COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent,	)	No. 70762-1-I
vs.	)	
TOMAS AFEWORKI, Appellant.	)	STATE'S RESPONSE TO DEFENDANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

A. IDENTITY OF RESPONDING PARTY

At the direction of this Court, respondent, the STATE OF WASHINGTON, responds to appellant's "Statement of Additional Grounds for Review (Amended Brief)" ("SAGR"), filed in this Court on November 14, 2014, as set forth below.

B. RELEVANT FACTS AND ARGUMENT

The facts of this case are set out in detail in the Brief of Respondent. Additional facts will be referenced as needed.

1. Alleged Appearance of Fairness Violations.

An appearance of fairness claim requires proof of actual or potential bias; mere speculation is not enough. State v. Harris, 123 Wn. App. 906, 914, 99 P.3d 902 (2004), *abrogated on other grounds by* State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). The doctrine requires the reviewing court to consider how the proceedings would appear to a reasonably disinterested person. State v. Ring, 134 Wn. App. 716, 722, 141 P.3d 669 (2006). A judge is presumed to act without bias or prejudice. Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945, *review denied,* 122 Wn.2d 1019 (1993).

The tenor of Afeworki's argument is that the trial judge and the prosecutor conspired throughout the proceedings to deprive him of a fair trial. In making his arguments, Afeworki frequently relies on his own perception of tone of voice or facial expression. Because such things are outside the record on appeal, this Court cannot consider them in deciding whether the trial court's actions ran afoul of the appearance of fairness doctrine. Afeworki also relies on statements that he claims were made, but that are not included in the transcript of trial court proceedings. Again, this

Court cannot consider these alleged statements, as they are outside the record. The record that is properly before this Court does not support Afeworki's allegations.

Afeworki first focuses on what he refers to as the "monkey clock." The issue appears to have arisen when the trial judge, noting a difference in the time shown between the court's computer and the courtroom clock, remarked: "No wonder I am always late when I am out on the bench. I am following the monkey. We will get him to the correct time." 1RP 178-79.

The reference was to a clock with a face that depicted designer Paul Frank's monkey logo, which the judge had retrieved from chambers and put in the courtroom when the courtroom clock ceased to function properly. 4RP 13-14. Afeworki insisted that the judge's use of this clock was racist, and showed that she was biased against him. 4RP 9-10, 12-13. The trial judge explained that she had not intended to offend Afeworki, and she apologized if she had inadvertently done so. 5RP 13. These facts would indicate neither bias nor prejudice to a disinterested observer.

Afeworki next alleges that the trial court exhibited personal bias in dismissing him from the courtroom when a group of college

students was in attendance. At the end of the court day, the judge said: "Do any of the students want to stay and ask questions? If not – one or two. Okay, let's get the defendant out." 3RP 55. Afeworki again took offense, insisting that the judge's behavior was "degrading and dehumanizing," that she had a "disgusting" look on her face, and that she said "Shoo, shoo, shoo" while waving her hands dismissively. 4RP 15; 5RP 13-14. The judge denied doing this, and the prosecutor's recollection of the incident did not support Afeworki's rendition. 4RP 15-16; 5RP 13-14. There is nothing in the record to support Afeworki's version of this incident.

Convinced that one of his former attorneys, Anthony Savage, was ineffective, Afeworki accuses the trial judge of showing her bias by speaking favorably of Savage. Again, there is nothing in the record to support this claim.

Lacking a record to support his allegations of bias, Afeworki turns to conspiracy theories, alleging that the court is hiding video and audio recordings that would confirm his claims. The record belies this. The parties requested a transcribed record for this trial. 8RP 20. The court made it clear that it would not be possible to use the audio recording system in addition to the court reporter,

since "[t]here can only be one record, one official record of a trial." 8RP 20. The court also explained that the cameras in the courtroom did not normally record the proceedings; they were there only in case of emergency, and had not been turned on during the proceedings in this case. 23RP 217-19. A reasonably disinterested person would infer neither bias nor prejudice here.

Afeworki also argues that the trial court showed bias in denying him time to prepare for trial. This issue arises out of Afeworki's last-minute pro se status. Barely a week before trial began, the trial court made it clear that Afeworki had "created a situation where [his] attorney could no longer ethically represent [him]," and that Afeworki's actions were "geared towards and intended to try to get a new attorney because [the court] denied [Afeworki's] prior requests to have a new attorney." 10RP 115. The court informed Afeworki that "we will go forward with trial and you will be representing yourself." 10RP 115. Moreover, Afeworki had only the day before insisted on representing himself, and had assured the court that he had "no issues with moving forward with the trial." 9RP 81-82, 89-92. There is no bias shown here.

Afeworki claims that the trial court showed demonstrated bias in failing to forward his motion for discretionary review to the Court of Appeals. The record before this Court is replete with pro se documents from Afeworki, many filed while he was represented by counsel. *See, e.g.,* 3RP 8-10; 5RP 11-12. The motion for discretionary review was itself filed while Afeworki was represented. CP 275. One week later, after Afeworki had been allowed to go pro se, the court directed the superior court clerk's office to forward the motion to the Court of Appeals. 12RP 2-3; CP 275-76, 540-41.

Afeworki's complaints about the court's allegedly biased rulings -- on the admissibility of evidence, the extent of cross-examination, and other matters -- betray only his lack of understanding of the rules of evidence. *See, e.g.,* 18RP 135. The portions of the record that he cites to in support of his claim that the trial court improperly threatened him show that the court had a valid basis for its actions in each case, and that the court was in fact remarkably patient under the circumstances. And not for the last time, he quotes the record he *wishes* existed, rather than the one that actually exists. *Compare* SAGR at 7 ("I am not going to get

shocked behind you.") *with* 17RP 119 ("I am not going to get behind you.").

Afeworki contends that the trial court did not consider the facts elicited at pretrial hearings pursuant to CrR 3.5 and 3.6, but simply ruled against him to deprive him of a fair trial. He does not assign specific error to any of the court's factual findings. Thus, they are verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). These findings support the court's conclusions of law. CP 543-49, 559-63; *see also* CP 104-22.

Afeworki also objects to the admission of the DNA evidence, arguing that the profile obtained fell below the threshold for entry into CODIS[1]. However, the fact that only a partial profile was obtained was fully explained to the jury, and the resulting "match" was quantified accordingly. 19RP 33-40. The limitations of a partial profile, and the requirements of CODIS, were fully explored on cross-examination. 19RP 52-53. There is no bias shown here.

The trial court did not prevent Afeworki from speaking at his sentencing. He was allowed allocution. The court merely reminded

[1] Combined DNA Index System.

him, more than once, that the purpose of allocution was not to relitigate guilt or innocence, but to give the court any information he wished to impart relevant to sentencing. 23RP 196-204.

Nor is there bias shown in the trial court's handling of the State's post-sentencing request for release of the gun used in the murder to the crime lab for testing, based on a tip that it might be involved in other crimes. 23RP 226. In response to Afeworki's objection, the court directed that removal of the exhibit be avoided if possible, or at least limited; in addition, in response to Afeworki's concern that detectives would tamper with the evidence in a way that would prejudice him, the court authorized an expert on behalf of the defense to observe any testing.[2] 23RP 226-37.

And far from preventing Afeworki from accessing the law library, the court offered to sign an order that would allow him such access so that he could litigate post-trial motions. 23RP 239-40. It was only after noting that there were no pending motions, and that an appeal had been filed and appellate counsel appointed, that the

[2] The State ultimately withdrew its motion, and the exhibit was never removed from evidence. 23RP 256-57.

court entered an order indicating that the case was concluded in the trial court. 23RP 258-59.

2. **Alleged Prosecutorial Misconduct.**

To establish prosecutorial misconduct, a defendant must show that the conduct was improper and that it prejudiced his right to a fair trial. State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553, *rev. denied*, 167 Wn.2d 1007 (2009). The defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 883. If the defendant did not object at trial, he is deemed to have waived any error unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

The prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Jackson, 150 Wn. App. at 883. The prosecutor has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

Afeworki never objected to the remarks he now challenges; hence, he must show that they were so flagrant and ill-intentioned that they could not have been cured by timely instruction from the trial court.[3] He has failed to show how he meets this standard.

In any event, there was no misconduct. The prosecutor's reference in his introductory remarks in closing argument to the travails that jurors endure – "unexplained delays and less than microbrewed coffee back in the jury room" – were not tied in any way to Afeworki. 21RP 5. It is pure speculation to think that jurors would blame any delays (or the bad coffee) on the defendant.

Nor did the prosecutor improperly inject personal belief by arguing that Afeworki was guilty, where the argument was prefaced by, "Looking at the evidence that was presented and the testimony given, as you must do as jurors . . . ." 21RP 5. And the prosecutor's comment in response to Afeworki's conspiracy theory – "The true killer's among us. He's been addressing all of us." – was not a comment on Afeworki's exercise of his right to self-representation, but is more logically read as a comment on

[3] Afeworki's objection to "everything," made prior to voir dire (11RP 235; SAGR at 16), cannot substitute for a timely and specific objection.

Afeworki's testimony at trial. 21RP 75. Because he testified, he was subject to the same rules as any other witness. *See* Thorgerson, 172 Wn.2d at 448 (prosecutor has wide latitude to argue inferences re credibility of witnesses).

As to the prosecutor's alleged misrepresentations of the witnesses' testimony, a prosecutor has wide latitude to argue reasonable inferences from the evidence. Id. The jury heard the testimony of those witnesses. If jurors did not want to draw the inferences that the prosecutor was urging, they were free to refrain from doing so. Moreover, the jury was instructed, and repeatedly reminded, that the remarks, statements and arguments of counsel were not evidence, and that they should disregard any remarks, statements or arguments not supported by the evidence or the law as given by the court. CP 466; 21RP 33, 64. Jurors are presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). Finally, while it is not clear that Detective Kasner testified that the Crime Lab no longer tests for gunshot residue, as the prosecutor asserted (21RP 68), forensic scientist Kathy Geil *did* testify that the lab no longer does hand swabs for gunshot residue. 18RP 15-16. Such minor misstatements, and

reasonable inferences from the evidence, hardly can be said to violate R.P.C. 3.3(a)(1) (prohibiting a lawyer from knowingly making false statements of fact or law to the tribunal).

The prosecutor's references to Afeworki as "the shooter" were in each instance tied to the evidence introduced at trial. 21RP 20-21, 23, 26-27. The fact that the prosecutor in rebuttal closing argument, after refuting Afeworki's claim that there had been a conspiracy to frame him, referred to Afeworki as the "true killer," is well within the bounds of proper argument. 21RP 64-75. There is nothing here that is akin to the arguments on which reversal was based in State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984).

It is hard to see the prejudice from Afeworki's next claim – that the prosecutor claimed personal knowledge in saying that the gun that Officers Didier and Eastman discovered underneath the liner of the bathroom trash can "may have been photographed." 21RP 66. Both officers testified to exactly what they did. 17RP 168-86 (Didier); 18RP 63-92 (Eastman). Didier said that he had lifted the trash can liner and discovered the gun underneath it, then returned the liner to its original position at the direction of a homicide detective. 17RP 176-77. The Crime Scene Investigation

Unit ("CSI") supervisor, Sergeant Stampfl, acknowledged that he would not have done it that way. 15RP 123-24.

Suggesting to the jury that tying Afeworki to the gun through his DNA was more significant than finding his fingerprints on the trash can liner would have been was proper argument. The fact that the DNA profile obtained was incomplete was fully disclosed to the jury, and the probability estimate made was accordingly lower (1 in 120,000). 19RP 33-40. The prosecutor's arguments about the white towel, which was seen in the shooter's hand by eyewitnesses Haylom Gebra (15RP 138), Mohammed Dima (16RP 146) and Elijah Knight (16RP 55-56), and shown in a photograph lying near the doorway of Zaina Restaurant (14RP 165) and in the video from the Gatewood Apartments (18RP 147), but was not taken into evidence (14RP 165), were reasonable inferences from the evidence, and in no way shifted the burden of proof to Afeworki.

Afeworki's comparison of this case with the situation in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), is wholly inapposite. In Fleming, the appellate court reversed because the prosecutor told jurors that they could acquit only if they found that the witness lied or was confused, and because the prosecutor

shifted the burden of proof and infringed on the defendant's right to remain silent. Id. at 214. But in this case, Afeworki's defense was that there was a grand conspiracy against him. 21RP 36-64. He specifically argued that police had planted evidence and perjured themselves. 21RP 61. Under these circumstances, it was not improper for the prosecutor to point out the monumental, coordinated effort that would have taken.

The prosecutor properly argued that the State's burden of proof existed only as to the elements of the crime, and that the State need not answer every question that might arise. CP 471 ("The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt."). As to the prosecutor's argument about how ammunition ended up in the toilet bowl, Afeworki again confuses injection of personal belief with argument based on reasonable inferences from evidence.

In making his arguments about same-sex marriage and "handing over" the gun to CSI, Afeworki misunderstands the prosecutor's statements. As to the former, the prosecutor was speaking of "common experience," not his own personal experience. 21RP 69. And the argument that "no one tampers with

the gun until it's handed over to CSI and CSI collects it" must be understood in the context of the previous paragraph; "it's handed over" refers to the scene (the bathroom), after which CSI collected the gun. 21RP 73.

Finally, the prosecutor tied his argument that "to some degree" Afeworki acknowledged frames in the video from the Gatewood Apartments, to Afeworki's own testimony – that is, inferences from the evidence. 21RP 32. And telling the jury that Afeworki was the man pictured in the video was similarly argument based on reasonable inferences. 21RP 10.

Based on the foregoing, Afeworki has shown neither misconduct nor prejudice. *See also* CP 523-27, 550-54.

3. **Alleged Governmental Misconduct & Brady Violations.**

In a criminal case, the prosecution must disclose to the defense any evidence that is favorable to the accused and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). Evidence is material only if there is a "reasonable probability" that, had the evidence been disclosed, the result of the proceeding would have been different. United

States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985). A "reasonable probability" is one that is sufficient to undermine confidence in the outcome. Id.

The failure to preserve "potentially useful" evidence is not a due process violation unless the defendant can show bad faith on the part of the State. State v. Wittenbarger, 124 Wn.2d 467, 477, 880 P.2d 517 (1994) (citing Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed.2d 281 (1988)). Potentially useful evidence is "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011) (quoting Youngblood, 488 U.S. at 57), *review denied*, 173 Wn.2d 1026 (2012). "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Groth, 163 Wn. App. at 558 (quoting Youngblood, 488 U.S. at 56 n.*).

Afeworki first complains of late discovery. Many of Afeworki's complaints stem from the difficulties of self-

representation while one is incarcerated. Afeworki forced his attorney to withdraw on the eve of trial.[4] The prosecutor immediately provided a complete copy of discovery to Afeworki in open court, consisting of 2712 pages, as well as DVDs and CDs containing scene photos, photos from the medical examiner, and various videos. 10RP 121-22. Several days later, the prosecutor personally delivered this discovery to the jail; the jail confirmed that Afeworki had been given access to a laptop, and that the jail would load the discovery onto the laptop. 11RP 224-25.

Afeworki's complaint that he was not given a complete set of photos rings hollow in light of the record; when he demanded the photos in court before the jury, the prosecutor responded that "a complete color copy set of the CSI pictures was provided to Mr. Afeworki last week." 15RP 23-24. Afeworki's response was, "I don't got time for that shit." 15RP 24.

Afeworki complains that the State failed to preserve certain items, including the white towel that is shown in the CSI photo on the floor near the door of Zaina Restaurant. Detectives testified

[4] *See* Brief of Respondent for details.

that they did not know the significance of the towel at the time they processed the scene, and consequently did not collect it. 14RP 165-66; 15RP 111. Afeworki's claim of prejudice is not clear. Given the testimony of several witnesses and the video showing a man with a white object in hand, there is little doubt that the white towel was used to cover the gun that killed Michael Yohannes. Assuming there was blowback of blood or tissue, the towel could have kept it from being deposited on the shooter. But this is speculative – such blowback occurs in only about 50% of close-up shootings, and is less likely to result from a single shot. 18RP 152; 19RP 21-22. The towel could similarly have kept gunshot residue from the shooter's hands, but Afeworki was not tested for gunshot residue. 18RP 15-16. He fails to explain how the towel could have shown the identity of the "true killer."

Afeworki also complains that video from Zaina Restaurant should have been preserved. While the restaurant employee testified that there were cameras in the restaurant (15RP 52), Detective Moss testified that the cameras were not recording during this incident. 18RP 137. Afeworki fails to explain how video of him in the restaurant, even if it existed, would be exculpatory.

Afeworki claims that, while transporting him to the jail, detectives used racial slurs and threatened to frame him. He accuses the police of destroying the record of this. But Detective Steiger testified that the car used was an unmarked one that, unlike marked patrol cars, was not equipped with audio or video recording capability. 13RP 140-41. Afeworki has brought forth nothing to refute this but his own speculation and belief.

Afeworki's Brady claim focuses on his belief that the in-car video that recorded his Miranda[5] advisement has been tampered with, in that it cuts off abruptly in the midst of the advisement. 1RP 38; Ex. 114. At trial, the prosecutor explained that his own copy was similarly truncated, as was the detective's. 16RP 25-26. Afeworki now claims that his family has obtained a complete copy, and he has filed this "new evidence" as sub #243 (converted to a file exhibit, as the disk it contains cannot be scanned). But the "new" copy appears to be identical to the one already in the record (Ex. 114).[6]

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

[6] Both copies have been designated to be sent to this Court. The relevant file on each is the third one ("7520"); the Miranda advisement is at the very end.

Afeworki also complains that the video from the interrogation room at the precinct is incomplete. Even if true, he cannot he show materiality; he invoked his right to an attorney, and the State did not obtain or attempt to introduce at trial any custodial statements. His claims are based on nothing more than speculation.

Afeworki's complaints about page number mix-ups (14RP 48-54) and handwritten notes of a forensic examiner (18RP 40-41) are similarly unavailing, as he has made no showing that the outcome of his trial was affected in any way.

4. **Alleged Witness Tampering.**

Afeworki claims that Detective Steiger tampered with the testimony of witness Haylom Gebra. During a brief break in testimony to resolve an evidentiary issue, the trial court asked witness Gebra to step out into the hall for "two minutes." 15RP 156. When testimony was about to resume, Afeworki informed the court that Steiger had walked Gebra out of the courtroom, patting him on the back and whispering to him. 15RP 158-59. When the court inquired why Steiger had done that, he responded, "He asked me because the paralegal wasn't here, just accompany him out to

the hallway since I was available." 15RP 159. The court accepted this explanation. 15RP 159.

During cross-examination of Gebra, Afeworki asked what Gebra and Steiger had talked about. 16RP 29-30. Gebra responded, "You doing a good job." 16RP 30. Asked what the prosecutor had told him after court the previous day, Gebra said, "We'll see you – we need to see you tomorrow." 16RP 30.

Afeworki's claim of tampering rests on nothing more than speculation. He claims that the prosecutor, responding to Steiger's explanation to the court, said something like "What are you doing man that's not right," but no such comment appears in the record. Nor does he specifically point to material facts in Gebra's testimony that he believes resulted from the alleged tampering. This claim is baseless, and should be rejected.

5. **Allegedly False Certification for Determination of Probable Cause.**

Afeworki takes issue with several statements in the Certification for Determination of Probable Cause, and complains as well of several things that he believes should have been included but were not. Regardless of the merits of his

disagreements with the Certification as filed, there can be no question that there was ample probable cause to arrest Afeworki. *See* CP 22-24, 456-60; Brief of Respondent at 3-11. "[A] judicial hearing is not prerequisite to prosecution by information." Gerstein v. Pugh, 420 U.S. 103, 119, 95 S. Ct. 854, 43 L. Ed.2d 54 (1975). In any event, "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." Id.

6. **Alleged Use Of False Testimony**.

Afeworki claims that witnesses perjured themselves, and that the prosecutor knowingly presented and argued perjured testimony. These claims are specious.

Afeworki's first claim relates to Haylom Gebra, who testified that someone who wore a yellow jacket and worked for the City of Seattle asked him who did the shooting; Gebra pointed out who did it, and the man followed that person. 15RP 139, 161. Mohammed Dima testified that he is a downtown safety ambassador, and that his uniform includes a yellow jacket. 16RP 142. Dima, who was working in the vicinity at the time of the shooting, denied that anyone pointed him toward anyone else. 16RP 156. Detective

Magan, who responded to the shooting scene within minutes, testified that there were Metropolitan Improvement District ("MID") Ambassadors on the scene, and that police used "them" for traffic and pedestrian control until sufficient police officers arrived to take over those tasks. 17RP 66, 70.

In his closing argument, Afeworki argued that Dima's testimony "reveals that Haylom Gebra lied and never pointed anybody towards north to him." 21RP 51. In rebuttal, the prosecutor cited Detective Magan's testimony that there were multiple MID ambassadors present at the scene of the shooting, and that Gebra might have interacted with an ambassador other than Dima. 21RP 71-72. This is a reasonable inference from the evidence, and is proper argument.

Afeworki also accuses the prosecutor of colluding with Detective Steiger to produce false testimony. Afeworki asserts that he caught Detective Kasner in a lie about whether he had ever handled the gun, and Steiger covered up the lie. This claim ignores the testimony. Kasner testified that he never handled the gun. 13RP 113. When Afeworki pointed out that Kasner had submitted the gun for fingerprints, Kasner responded: "This would have been

just a latent print request form. I didn't take the weapon there." 13RP 113-14. Steiger merely confirmed this: "The fingerprint lab is in the same physical location as our evidence section. We send the request, they go over and get the item, and then they bring it back and do everything they need to do, and then they return it to evidence. We don't have any physical contact with the item." 14RP 36; *see also* 14RP 39 ("We don't physically handle things that we're submitting either to the crime lab or to the fingerprint section. We just request that it be examined.").

Similarly, Afeworki accuses Steiger of "conjur[ing] with the help of prosecutor" to explain the absence of so-called "blowback" (blood or tissue residue) on Afeworki's clothing. Steiger testified that, in his experience, blowback is deposited about half the time. 18RP 151-52. This explanation was buttressed by a forensic scientist, who testified that blowback is commonly absent when there is only a single shot. 19RP 21-22.

As to the white towel that was not collected from the floor of Zaina Restaurant, Detective Steiger explained that he did not learn of the significance of that item until two or three days after the shooting when he was able to interview Haylom Gebra. 18RP 151.

This was confirmed by Detective Suguro, who responded to the scene. 14RP 165 (did not collect towel, learning of its significance only three or four days after the shooting).

As to the time-stamp on video footage from the Gatewood Apartments, camera 1, it is difficult to ascertain Afeworki's complaint. Detective Steiger's explanation of correcting the time based on the time at which a patrol officer's car can be seen on camera 1 pulling up to the scene makes perfect sense. 18RP 154-56. Afeworki has shown nothing that would merit reversal of his conviction, suppression of evidence, or remand to a different judge.

7. **Alleged Ineffective Assistance of Counsel.**

To prevail on a claim of ineffective assistance of counsel the defendant must demonstrate that: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different but for the challenged conduct. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the

court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, *rev. denied*, 115 Wn.2d 1010 (1990).

Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). When an ineffective assistance claim is based on counsel's failure to call a witness, prejudice generally cannot be established without an affidavit from the witness indicating what the witness would say if called to testify. See State v. Neidigh, 78 Wn. App. 71, 81, 895 P.2d 423 (1995); State v. Sherwood, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

Attorney Anthony Savage appeared on Afeworki's behalf on February 7, 2011. CP 593. On March 29, 2011, Savage's doctor sent a letter "To Whom It May Concern," announcing that Savage had been diagnosed with cancer of the esophagus, that he would be undergoing treatment, that he would likely be able to work no more than part-time until at least June 2011, and that a full recovery was possible. CP 342. On September 22, 2011, the same doctor announced that the treatment had not been effective, and that

Savage would be closing his practice. CP 341. On October 4, 2011, Savage withdrew from representation of Afeworki. CP 594.

While still representing Afeworki, Savage on April 21, 2011 received notification from the prosecutor that the available DNA would be completely consumed in testing by the State. CP 130. The prosecutor asked if Savage wished to have an expert present during the testing. CP 130. On May 10, 2011, Savage responded that the defense would not be hiring its own expert. CP 131.

Afeworki contends that this was ineffective. To start with, he cannot show deficient performance. As the trial court explained:

> The decision of whether or not to employ an expert is a discretionary decision, and it's trial strategy that is up to the attorney. There are a lot of reasons why you would not employ your own expert in this case, because you can then argue to the jury we didn't have our expert, you know, there was nobody there, it was destroyed, we can't test it, as opposed to having your own expert there and having your expert also agree that it is the DNA of your client.

2RP 104. A reasonable strategic decision such as this cannot support a claim of ineffective assistance.

Nor can Afeworki show prejudice. He seems to believe that having his own expert would have led to identification of another suspect, or lent support to his conspiracy theory. This is nothing

more than speculation. Moreover, the forensic scientist who analyzed the DNA explained to the jury that she obtained sufficient DNA at only four of the thirteen markers required for a complete profile. 19RP 33-36. The probability estimate was accordingly quite low – "[t]he estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 120,000." 19RP 37. *See also* CP 457-58, 549. There is no basis to assume that a defense expert would have reached a different conclusion.

Afeworki's complaint that Savage should have seized the hard drives from the cameras that recorded events related to the shooting is similarly unavailing. His belief that exculpatory evidence existed on the hard drives that was not present on the copies obtained by police is purely speculative. The "choppiness" observed on the video footage from the Gatewood Apartments cameras resulted at least in part from the fact that those cameras were motion-activated – when nothing was happening within the field of a particular camera (there were 16 in all), the camera stopped recording. 17RP 157-59. *See also* CP 457. Afeworki has shown no prejudice here.

C. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Respondent, the State respectfully asks this Court to affirm the judgment and sentence.

Submitted this 24th day of March, 2015.

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Today I directed electronic mail addressed to the attorney for the appellant, **Gregory C. Link**, containing a copy of the **State's Response to Defendant's Statement of Additional Grounds for Review**, in **STATE V. TOMAS AFEWORKI**, Cause No. **70762-1-I**, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

03-24-15

Date

Done in Seattle, Washington

KING COUNTY PROSECUTOR

March 24, 2015 - 1:10 PM

Transmittal Letter

Document Uploaded: 707621-Statement of Additional Grounds Brief.pdf

Case Name: TOMAS AFEWORKI
Court of Appeals Case Number: 70762-1

Party Respresented: WAP
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Statement of Additional Grounds
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Ly Bora - Email: bora.ly@kingcounty.gov

A copy of this document has been emailed to the following addresses:

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