendant is entitled to such an instruction when that instruction would be duplicative of the self-defense instruction provided to the jury. Rather, there, the defendant asserted that, to be entitled to an instruction regarding RCW 9A.16.050(2), he was not required to show fear of great bodily harm or death if he acted in actual

defense of an attempted felony. Brightman, 155 Wn.2d at 519. Our Supreme Court rejected the argument, holding that "a justifiable homicide instruction based on *either* .050(1) or .050(2) depends upon a showing that the use of deadly force was *necessary under the circumstances*." Brightman, 155 Wn.2d at 523.

Gates's reliance on other decisional authority is similarly misplaced. See State v. Brown, 21 Wn. App. 2d 541, 506 P.3d 1258, review denied, 199 Wn.2d 1029 (2022); State v. Ackerman, 11 Wn. App. 2d 304, 453 P.3d 749 (2019). In Ackerman, the trial court instructed the jury regarding both RCW 9A.16.050(1) and .050(2), but the court altered the language of the resistance of a felony instruction to state that homicide was justifiable if the defendant acted in resistance of a "'violent felony.'" 11 Wn. App. 2d at 311-12. The court did not instruct the jury that robbery—the offense that the defendant allegedly acted in resistance of—constituted such a felony. Ackerman, 11 Wn. App. 2d at 313. We held that "[b]y suggesting that a robbery may not satisfy the requirements of a justifiable homicide defense," the instructions "diluted the State's burden of proving the absence of self-defense beyond a reasonable doubt." Ackerman, 11 Wn. App. 2d at 313.

In Brown, both defense counsel and the State proposed instructions on justifiable homicide in self-defense and in resistance of a felony. 21 Wn. App. 2d at 560. On appeal, the defendant asserted that she received ineffective assistance of counsel because the instruction provided to the jury regarding RCW 9A.16.050(2) misstated the law by indicating that homicide was justifiable only if the slayer possessed a reasonable fear of great personal danger. Brown,

21 Wn. App. 2d at 561. Division Three held that the instruction provided to the jury properly stated the law because RCW 9A.16.050(2) "require[s] the slayer to reasonably fear great personal injury before using deadly force." Brown, 21 Wn. App. 2d at 564 (citing Brightman, 155 Wn.2d at 520-22). Neither decision suggests that the trial court erred here.

A defendant is entitled to a justifiable homicide instruction when some credible evidence indicates that the homicide occurred in circumstances that meet the requirements of RCW 9A.16.050. Brightman, 155 Wn.2d at 520. However, a defendant is not entitled to repetitious jury instructions. Bogdanov, No. 56202-2-II, slip op. at 12; Boisselle, 3 Wn. App. 2d at 291; Brenner, 53 Wn. App. at 377. Here, the instruction provided to the jury properly stated the law and permitted Gates to argue his theory of the case—that the homicide was justifiable because he reasonably feared that Baker intended to harm him or his friends. Moreover, because the trial court instructed the jury regarding justifiable homicide in defense of self or others, the State was not relieved of its burden to disprove self-defense. The proposed instruction would have been repetitious. Accordingly, the trial court did not err by refusing to so instruct the jury.

V

Gates further asserts that he was denied a fair trial due to prosecutorial misconduct. Specifically, he contends that the prosecutor's comments in closing argument minimized and shifted the burden of proof, denigrated defense counsel, mischaracterized the law, and falsely implied that the defense argument was racist. We disagree. The prosecutor accurately described the reasonable

doubt standard, neither minimizing nor shifting the State's burden of proof. Moreover, the prosecutor's remarks in rebuttal closing argument were made in response to defense counsel's invitation to the jury to consider the reasonableness of Gates's conduct from a purely subjective standpoint. The prosecutor's remarks accurately portrayed the objective component of the self-defense standard and neither denigrated defense counsel nor implied that defense counsel's closing argument was racist.

"Prosecutorial misconduct may deprive a defendant of his right to a fair trial." State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). "We review a prosecuting attorney's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). In order to establish that a prosecutor's remarks constituted misconduct, the defendant must demonstrate both that the comments were improper and that prejudice resulted. Anderson, 153 Wn. App. at 427. "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). When, as here, the defendant did not object at trial to the allegedly improper remarks, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61. "In other words, a conviction must be reversed only if there is a substantial likelihood

that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

A

Gates first asserts that the prosecutor committed misconduct by minimizing and shifting the burden of proof. In closing argument, the prosecutor stated:

> The most important principle in our justice system is that in a criminal case, the State has the burden to prove beyond a reasonable doubt every element of every crime.
>
> . . . .
>
> This is a high burden, the highest burden, but it is not an impossible burden. It is not an unusual burden. It is the burden that must be met for every criminal conviction.

The prosecutor further stated to the jury:

> Reason must inform your doubt. If you have a doubt, it must be for a reason. Likewise, if you believe that something is proven, it must be for a reason.

"Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). Accordingly, statements by the prosecutor suggesting that the jury must convict unless they can articulate a reason to do otherwise are improper. Emery, 174 Wn.2d at 760; Evans, 163 Wn. App. at 645-46; State v. Johnson, 158 Wn. App. 677, 684-86, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-25, 228 P.3d 813 (2010); Anderson, 153 Wn. App. at 429-32. Such arguments imply "that the jury must be able to articulate its reasonable doubt by filling in the blank." Emery, 174 Wn.2d at 760. "This suggestion is inappropriate because the State bears the

burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. By suggesting otherwise, the State's 'fill in the blank' argument subtly shifts the burden to the defense." Emery, 174 Wn.2d at 760 (citations omitted). Thus, in Emery, the court found improper the prosecutor's closing statement to the jury that

> "in order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank."

Emery, 174 Wn.2d at 750-51. However, the court found no fault with the prosecutor's description to the jury of "reasonable doubt as a 'doubt for which a reason exists,'" which the court concluded "properly describe[d]" the reasonable doubt standard. Emery, 174 Wn.2d at 760.

Here, the prosecutor did not suggest to the jury that it must convict Gates unless it could "articulate its reasonable doubt by filling in the blank." Emery, 174 Wn.2d at 760. Rather, consistent with the trial court's instructions to the jury,[15] the prosecutor told the jurors that, "If you have a doubt, it must be for a reason." This statement "properly describes" the reasonable doubt standard. Emery, 174 Wn.2d at 760; see also Anderson, 153 Wn. App. at 430 (holding that "[t]he prosecutor's statements that a 'reasonable doubt' is one for which a reason exists were . . . not inaccurate," and noting that "the trial court's instructions to the jury only reiterated this concept"). Accordingly, contrary to Gates's contention,

[15] The trial court instructed the jury: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." (Jury Instruction 3).

the prosecutor's statement did not improperly shift the burden of proof to the defense.

Gates additionally asserts that the prosecutor improperly "equated what the jury must do to *acquit* with what the jury must do to *convict*"[16] by stating to the jury: "If you have a doubt, it must be for a reason. Likewise, if you believe that something is proven, it must be for a reason." We disagree. This statement, rather than relieving the State of its burden, accurately described the reasonable doubt standard and informed the jury that it must also have a reason in order to conclude that the State proved the elements of the offense. Moreover, the prosecutor additionally informed the jury that "the State has the burden to prove beyond a reasonable doubt every element of every crime," which the prosecutor described as "[t]he most important principle in our justice system." The prosecutor further described the State's burden as "the highest burden." The remarks challenged by Gates must be considered in the context of the prosecutor's entire argument. Anderson, 153 Wn. App. at 427. Because these statements neither minimized nor shifted the State's burden of proof, they do not constitute prosecutorial misconduct.

B

Gates additionally contends that the prosecutor committed misconduct in rebuttal closing argument "by misstating the law, denigrating defense counsel, and falsely implying the defense argument was racist."[17] Again, we disagree.

[16] Br. of Appellant at 81.
[17] Br. of Appellant at 84.

The challenged remarks neither denigrated defense counsel nor suggested that defense counsel's closing argument was racist. Rather, the prosecutor's remarks, which accurately described the objective component of the reasonableness standard, were made in response to defense counsel's invitation to the jury to consider the reasonableness of Gates's conduct from a purely subjective standpoint. We conclude that, in this context, the prosecutor's remarks do not constitute misconduct.

"A prosecuting attorney commits misconduct by misstating the law." State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Additionally, although a prosecutor "can certainly argue that the evidence does not support the defense theory," the prosecutor "must not impugn the role or integrity of defense counsel." Lindsay, 180 Wn.2d at 431-32. "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." Lindsay, 180 Wn.2d at 432. Nevertheless, the prosecuting attorney has "wide latitude" in closing argument "to argue reasonable inferences from the evidence." State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." Russell, 125 Wn.2d at 86.

Here, in closing argument, defense counsel urged the jury to consider Gates's life experiences in evaluating the reasonableness of his conduct. Defense counsel stated:

> A homicide is justifiable as is the case here when, specifically to the facts of this case, Mr. Gates had a reasonable belief that Mr. Baker intended to inflict death or great personal injury upon him. Mr. Gates reasonably believed that there was intent of such harm being accomplished, and Mr. Gates employed such force as a reasonably prudent person would under the same or similar conditions as they reasonably appeared to Mr. Gates taking into all – taking into consideration all the facts and circumstances as they appeared to Mr. Gates at the time, as they appeared to him.
>
> You have to place yourself into the shoes of Mr. Gates, right? And knowing everything that he knew at that time in terms of observations of what conduct is going on and also taking into effect his personal experiences and his personal knowledge about how situations like this unfold; when you do so and you incorporate and include his observations, his knowledge, and his experience in those two minutes [when the shooting occurred], . . . it is clear that he was justified, that his use of force was reasonable, and that his assessments were correct.
>
> . . . .
>
> So how do you assess all the facts and circumstances as they appeared to Chris Gates? Different life experiences of people do not make one's heightened ability to and danger any less reasonable than those experiences of people who have not shared the same life experience as Christopher Gates, all right? We all come from different places and we all bring different experiences into how we view situations. But looking at where Mr. Gates comes from and his experiences and his knowledge is how you have to view and assess was he reasonable in reaching the conclusions that he did. He has spoken to you . . . about how he has been at nightclubs and he has seen things occur at nightclubs that create a very unsafe environment. He has told you that he has had a cousin that was killed, he had a friend . . . that was killed, and he's been shot at himself. These are experiences that engrain themselves in you so that when you are in certain positions or at certain places that you are unfamiliar with or may not know the people, it shapes the way that you perceive what's out there. And people that don't have the life experience and knowledge that Christopher Gates has, they can walk into the Cedar Room and everything to them is going to seem real happy-go-lucky, right? There's no threats that

exist. But not everyone comes from the . . . same background, and so those experiences lead to the appearance of the observed conduct, right?

But, nonetheless, you have to take into consideration that experience and that knowledge that he has in assessing – whether his assessment of the threat was reasonable. And it may be difficult to fully grasp that witnessing such conduct and having such experience and knowledge can occur, but it is actually quite more common tha[n] you might expect. And how do we know this? Because we know from the evidence in this case, right? Those shared experiences amongst the parties in this case are why Adam Smith had a gun in the first place. Those shared life experiences are why Adam Smith took the gun into the club himself. He told you I was afraid. He didn't say . . . that there was any person that he was afraid of per se. He said he was afraid and that's why he brought the gun in with him.

Those shared experiences are why Adam Smith was shot the week before and suffered a potentially mortal injury, but for the grace of his telephone in his pocket according to his testimony. Those shared experiences are why Robert Baker armed himself with Adam Smith's gun at the car on April 22nd. Those shared experiences are why Christopher Gates took a gun to the club. Those shared experiences are why so many people have lost friends and loved ones because it is a lot more common, the threat and the danger does exist out there, and just because you may not have the life experience or the personal knowledge to see it when it is occurring does not mean that it is not occurring right before your very face.

. . . .

. . . So these are widespread experiences, and these experiences exist among many many people and they are reasonable experiences in order to assess situations, and that's what was happening at the Cedar Room on April 22nd.

The prosecutor, in rebuttal, stated:

The problem with Defense's argument about self-defense is this. He wants different standards for different people. He wants you to look at Mr. Gates and look at Mr. Baker and look at Adam [Smith] and figure because they were up to something or because they are from a different background that they get a different law. Wow. Wow. That because of who they are, it's okay to just shoot somebody for walking down the street out the back of a club. It's okay to assume that they're armed when you didn't even see exactly what was handed. It's a different standard for Robert [Baker] and a different standard for the defendant because they're

> different. Wow. The law applies to everyone equally and the law says that you can't kill somebody because you think they have a gun.

Gates first asserts that the prosecutor committed misconduct in rebuttal closing argument by misstating the law of self-defense. According to Gates, the prosecutor "falsely told the jury that [Gates's] explanation [in closing argument] was wrong."[18] We disagree. The reasonableness standard of self-defense incorporates both subjective and objective components. In closing argument, defense counsel encouraged the jury to evaluate the reasonableness of Gates's conduct based on his personal life experiences. In rebuttal, the prosecutor accurately, though perhaps unartfully, explained to the jury that the reasonableness standard also requires an objective inquiry. These comments, made in response to defense counsel's closing argument, do not constitute misconduct.

"The longstanding rule in [Washington] is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) (citing State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984)). This approach to reasonableness "incorporates both subjective and objective characteristics." Janes, 121 Wn.2d at 238. "It is subjective in that the jury is 'entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" Janes, 121 Wn.2d at 238 (alteration in original) (quoting

[18] Br. of Appellant at 90.

State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). "The self-defense evaluation is objective in that the jury is to use this information in determining 'what a reasonably prudent [person] similarly situated would have done.'" Janes, 121 Wn.2d at 238 (alteration in original) (quoting Wanrow, 88 Wn.2d at 236).

Our Supreme Court has articulated the significance of each component of the reasonableness standard. "The subjective aspects," the court has explained, "ensure that the jury fully understands the totality of the defendant's actions from the defendant's own perspective." Janes, 121 Wn.2d at 239. On the other hand, the objective component of the inquiry

> serves the crucial function of providing an external standard. Without it, a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions. In essence, self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs.

Janes, 121 Wn.2d at 239.

The court then cautioned against the consequence of a fully subjective reasonableness standard:

> "[I]f the reasonable person has all of the defender's characteristics, the standard loses any normative component and becomes entirely subjective. Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not and who blind themselves to opportunities for escape that seem plainly available. These unreasonable people may not be as wicked as (although perhaps more dangerous than) cold-blooded murderers . . . but neither are they, in practical or legal terms, justified in causing death."

Janes, 121 Wn.2d at 240 (alterations in original) (quoting Susan R. Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1435 (1990)).

Defense counsel in closing argument told the jurors that "looking at where Mr. Gates comes from and his experiences and his knowledge is how you have to view and assess was he reasonable in reaching the conclusions that he did." Counsel then referenced Gates's testimony that he had observed unsafe situations at nightclubs, that his cousin and friend had been killed, and that Gates himself had "been shot at." Such experiences, defense counsel told the jury, "shape[] the way you perceive what's out there." Counsel suggested that Gates's "heightened ability" to perceive danger due to his "life experiences" did not make his experiences "any less reasonable than those experiences" of others. Defense counsel told the jury that Gates's experiences are "widespread" and "they are reasonable experiences in order to assess situations." In essence, defense counsel argued that, given Gates's life experiences and alleged "heightened ability" to perceive danger, Gates acted reasonably in shooting Baker, even if people with different life experiences would have been unreasonable in so doing.

In rebuttal, the prosecutor stated that Gates was requesting "different standards for different people." She informed the jury that "[t]he law applies to everyone equally and the law says that you can't kill somebody because you think they have a gun." The prosecutor's remarks, although perhaps unartful, were in response to defense counsel's suggestion that the reasonableness of Gates's conduct should be evaluated based solely on his subjective experience. The remarks conveyed that, if the reasonableness standard was solely subjective, the standard would lose any external normative component and, thus,

a different standard could be applied to every defendant based on his or her own subjective experiences. These remarks were an accurate portrayal of the law. See Janes, 121 Wn.2d at 239 (discussing the subjective and objective components of the reasonableness standard). The question is not whether Gates's conduct was reasonable based on his own subjective beliefs, as suggested by defense counsel. Rather, the question is whether a "reasonably prudent person, knowing all [that Gates knew] and seeing all [that Gates saw]," would have shot Baker. Janes, 121 Wn.2d at 238. Contrary to Gates's contention, the prosecutor did not misstate the law of self-defense.[19]

Nor did the prosecutor's remarks in rebuttal malign defense counsel or suggest that defense counsel's closing argument was racist. Prosecutorial comments indicating that defense counsel's case presentation was "'a crock'" or involved "'sleight of hand'" impugn defense counsel's integrity and, thus, constitute misconduct. Lindsay, 180 Wn.2d at 433-34; Thorgerson, 172 Wn.2d at 451-52. No such comments were made here. Moreover, contrary to Gates's suggestion, the prosecutor's remarks did not imply that defense counsel was seeking a different standard because Gates is a Black man. Rather, the prosecutor's argument was that the reasonableness standard is not solely subjective and that, were it so, a defendant's life experiences would create a

[19] We also express our disagreement with an argument that found its way into Gates's reply brief on appeal. Therein, Gates asserted that implicit in the prosecutor's remarks "is the assumption that the objective 'reasonable person' standard means a middle-aged white person with experiences in privileged white communities." Reply Br. of Appellant at 37. This is not so. That the reasonableness standard includes an objective component does not implicate the subjective experience of a "middle-aged white person" any more than it implicates Gates's own life experiences.

"different standard" for justifiable homicide.[20]

The prosecutor in closing argument accurately described the reasonable doubt standard without either minimizing or shifting the State's burden of proof. The prosecutor's remarks in rebuttal closing argument, which were made in response to defense counsel's portrayal of the reasonableness standard as purely subjective, accurately portrayed the objective component of that standard. The remarks neither denigrated defense counsel nor implied that counsel's closing argument was racist. The prosecutor did not commit misconduct, and Gates was not denied a fair trial.

VI

Gates also contends that the admission of evidence of his prior robbery conviction violated his constitutional right "to appear and defend in person" and "to testify in his own behalf," WASH. CONST. art. I, § 22, and was improper pursuant to ER 609(a)(2). We disagree. As Gates acknowledges, our Supreme Court has previously rejected similar claims of error. Accordingly, the trial court did not err by admitting evidence of Gates's prior robbery conviction.

It is well established in Washington that evidence of crimes of dishonesty, including theft and robbery, is per se admissible at trial for purposes of

[20] For these same reasons, we reject Gates's assertion that our Supreme Court's decision in State v. Zamora, 199 Wn.2d 698, 512 P.3d 512 (2022), requires reversal of his convictions. The prosecutor's remarks could not be viewed by an objective observer as an appeal to the jurors' potential prejudice, bias, or stereotypes. See Zamora, 199 Wn.2d at 718. Rather, as we have discussed, the remarks implicated the dual nature of the reasonableness standard. See Zamora, 199 Wn.2d at 718-19 (holding that the pertinent inquiry requires the court to consider "the apparent purpose of the statements, whether the comments were based on evidence or reasonable inferences in the record, and the frequency of the remarks").

impeachment pursuant to ER 609(a)(2).[21] State v. Rivers, 129 Wn.2d 697, 705, 921 P.2d 495 (1996); State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991); State v. Brown, 113 Wn.2d 520, 552-53, 782 P.2d 1013, 787 P.2d 906 (1989). The admission of such evidence, our Supreme Court has concluded, does not impermissibly interfere with a defendant's right to testify in his or her own behalf. State v. Ruzicka, 89 Wn.2d 217, 232-35, 570 P.2d 1208 (1977). In Ruzicka, the defendant asserted that a statute permitting the introduction of prior conviction evidence for impeachment purposes was "unconstitutional as permitting the prosecutor to impose a penalty on the defendant for exercising his constitutional right to testify on his own behalf." 89 Wn.2d at 232. Our Supreme Court disagreed:

> Not all burdens placed on the defendant's choice of whether to testify constitute impermissible penalties on his exercising his constitutional right to testify on his own behalf. For example, the police may obtain a statement from the defendant which violates his Miranda[22] rights. Although his statement cannot be introduced in the prosecutor's case-in-chief, if the defendant chooses to testify the prosecutor can use the defendant's statement for impeachment purposes. In deciding whether to testify, the defendant must weigh the pros and cons of perhaps having his previously inadmissible statement heard by the jury. This procedure is not thought to be inconsistent with the defendant's right to testify.

Ruzicka, 89 Wn.2d at 233-34 (citations and footnotes omitted).

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[21] Evidence Rule 609 provides:
For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by the public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

[22] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In Brown, the court similarly rejected the assertion that ER 609 must be narrowly construed in order to avoid a "Hobson's choice" in which the defendant "faced with prior conviction evidence" must "either refuse to testify and lose any benefit of presenting his or her side of the story as is the defendant's right, or testify and risk the effect of the inherent prejudice associated with prior conviction evidence." 113 Wn.2d at 553. There, the court explained that

> as hard as this choice may be for a defendant, requiring such choices is not inconsistent with the criminal process . . . . Further, we do not lose sight of the principle that a defendant has no right to testify free of impeachment, and that the purpose of ER 609(a)(2) is to permit admission of evidence affecting the credibility of the witness. Society has an interest here in evaluating the credibility of defendants with criminal convictions affecting their credibility and in preventing a defendant with a criminal past from presenting himself or herself as an "innocent among thieves."

Brown, 113 Wn.2d at 553-54.

Gates nevertheless contends that robbery is not a crime of dishonesty and, thus, that the admission of his robbery convictions was erroneous under a proper reading of ER 609(a)(2). He further contends that admission of the prior conviction evidence impermissibly interfered with his right to testify in his own behalf pursuant to article I, section 22. Gates acknowledges, however, that his arguments are foreclosed by our Supreme Court's decisional authority. Because that authority "is binding on all lower courts until it is overruled," State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984), Gates does not establish an entitlement to appellate relief on these claims.

VII

Gates further asserts that his right to be free from double jeopardy was violated by the inclusion in his judgment and sentence of convictions of both second degree intentional murder and second degree felony murder. The State concedes that the felony murder conviction must be vacated. We agree and accept the State's concession. Accordingly, we remand to the trial court for entry of an order vacating the second degree felony murder conviction and amending the judgment and sentence to remove reference to that conviction.

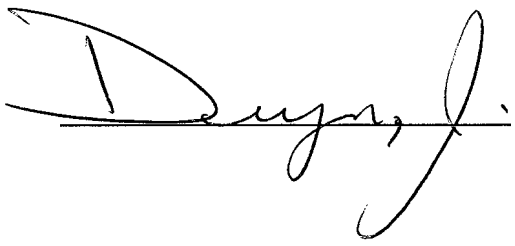
Both our federal and state constitutions protect persons from being twice put in jeopardy for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. In addition to prohibiting a second prosecution for the same offense after acquittal or conviction, the protection against double jeopardy also prohibits the imposition of multiple punishments for the same criminal conduct. State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006). "The term 'punishment' encompasses more than just a defendant's sentence for purposes of double jeopardy." State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (citing State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007)). "Indeed, even a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections." Turner, 169 Wn.2d at 454-55. Thus, double jeopardy may be violated "*either* by reducing to judgment both the greater and the lesser of two convictions for the same offense *or* by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid." Turner, 169 Wn.2d at 464; see also

Womac, 160 Wn.2d at 647, 660 (holding that additional convictions premised on the same facts must be vacated, even when the trial court imposed sentence on only one of the convictions). "To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction." Turner, 169 Wn.2d at 464.

Here, Gates was convicted of both second degree intentional murder and second degree felony murder for his conduct resulting in the death of Baker. The felony judgment and sentence includes both of the convictions, but it indicates that the felony murder conviction was vacated "for sentencing purposes only, in order to avoid multiple punishments for one criminal act." The State concedes that the inclusion of the felony murder conviction in the judgment and sentence violates double jeopardy protections. We accept the State's concession and remand to the trial court for entry of an order vacating the second degree felony murder conviction and amending the judgment and sentence to remove any reference to that conviction.[23]

[23] Gates raises numerous additional claims of error in his statement of additional grounds, including that (1) the trial court erroneously denied his motion to suppress search warrants, (2) the trial court erred by allowing the State to amend the information on the first day of trial, (3) the trial court improperly excluded evidence relevant to his perceptions while committing the offense by sustaining hearsay objections, (4) the trial court erroneously admitted into evidence text messages from the days following the offense, (5) the trial court erred by granting the State's request for a first aggressor jury instruction, (6) the trial court erroneously granted the State's request for an instruction on the lesser included offense of intentional murder in the second degree, (7) the trial court provided to the jury an erroneous to-convict instruction for felony murder in the second degree, (8) the State engaged in misconduct that violated his right to a fair trial when the prosecution (a) allegedly appealed to racial bias in referencing the lack of remorse and the use of language in Gates's text messages and in questioning Gates's decision to visit the nightclub outside of which the incident occurred and (b) allegedly impugned Gates's decision to exercise his constitutional right to bear arms, (9) the trial court erroneously denied his proposed jury instructions regarding self-defense, and (10) his right to present a defense was violated by the trial court's refusal to instruct the jury on justifiable homicide in resistance of a felony. After thoroughly reviewing these claims of error, we conclude that they are without merit.

Affirmed and remanded.



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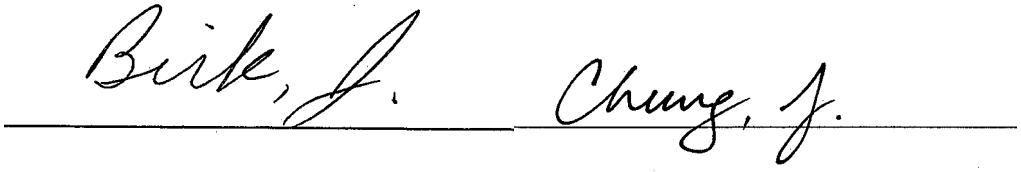

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