Supreme Court No. 95744-4
COA No. 74408-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHAVEL LEVRON POPE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Shavel Levron Pope requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Pope, No. 74408-9-I, filed March 26, 2018. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Is Pope entitled to a new trial based on multiple instances of prejudicial jury misconduct?

2. Did the prosecutor commit misconduct by commenting on Pope's rap music, denying him a fair trial?

3. Do Pope's convictions for first degree assault and drive-by shooting violate double jeopardy?

4. Did Pope receive ineffective assistance of counsel?

5. Did the prosecutor commit misconduct by improperly cross-examining a key witness, making improper remarks, and vouching for State witnesses?

6. Did the cumulative effect of multiple errors and instances of misconduct deny Pope a fundamentally fair trial?

C. STATEMENT OF THE CASE

Pope's girlfriend Roberta Castillo had told Pope about acts of violence that her former boyfriend Jermaine Hickles had committed against her and her son. 7/20/15RP 648-52, 736-39; 7/21/15RP 739, 794. Pope was also told that Hickles always carried a gun. 7/21/15RP 791-92, 807. And, he was told that Hickles had repeatedly threatened to harm him. 7/20/15RP 655, 662-64; 7/21/15RP 795-99, 803-04. One day, Hickles threatened Pope directly. 7/20/15RP 742-45. Pope took these threats seriously. 7/21/15RP 890.

Castillo testified that, on May 21, 2014, she and her daughter were at the laundromat when Hickles pulled up next to them, looked at them angrily and gave them a "dirty look." 7/14/15RP 1547-49, 1556, 1579; 7/20/15RP 681; 7/21/15RP 81. Castillo was at the nearby laundromat a short time later when she saw Hickles drive through the parking lot several times, burning rubber and scowling at them. 7/14/15RP 1554, 1585-6. Castillo was afraid and told Pope about Hickles' conduct shortly thereafter. RP 7/14/15RP 1547-49; 7/20/15RP 681, 758.

Pope testified that he parked his Hummer in the parking lot, keeping his eye on the laundromat in order to protect Castillo.

7/20/15RP 760. He said soon Hickles returned to the parking lot and stopped his Chevy Tahoe next to Pope's Hummer and gave him a threatening look. Pope thought about what he had heard about Hickles' violent behavior and his own threatening encounter with Hickles. Pope was afraid. 7/20/15RP 764-65; 7/21/15RP 821-22.

Hickles' friend Gustavo Ramos drove up and he and Hickles boxed Pope in, preventing him from leaving. Hickles then reached toward him with a gun and shot at him. 7/21/15RP 823-27. Pope reached into the armrest console of the Hummer, where he knew Castillo kept a handgun, and reached over and shot at Hickles in self-defense. 7/20/15RP 733; 7/21/15RP 827-28, 834, 900. Hickles was shot in the arm. 7/15/15RP 248, 254-56.

Hickles, on the other hand, testified that he did not have a gun and did not shoot at Pope. 7/15/15RP 252.

Pope was charged and convicted of one count of first degree assault with a firearm enhancement, one count of drive-by shooting, and one count of unlawful possession of a firearm in the second degree. CP 178-79, 234-37. He appealed and the Court of Appeals affirmed.

Additional facts are set forth in the Court of Appeals opinion and the relevant argument sections below.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Multiple instances of jury misconduct deprived Pope of his Sixth and Fourteenth Amendment rights.

Three instances of jury misconduct occurred. First, one juror conducted an experiment at her home. She put a glove in the console of her car and counted how long it took her to undo her seat belt, open up the console, get the glove out and then turn back and mimic returning fire. The juror reported to the other jurors that the pause required to get the gun out and return fire was contrary to the testimony of witnesses who said the shots fired were "close together." CP 158-59, 171, 176-77.

Second, some of the jurors reenacted the testimony of a bystander, Patricia Loveridge, who had said she saw the shooting through the rearview mirror of her car while she was driving by. Loveridge testified she had seen an arm extended from the window of a black truck, shooting into a maroon truck. 7/16/15RP 438-57; Exhibit 18 (911 call). Hickles' Chevy Tahoe was dark blue and Pope's Hummer was burgundy. 7/14/15RP 1543, 1547. In the jury room, one juror held up a compact mirror and looked through it while two other jurors mimicked pointing a gun at each other behind her. CP 156, 169-

70, 176. The jurors concluded Loveridge was confused about what she saw because "she wasn't taking into account that she was looking into a mirror and everything in a mirror is reversed." CP 170. The jurors concluded the gun was not pointing from the blue car as Loveridge testified, but must have been pointing from the maroon car. CP 171.

Third, another juror went home and looked at a map for the "Tacoma River." CP 161. Pope had testified he threw the gun into the "Tacoma River" after the shooting. 7/21/15RP 888, 921.

It is misconduct for a jury to consider extrinsic evidence and if it does, that may be a basis for a new trial. State v. Pete, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004). Extrinsic evidence is information outside the evidence admitted at trial. Id. This type of evidence is improper because it is not subject to objection, cross-examination, explanation or rebuttal. Id.

The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to a jury that considers only the evidence presented at trial, and the right to confront the evidence against him. Parker v. Gladden, 385 U.S. 363, 364-65, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966); Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); U.S. Const. amends. VI, XIV. The constitutional right to

trial by jury "necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner, 379 U.S. at 472-73.

The jury may conduct an experiment or investigation only if it is within the scope or purview of the evidence admitted at trial. Tarabochia v. Johnson Line, Inc., 73 Wn.2d 751, 755-56, 440 P.2d 187 (1968). If some new fact, hurtful to the defendant, is discovered by the experiment, jury misconduct occurs and a new trial is warranted. Id. Although the jury may apply its "common sense and the normal avenues of deductive reasoning" to conduct experiments or reenactments, the experiment or reenactment must conform to the testimony and the material conditions of the event as they were established at trial. State v. Balisok, 123 Wn.2d 114, 118-19, 866 P.2d 631 (1994); Cole v. McGhie, 59 Wn.2d 436, 447-48, 361 P.2d 844 (1962).

Applying these principles, all three of the jury's investigations in this case were improper. The jury's reenactments exceeded the

scope of the evidence admitted and did not replicate the material conditions as they existed at the time of the event.

First, the juror's experiment outside the courtroom with the glove did not conform to the scope or purview of the evidence admitted. The juror's actions amount to misconduct similar to what occurred in People v. Vigil, 191 Cal.App.4th 1474, 1483, 120 Cal.Rptr.3d 643 (2011). There, a crucial issue was whether the defendant, who was driving a car, could have known that his co-defendant, sitting in the back seat, was going to point a rifle out of the back window and fire it. The juror used a broomstick at home to simulate the rifle and attempted to point it out the back window of his car. Due to the difficulty of maneuvering the broomstick inside the car, the juror concluded the defendant must have been aware of what his co-defendant was doing. "The result of the experiment was then reported to the deliberating jurors as if it were scientific confirmation of the juror's views on a vital issue in the case." Id. at 1486.

Similarly, here, the juror's experiment touched on a crucial issue—whether Pope fired in self-defense. The juror reported her results to the other jurors as if they were established facts. Yet the juror did not use admitted exhibits or replicate the conditions of the actual

event. She used a glove instead of a gun. She did not replicate the characteristics of the interior of the Hummer or its center console. She assumed Pope must have been wearing a seatbelt. Moreover, the juror's assumptions about what the witnesses heard did not conform to the testimony. Although two witnesses said they heard gunshots in quick succession, another said he heard three gunshots, a slight delay, then a couple more. 7/14/15RP 1487; 7/15/15RP 185; 7/16/15RP 447.

Second, the jurors' experiment with the mirror constitutes misconduct because it did not conform to the testimony at trial. The experiment did not conform to Loveridge's testimony. Loveridge testified she looked in her rearview mirror and saw an arm extended from the window of a black truck, shooting into a maroon truck. 7/16/15RP 451; Exhibit 18. She thought the gunshots could not possibly be coming from the maroon truck because the other truck was blocking her view of it. 7/16/15RP 456-57. In other words, she was not looking at the trucks side by side. She could see only the "black" truck and the other truck was hidden from view. Moreover, she identified the trucks by color and not by their position. She could not have been confused by the fact that objects in a mirror are reversed.

This misconduct is similar to the misconduct in Cole, 59 Wn.2d at 447-48. There, the plaintiff had fallen over a timber fixed to the ground by the defendant. The court conducted a jury view of the scene. The jurors were instructed to walk between two parked cars, as the plaintiff had done, to ascertain whether they could see the timber. This procedure amounted to a reenactment rather than a simple view. It was improper because it exceeded the scope of the evidence admitted. None of the jurors failed to see the timber and all of them succeeded in stepping over it simply because they were looking for it. By contrast, the plaintiff was not aware of the timber at the time of the accident. The result of the reenactment was the jury's improper consideration of extrinsic evidence, *i.e.*, that the plaintiff must have seen the timber. Id.

Similarly, the jurors' experiment with the mirror amounts to misconduct because it resulted in the jury's consideration of extrinsic evidence touching on a material issue. The extrinsic evidence is that the trucks must have been standing in different positions from what Loveridge reported. The results of the experiment did not conform to the testimony at trial. Balisok, 123 Wn.2d at 118-19; Tarabochia, 73 Wn.2d at 754-57; Cole, 59 Wn.2d at 447-48.

Finally, one of the jurors improperly considered extrinsic evidence when she consulted a map at home to determine whether the "Tacoma River" exists. She could not find it on the map and concluded it does not exist, contrary to Pope's testimony that he threw the gun in the "Tacoma River." CP 151, 161, 177.

Extrinsic evidence is information outside the evidence admitted at trial. Pete, 152 Wn.2d at 552-53. Plainly, the juror's consultation of the map produced extrinsic evidence.

These instances of jury misconduct are prejudicial and require reversal because there is a reasonable possibility the extrinsic information could have affected the verdict.

Once juror misconduct is established, prejudice is presumed. State v. Boling, 131 Wn. App. 329, 332-33, 127 P.3d 740 (2006). To overcome this presumption, the State must satisfy the trial court that, viewed objectively, it is unreasonable to believe the misconduct could have affected the verdict. Id. The court must grant a new trial unless it is satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. Id.; Marino v. Vasquez, 812 F.2d 499, 505 (9th Cir. 1987) (citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

If the extrinsic evidence undermines the defense or lightens the prosecution's burden of proof on a material issue, a new trial is required. Pete, 152 Wn.2d at 554-55; Vigil, 191 Cal.App.4th at 1488.

Prejudice is demonstrated. It is reasonable to believe the misconduct could have affected the verdict. The extrinsic evidence produced by the jurors undermined Pope's defense of self defense.

2. Multiple instances of prosecutorial misconduct deprived Pope of a fair trial.

The State moved to admit evidence about Pope's "rap" music. The State sought to inform the jury that the lyrics of Pope's songs refer to guns, being a "pimp," shooting people, and other nefarious activities. CP 16-19; 7/07/15RP 1312-14. Defense counsel objected, arguing the content of Pope's music is artistic expression and not relevant. 7/07/15RP 1316-19; 7/08/15RP 1348-49; 7/21/15RP 849-53. The court agreed and ruled the evidence was not relevant or admissible. 7/21/15RP 881-83.

The prosecutor tried to elicit testimony about Pope's rap music and urged the jury to draw negative inferences about it. While cross-examining Castillo's daughter Sonia, the prosecutor asked:

Q. He mention anything about himself having guns?
A. No.
Q. He never said anything about that?

A. No.
Q. Even through his music did he ever say anything about that?
A. Specifically, I don't know. But if he did, it's the rap industry. It's for entertainment.
Q. And you listen to his music?
A. Yeah.

MR. GEHRKE: Objection. Beyond the scope.

THE COURT: Overruled.

Q. (By Mr. Sewell) And how much, how often do you listen to his music?
A. Pretty often.

MR. GEHRKE: Your Honor –

THE COURT: All right.

MR. GEHRKE: I have objection regarding some of the earlier motions.

THE COURT: Yeah. Do we need to excuse the jury, or are we moving on?

MR. SEWELL: I can move on.

THE COURT: All right.

MR. SEWELL: I appreciate that. Thank you.

Q. (By Mr. Sewell) You mentioned that he talked about a "burner." What's a burner?
A. A gun.
Q. It's a slang term for a gun?
A. Yeah. It's what all rappers use.
Q. Any other slang terms for guns that you know of?
A. A strap.
Q. Any others?
A. Not that I can think of.
Q. Gatt?
A. Yeah, there you go.
Q. Any others you can think of?
A. Gatt, strap, burner. Nope.

7/21/15RP 807-09.

The prosecutor returned to this topic in his cross-examination of Pope:

Q. You testified on direct examination that you're a musician.
A. I'm a producer, a CEO.
Q. You're a producer, a CEO; you don't sing?
A. I do music and I do fashion and I –
Q. What do you mean when you say you "do music?"
A. We produce, we write for people, people write for us.
Q. So that includes you singing this music as well?
A. Yeah, we perform mostly college towns up and down the coast.
Q. You testified you produce R&B music; is that right?
A. Yeah, I got a R&B artist.
Q. What other types of music do you produce?
A. Hip hop.
Q. Hip hop. What's hip hop?
A. I don't know. What's you mean? What do you mean "what is hip hop?"
Q. When you say "hip hop," that's pretty expansive. A lot of types of music fall under hip hop, so what types of hip hop do you produce?
A. Not how I was raised. Hip hop is hip hop.
Q. And to be clear, you also testified that you've got family members that are gospel singers, famous gospel singers; is that right?
A. My mother, the Pope Sisters.
Q. That's right.
A. Yes.
Q. But you're not a gospel singer?
A. No, I'm not.
Q. And you're not a choir boy or anything along those lines?
A. I sang in the church when I was little.
Q. Do you now?

A. No.

7/21/15RP 888-90.

During closing argument, the prosecutor urged the jury to draw negative inferences about Pope's character from this exchange:

> The defendant went to great lengths to paint himself in a positive light. If you recall, when asked, he wouldn't say what kind of music he performed. You had to hear it through Sonia that he's a rapper. So why all the talk about how he promotes R&B artists and hip-hop and how his mother and aunt were famous gospel singers? There's absolutely nothing wrong with rap. I want to make that clear. So why was he so reluctant to say it? If he was so reluctant to talk about something as small as that, what else might he be trying to keep from you? Rap music isn't something you would or should hold against him. You should hold the evidence against him.
>
> You'll notice, though, that he was totally gung ho to claim about how he worked at a hospital and how he worked at a boys home. But that's not the man that's here today. If he ever did work at those places, it was years ago, and like the Hummer, somewhere down in California.

7/22/15RP 1033-34.

To prove prosecutorial misconduct, the defendant must show the prosecutor's conduct was both improper and prejudicial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). A prosecutor's inflammatory comments that are a deliberate appeal to the jury's

passion and prejudice are improper. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Prejudicial prosecutorial misconduct may deprive the defendant of a fair trial as guaranteed by the Sixth and Fourteenth Amendments and article I, section 22 of the Washington Constitution. In re Pers. Restraint of Phelps, __ Wn.2d __, 410 P.3d 1142, 1147 (2018); U.S. Const. amends. VI, XIV; Const. art. I, § 22.

Here, the prosecutor's comments and questions about Pope's rap music and the questions about guns in the lyrics were a deliberate appeal to the jury's passions and prejudice. They were an unwarranted attack on his character.

Any reference to a defendant's violent rap lyrics carries the potential to be used by the jury as propensity evidence and poison it against the defendant. State v. Skinner, 218 N.J. 496, 517, 95 A.3d 236 (2014).

Prosecutorial misconduct is prejudicial if there is a "substantial likelihood the misconduct affected the jury's verdict." Weber: 159 Wn.2d at 270. The Court reviews the misconduct in the context of the entire case. State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011).

The prosecutor's questions and comments about Pope's rap music lyrics and their reference to guns are prejudicial because they invited the jury to infer Pope is a violent person who uses guns. This undermined Pope's claim that the gun in the Hummer was not his and he did not intend to shoot anyone that day. It seriously undermined his defense of self defense.

3. Pope's two convictions for first degree assault and drive-by shooting violate double jeopardy.

Courts may not enter multiple convictions for the same offense without offending the constitutional right to be free from double jeopardy. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 735 (2005); U.S. Const. amend. V.

Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. Freeman, 153 Wn.2d at 771. If legislative intent is not clear, the court applies the Blockburger test. Id.; Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). If each crime contains an element that the other does not, the court presumes the crimes are not the same offense for double jeopardy purposes. Freeman, 153 Wn.2d at 771. But the court does not consider the

elements of the crime on an abstract level. The question is whether each provision requires proof of a fact that the other does not. Id.

Here, Pope was convicted of both first degree assault, RCW 9A.36.011(1)(a), (c), and drive-by shooting, RCW 9A.36.045, for the same act—shooting a gun from a car. Because the same facts were used to prove both crimes, Pope's constitutional right to be free from double jeopardy was violated.

5. Multiple instances of deficient performance deprived Pope of his constitutional right to the effective assistance of counsel.

An attorney's performance constitutes ineffective assistance of counsel when his actions "fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010); Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); U.S. Const. amend. VI.

Defense counsel's failure to object when there was no tactical reason not to, where a competent attorney would have at critical stages of the trial, was sufficient to establish ineffective assistance of counsel.

6. The prosecutor committed other instances of misconduct.

As stated, prejudicial prosecutorial misconduct may deprive the defendant of a fair trial as guaranteed by the Sixth and Fourteenth Amendments and article I, section 22 of the Washington Constitution. Phelps, 410 P.3d at 1147; U.S. Const. amends. VI, XIV; Const. art. I, § 22. A prosecutor's expressions of personal opinion about the defendant's guilt or the witness's credibility are improper. State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). A prosecutor commits misconduct by vouching for a witness's credibility. State v. Robinson, 189 Wn. App. 877, 892, 359 P.3d 874 (2015).

The prosecutor made improper remarks, used the weight of his office to influence evidence, vouched for evidence and witnesses, purposely misstated evidence, and unfairly undermined Loveridge's testimony. RP 435, 452, 456-58, 464, 466, 470-71, 1016. The prosecutor also vouched for witness Ramos.

7. The cumulative and unfairly prejudicial effect of the above instances of juror and prosecutorial misconduct and other errors denied Pope a fair trial.

Under the cumulative error doctrine, reversal is required when there have been several errors, whether preserved or unpreserved, that

standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because of (1) court's severe rebuke of defendant's attorney in presence of jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel); Taylor v. Kentucky, 436 U.S. 478, 487-88, 487 n.15, 490, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (several errors may have cumulative effect of violating due process guarantee of fundamental fairness); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) ("Although each of the above errors, looked at separately, may not rise to the level of

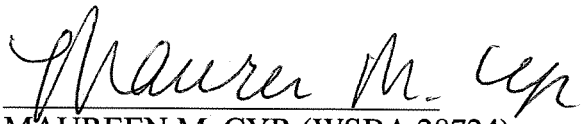
reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted."); U.S. Const. amend. XIV; Const. art. I, § 3.

Here, the cumulative effect of multiple instances of jury and prosecutorial misconduct, as well as the other errors identified, denied Pope a fundamentally fair trial, even if any one of them alone would not justify reversal. Pope must receive a new trial.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 13th day of April, 2018.



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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 74408-9-I
v.	)	DIVISION ONE
SHAVEL LEVRON POPE, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: March 26, 2018

SPEARMAN, J. — Shavel Pope shot bullets into Jermaine Hickles' car, striking Hickles in the arm. Pope was charged with drive-by shooting, first degree assault, and unlawful possession of a firearm. During trial, the prosecutor made several references to Pope being a rap musician, even though the trial court had excluded Pope's lyrics. During trial and deliberations, jurors engaged in two reenactments of testimony, and one juror referenced a map at home. Pope was convicted as charged. He appeals, arguing that he is entitled to a new trial due to juror and prosecutorial misconduct. We disagree and affirm.

FACTS

Jermaine Hickles and Roberta Castillo broke off their relationship in 2010. When Castillo started dating Shavel Pope in 2012, she told Pope that Hickles physically abused her. She also told Pope that Hickles had threatened a man she

dated because he was driving her car, and that Hickles later shot at her car. She told Pope that Hickles had guns, and had threatened to kill Pope if he saw him driving one of her cars.

On May 21, 2014, Castillo and her daughter drove to a laundromat to wash their clothes. Pope followed in Castillo's maroon Hummer to buy gas at an adjacent station. As Castillo waited for Pope to arrive, she saw Hickles drive through the parking lot in his blue Tahoe, looking angry. Fearful, Castillo called Pope, but he didn't answer. When Pope finally pulled into the parking lot, Castillo told him that she could have been killed and asked him why he didn't pick up his phone. After Castillo and Pope finished pumping gas, Castillo and her daughter went into the laundromat. Castillo testified that while she was doing laundry, Hickles circled through the parking lot at least five times, burning rubber each time.

Pope testified that after filling his tank, he drove home to fetch his phone and wallet. But, he returned to the gas station out of concern for Castillo's safety. He parked the Hummer and played games on his phone while he waited. Pope testified that Hickles drove through the parking lot once, and then came back ten or fifteen minutes later. Hickles drove very slowly and stopped in front of Pope, blocking the Hummer. A car driven by Gustavo Ramos, a friend of Hickles, also blocked Pope. Pope testified that, after a verbal exchange, Hickles raised a gun towards him and shot at him several times. Pope ducked, opened the console between the two front seats, retrieved a gun, and shot at Hickles multiple times. After the exchange of gunfire, Ramos moved his car enough that Pope could

maneuver his car out of the parking lot. Pope fled the scene, but Hickles followed him. After a brief chase, Pope made it to the freeway and drove south to the home of his children. Pope, a musician, then drove the Hummer to California to perform scheduled tour dates. He testified that on his way, he threw the gun in the Tacoma River. He returned to Washington without the Hummer.

Hickles described events differently. He testified that he pulled into the strip mall once to buy a soda, but left after seeing Castillo. He drove around for an hour or so, returned, parked, and bought a soda. After Hickles returned to his truck, Pope pulled up next to him, accused him of harassing Castillo, and then shot at him. Hickles ducked down, but was hit once in the arm. Hickles denied that he was armed, and no gun was found in his vehicle. Hickles also testified that his friend, Ramos, happened to be driving by when he saw Hickles get shot, and came to his aid. Ramos confirmed that he was a bystander, and that he guarded Hickles' car after Hickles went to the hospital, and did not see a gun inside.

One witness with expertise in guns testified that he heard seven to nine gunshots from the same gun, fired in two sets, close together. He testified that the shots were not from multiple shooters because the gunfire did not overlap. Another witness, Patricia Loveridge, was driving by when she saw two trucks, one black and one maroon, side by side blocking the entrance to the parking lot. She heard five or six shots, looked in her rearview mirror, and saw an arm extended from the window of a black truck, shooting into the window of the other truck.

Pope was charged with first degree assault with a firearms enhancement, second degree unlawful possession of a firearm, and drive-by shooting. He was convicted as charged.

After trial, jurors disclosed that one juror reenacted Pope's testimony at home by placing a glove, representing a gun, in her car's console. Then she tested how long it took to retrieve and "fire." Clerk's Papers (CP) at 158. Another juror looked at a map to try to find the "Tacoma River." CP at 172. Finally, several jurors reenacted Loveridge's testimony with a mirror in the jury room. Based on these allegations of misconduct, defense counsel moved for a new trial. The trial court denied the motion.

DISCUSSION

Juror Misconduct

Pope alleges three instances of juror misconduct: the gun retrieval reenactment, the rearview mirror experiment in the jury room, and the Tacoma River map consultation. The State argues that juror declarations supporting the misconduct claims describe matters inhering in the verdict, so they cannot be considered by this court.

Central to our jury system is the secrecy of jury deliberations. In re Pers. Restraint of Lui, 188 Wn.2d 525, 567-68, 397 P.3d 90 (2017) (citing Long v. Brusco Tug & Barge, Inc., 185 Wn.2d 127, 131, 368 P.3d 478 (2016)). Courts are appropriately forbidden from receiving information to impeach a verdict based on revealing the details of the jury's deliberations. Id. Thus, in considering whether to declare a mistrial based on alleged juror misconduct, the first question is

whether the facts alleged inhere in the verdict. Id. Whether juror misconduct inheres in the verdict is a question of law that we review de novo. Id. (citing Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 768, 818 P.2d 1337 (1991)).

Matters that inhere in the verdict include facts "'linked to the juror's motive, intent, or belief, or describ[ing] their effect upon'" the jury, or facts that cannot be rebutted by other testimony without probing any juror's mental processes. Id. at 131-32 (quoting Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962)). Jurors discussing and using their life experiences to evaluate evidence and reach a verdict inheres in the verdict and may not be considered. Id. at 137. This contrasts with circumstances in which jurors introduce extrinsic evidence into their deliberations. "In such cases, the juror statements were plainly not matters of opinion based on personal experience, but expressions of law or fact based on outside sources." Id. (citing Bouton–Perkins Lumber Co. v. Huston, 81 Wash. 678, 680, 143 P. 146 (1914)).

Only if we conclude that the juror declarations allege actual facts constituting misconduct, rather than matters inhering in the verdict, do we then decide whether the trial court's denial of a motion for a new trial for juror misconduct was an abuse of discretion. State v. Crowell, 92 Wn.2d 143, 145, 594 P.2d 905 (1979).

Here, juror declarations largely describe expressions of fact, not matters of opinion based on personal experience.[1] Jurors reported that one juror tested the theory of self-defense by timing how long it took her to retrieve a glove from her car's console. This does not describe a juror's motive, intent, or belief, and may be rebutted by testimony that the juror did not report such an experiment. Similarly, jurors reported recreating the testimony of Loveridge: "[S]omebody used a compact and one person had – I had pointed my hand at one person, they had pointed their hand back at me and we looked into the compact to see how it would look." CP at 169. Again, this does not describe the jurors' motive, intent, or belief, and can be rebutted without questioning the juror's mindset. Finally, a juror consulted a map and reported that she could not find the Tacoma River. This is an expression of fact based on an outside source, and does not inhere in the verdict.[2]

Because we conclude that the declarations allege actual facts constituting misconduct, rather than matters inhering in the verdict, we now turn to whether the trial court abused its discretion by denying a motion for a new trial based on juror misconduct. The consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial. Such evidence is improper

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[1] The State argues that the juror declarations describing the gun retrieval and Tacoma River misconduct claims are hearsay, and cannot be relied on to support the misconduct claims. But the report of the experiments, not whether they occurred, is the basis of the misconduct claims. Thus, these out of court statements are not hearsay because they are not used to prove the truth of the matter asserted. Evidence Rule 801.

[2] To the extent that parts of the juror declarations describe the effect of the alleged misconduct on the jury, such allegations do inhere in the verdict and are not considered to determine whether the misconduct prejudiced the proceeding. State v. Boling, 131 Wn. App. 329, 332–33, 127 P.3d 740 (2006); Gardner, 60 Wn.2d at 843.

because it is not subject to objection, cross examination, explanation or rebuttal. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994) (citing Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). But "where the jurors attempt to re-enact the crime during their deliberations in accordance with their own recollection of the testimony, their conduct constitutes nothing more than an 'application of everyday perceptions and common sense to the issues presented in the trial.'" Id. at 118 (quoting People v. Harris, 84 A.D.2d 63, 105, 445 N.Y.S.2d 520, 546, 31 A.L.R.4th 525 (1981)).

> [If] the experiment or what the jury has done, has the effect of putting them in possession of material facts which should have been supported by evidence upon the trial, but which was not offered, this generally constitutes such misconduct as will vitiate the verdict. But if the experiment involves merely a more critical examination of an exhibit than had been made of it in the court, there is no ground of objection.

Id. at 119 (quoting State v. Everson, 166 Wash. 534, 536-37, 7 P.2d 603 (1932).

Juror use of extrinsic evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced. Boling, 131 Wn. App. at 332-33 (citing State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989)). The court's inquiry is objective: The question is whether the extrinsic evidence could have affected the jury's determinations. Id. (citing State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)).

In Balisok, the defendant testified that when the victim attacked him with a dagger and placed him in a headlock, the defendant pulled a pistol out of his pocket and shot the victim in the head. The defendant, weighing over 300 pounds, simulated this at trial. During deliberations, the jurors reenacted the

struggle as described by the defendant, and concluded that it was "virtually impossible. . . ." Id. at 116-17. The Court held that there was no misconduct, reasoning that differences in the circumstances of the reenactment were not material and that the jurors' actions "amounted to nothing more than a critical examination of [the defendant's] self-defense theory." Id. at 120.

In a similar case, the defendant testified that as the victim brought his shoulder back to punch her, she reached into her coat pocket, grasped and opened a folding knife, and cut the victim across the nose. State v. Brown, 139 Wn.2d 20, 22, 983 P.2d 608 (1999), overruled on other grounds by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). During deliberations, the jurors wore the victim's coat and tested the difficulty of pulling the defendant's knife out of the pocket and opening it. Id. at 23. The court held that this reenactment was not misconduct because the differences in coats was not material and the jury properly used admitted evidence to critically examine the defendant's version of events. Id. at 24.

Pope argues that the gun retrieval reenactment was juror misconduct. At trial, Pope testified that Hickles fired several shots, Pope ducked, reached in the console, grabbed a gun, and reached over and shot at Hickles, with a "pause for a second" between each barrage of bullets. Verbatim Report of Proceedings (VRP) at 827-28. Other witnesses testified that the series of less than ten shots was either continuous or separated by a brief pause after the first several shots. While at home, the juror sat in her car, placed a glove in the console, and closed the lid. She timed how long it took to unbuckle her seatbelt, open the lid, retrieve

the glove, and turn to "'fire.'" CP at 176-77. This juror reported to the jury that it took her longer to perform those activities than what the testimony reflected, so she concluded that Pope already had his gun out.

Similar to the jurors' knife retrieval in Brown, this juror tested if the defendant could retrieve a gun from a car's console in a short amount of time. This was a critical examination of Pope's self-defense theory. Any juror was free to question Pope's testimony that he retrieved the gun in a short period of time. This juror merely examined the reliability of that testimony through her own reenactment and reported her finding to the jury. The juror did not introduce new evidence that could not be rebutted, such as the impossibility of retrieving a gun in a certain amount of time. Rather, the juror expressed doubts about the defendant's credibility because of the length of time it took to retrieve the glove.

That this juror was at home rather than in the jury room does not impact the result. Balisok holds that jurors may use their common sense to understand divergences in the reenactment, such as the difference between a glove and a gun. And Pope cites no Washington authority holding that an out-of-court reenactment should be considered differently than one conducted in the jury room. The gun retrieval reenactment was not misconduct.

Pope next argues that the rearview mirror reenactment is juror misconduct because it did not conform to the evidence. During deliberations, two jurors sat in chairs and pretended to point guns at each other. A third juror sat in front and used a compact mirror to observe the jurors behind her. The jurors wondered whether the testimony of Loveridge, who witnessed the shooting through her

rearview mirror, was reliable because a mirror reverses images. Pope did not brief this alleged misconduct to the trial court, and conceded at the trial court that it did not constitute misconduct.

Generally, we do not consider arguments raised for the first time on appeal. RAP 2.5(a). But a defendant may appeal a manifest error affecting a constitutional right even if the issue was not raised at the trial court. RAP 2.5(a)(3). The defendant must identify a constitutional error and show that it resulted in actual prejudice, which means that it had practical and identifiable consequences in the proceeding. State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000).

Pope meets the first part of the RAP 2.5(a)(3) analysis because his claimed error implicates the constitutional guarantee to a trial by impartial jury. But he does not satisfy the second part. The mirror reenactment was not prejudicial because it does not constitute juror misconduct. Through this reenactment, the jurors properly applied their everyday perceptions and common sense to the issues presented at trial. And under Balisok and Brown, the difference between the mirror used by the jurors and the rearview mirror in the witness's car is not material. The jurors used their common sense to understand that the mirrors were not the same.

Pope cites Cole v. McGhie, 59 Wn.2d 436, 447, 367 P.2d 844 (1962), in which jurors visited the site of an accident in which the plaintiff tripped on a timber, and were instructed to walk across the timber. On appeal, the Court granted a new trial because the experiment allowed jurors to acquire new

evidence by stepping over the timber. Cole, 59 Wn.2d at 446. Cole is distinguishable because the juror's use of a mirror did not allow them to acquire new evidence. Rather it enabled them to visualize, and therefore critically examine, witness testimony.

Because Pope fails to show he was prejudiced by the alleged misconduct of reenacting the rearview mirror testimony, we decline to review the claim under RAP 2.5(a)(3).[3]

Finally, Pope argues that a juror committed prejudicial misconduct by referring to a map to find the "Tacoma River." After hearing Pope's testimony that he threw the gun into the Tacoma River, one juror reported searching a map for the "Tacoma River" with a magnifying glass. CP at 151. She did not find it and concluded that Pope did not actually throw the gun into the Tacoma River. The trial court found that this constituted misconduct, but that there was no "reasonable possibility that [Mr. Pope] was prejudiced by that. . . ." VRP at 1164.

The State concedes that this action was misconduct, but not prejudicial. We agree. Pope testified that he disposed of the gun in a river. The name of the river is immaterial. In addition, Pope testified that he was not familiar with the area because he was from California. His counsel referenced this fact in closing argument. It is therefore reasonable to conclude that the jury did not make a

[3] Pope's argument that he received ineffective assistance of counsel also fails. An ineffective assistance claim requires that (1) counsel's performance "fell below an objective standard of reasonableness and (2) there was prejudice, measured as a reasonable probability that the result of the proceeding would have been different." State v. Humphries, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Even if counsel's waiver was deficient performance, it did not result in prejudice because Pope would not have succeeded on the claim.

substantial credibility assessment based on Pope's river misnomer. The map reference was not prejudicial.

The trial court did not abuse its discretion by denying Pope's motion for a new trial based on juror misconduct.

Prosecutorial Misconduct

Pope argues that the prosecutor committed misconduct by referencing his rap music. He contends that, in spite of his failure to object, he did not waive his challenge because the prosecutor's actions violated a ruling by the court.

Pope moved in limine to exclude testimony or reference to his music lyrics. The State responded that it intended to introduce the lyrics if relevant to impeach Pope's testimony. The trial court clarified, "the State is not going to talk about rap music or lyrics to rap music or anything at all during the case-in-chief; is that right? Or maybe talk about, you know, he is a rap artist or something like that, but not go into details?" VRP at 1317. The State confirmed, but clarified that witnesses may reference Pope's stage name, Guce. Id. The trial court reserved ruling until the State sought to introduce the lyrics in rebuttal to specific testimony. The trial court warned that "I don't know what the evidence is going to be ... if he pulls up the CD and marks it as an exhibit, that would be your heads-up. You can object ... if somehow it's being offered into evidence or questions asked about it." VRP at 1318. At trial, the State moved to introduce lyrics to rebut Pope's testimony that he had worked at a boys' home and a hospital, and that he is not the type of person who abuses women. The court excluded the lyrics.

Pope objects to three references to his rap music. First, the prosecutor cross-examined Castillo's daughter, Sonia, about whether Pope discussed guns:

> Q: Even through his music did he ever say anything about that?
> A: Specifically, I don't know. But if he did, it's the rap industry. It's for entertainment.
> Q: And you listen to his music?
> A: Yeah
> Mr. Gehrke: Objection. Beyond the scope.
> The Court: Overruled.
> Q: (By Mr. Sewell) And how much, how often do you listen to his music?
> A: Pretty often.
> Mr. Gehrke: Your Honor –
> The Court: All right.
> Mr. Gehrke: I have objection regarding some of the earlier motions.
> The Court: Yeah. Do we need to excuse the jury, or are we moving on?
> Mr. Sewell: I can move on.
> ...
> Q: (By Mr. Sewell) You mentioned that he talked about a "burner." What's a burner?
> A: A gun.
> Q: It's a slang term for a gun?
> A: Yeah. It's what all rappers use.
> Q: Any other slang terms for guns that you know of?...

VRP at 807-808. This exchange occurred before the trial court excluded Pope's lyrics. The second allegation of misconduct occurred after the trial court's ruling, when the prosecutor cross-examined Pope:

> Q: You testified on direct examination that you're a musician.
> A. I'm a producer, a CEO.
> Q. You're a producer, a CEO; you don't sing?
> A. I do music and I do fashion and I --
> Q. What do you mean when you say you "do music?"
> A. We produce, we write for people, people write for us.
> Q. So that includes you singing this music as well?
> A. Yeah, we perform mostly college towns up and down the coast.
> Q. You testified you produce R&B music; is that right?
> A. Yeah, I got a R&B artist.
> Q. What other types of music do you produce?
> A. Hip hop.
> Q. Hip hop. What's hip hop?

A. I don't know. What's you mean? What do you mean "what is hip hop?"
Q. When you say "hip hop," that's pretty expansive. A lot of types of music fall under hip hop, so what types of hip hop do you produce?
A. Not how I was raised. Hip hop is hip hop.
Q. And to be clear, you also testified that you've got family members that are gospel singers, famous gospel singers; is that right?
A. My mother, the Pope Sisters.
Q. That's right.
A. Yes.
Q. But you're not a gospel singer?
A. No, I'm not.
Q. And you're not a choir boy or anything along those lines?
A. I sang in the church when I was little.
Q. Do you now?
A. No.

VRP at 888-90. Third, the prosecutor argued in closing:

> The defendant went to great lengths to paint himself in a positive light. If you recall, when asked, he wouldn't say what kind of music he performed. You had to hear it through Sonia that he's a rapper. So why all the talk about how he promotes R&B artists and hip-hop and how his mother and aunt were famous gospel singers? There's absolutely nothing wrong with rap. I want to make that clear. So why was he so reluctant to say it? If he was so reluctant to talk about something as small as that, what else might he be trying to keep from you? Rap music isn't something you would or should hold against him. You should hold the evidence against him.

VRP at 1033.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). If the defendant did not object at trial, the issue is waived unless the "prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State

v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citing State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

Citing Weber, Pope argues that he did not waive his claim because he need not object once the court excluded the lyrics. But Pope mischaracterizes Weber, which holds that parties who successfully exclude evidence must object to attempts to introduce such evidence in order to preserve the issue for appeal. Weber, 159 Wn.2d at 272. There is a limited exception to this rule where the State's questioning is in deliberate disregard of the court's ruling. Id.

Pope did not object to the testimony and argument he now challenges.[4] He was not excused from objecting under Weber because the prosecutor did not deliberately disregard the court's ruling on the admissibility of music lyrics. After the court's ruling, the prosecutor merely referred to Pope as a rap musician.

The next inquiry is whether the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Pope argues that the prosecutor deliberately appealed to the jury's passions and prejudice, and attacked his character. But it was Sonia, questioned by defense counsel on direct, who was the first to associate him with rap music. The prosecutor's questioning and argument was not flagrant or ill intentioned misconduct; it was follow up to Sonia's testimony.

Pope waived his prosecutorial misconduct claims.

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[4] Pope objected to Castillo's daughter's testimony, but first on grounds of scope, and then successfully stopped the prosecutor's line of questioning. He did not object to the State's question about whether Pope rapped about guns, which most closely aligns with the pretrial motion to exclude rap lyrics.

Cumulative Error

Pope argues that multiple instances of juror and prosecutorial misconduct denied him a fundamentally fair trial. A defendant may be entitled to a new trial when cumulative errors make a trial fundamentally unfair. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Pope's challenges fail, and he is not entitled to a new trial because he was not deprived a fundamentally fair trial.

Statement of Additional Grounds

Pope advances a number of additional challenges in his statement of additional grounds (SAG).

Pope argues that his convictions for first degree assault and drive by shooting violate double jeopardy. First degree assault and drive by shooting are not the same in law. State v. Statler, 160 Wn. App. 622, 639, 248 P.3d 165 (2011). But the inquiry does not stop there. We must look at the facts used to prove the statutory elements to determine whether each offense required proof of a fact that the other did not. Blockburger v. United States, 284 U.S. 299, 303, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Here, evidence that Pope fired a gun was required to prove both his convictions for drive-by shooting and first degree assault. But each offense also required proof of a fact that the other did not. With respect to the first degree assault, the State had to prove that Pope's shooting was directed at Hickles with intent to inflict great bodily harm. To prove drive-by shooting, the State had to prove that Pope discharged a weapon from a vehicle or in proximity to a vehicle in a manner that created a substantial risk of death or serious injury to another person. This is not a case where evidence of a single

act was required to prove multiple offenses and was the sole evidence to prove those charges. The evidence that Pope fired one bullet at Hickles' car was all that was needed to prove first degree assault. This evidence was available, but not required, to support the drive by shooting conviction. That crime was also established by evidence that Pope fired multiple subsequent bullets. The first degree assault and drive by shooting convictions do not violate double jeopardy.

Pope argues that the Information was deficient because it did not include a specific charge of firearm enhancement. But the amended Information does contain a firearm enhancement allegation for count 1, Assault in the first degree. The jury found facts supporting the firearms enhancement as charged.

Pope argues that the prosecutor engaged in misconduct. First, he argues that the prosecutor attempted to discredit witnesses Loveridge and Daniel Castillo while vouching for witnesses Ramos and Hickles. Second, Pope argues that the testimony of Hickles and Ramos was false and inconsistent, and that there was an exculpatory video, so the prosecutor knowingly used perjured testimony to obtain a conviction.

Pope's counsel failed to object to any of the testimony or argument now challenged, so his claim is waived unless the misconduct was so flagrant and ill intentioned that it results in enduring prejudice that a curative instruction cannot remedy. A prosecutor's expressions of personal opinion about the defendant's guilt or the witness's credibility are improper. State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). To determine whether the prosecutor is expressing a personal opinion about the defendant's guilt, independent of the evidence, we

view the challenged comments in context. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

Pope first objects to the manner in which the prosecutor questioned witness Loveridge. But the prosecutor was merely eliciting eyewitness testimony in a somewhat critical manner, which is not misconduct. The argument that he did so with a "sneer" assumes facts not evidence. Pope also argues that the prosecutor's closing argument compared Loveridge to "killer texters." SAG at 11. But the prosecutor did no such thing. He appropriately argued that Loveridge's testimony may not be reliable because she witnessed the shooting while driving and testified to being distracted. This is not a personal opinion of credibility, but an argument from the evidence.

Pope suggests that the prosecutor called Daniel Castillo a liar in closing arguments. The prosecutor did not call Castillo a liar. When discussing Castillo's testimony, the prosecutor was making an argument about the credibility of Pope's testimony based on admitted evidence. This is not misconduct.

Pope contends that the prosecutor vouched for Hickles by questioning the veracity of Pope's testimony that Hickles chased him after the shooting. He also argues that the prosecutor vouched for Ramos by stating that Ramos testified that he saw gunfire from the Hummer after randomly arriving at the scene. A prosecutor commits misconduct by vouching for a witness's credibility. State v. Robinson, 189 Wn. App. 877, 892, 359 P.3d 874 (2015). But the prosecutor here did not vouch. He made proper closing arguments based on the evidence.

Pope also argues that the prosecutor engaged in misconduct by knowingly offering perjured testimony and failing to disclose an exculpatory video to police investigators. Pope offers no evidence that Hickles and Ramos engaged in perjury, or that the prosecutor knowingly offered perjured testimony. And we find nothing in the record to support the claim that the prosecutor knowingly kept the video from police investigators. To the extent these claims rely on evidence not in the record, we decline to consider them. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

Pope argues that he received ineffective assistance of counsel due to his attorney's deficient investigation. Specifically, he argues that his attorney failed to interview the two passengers in Ramos' car. But the record is silent regarding trial counsel's lack of attempt to interview these witnesses. Because this claim appears to rely on evidence that is not in the record, we decline to consider it.

Pope argues that he received ineffective assistance of counsel because his attorney did not obtain the paperwork for Castillo's petition to renew a "restraining order" protecting Castillo against Hickles. Again, we decline to review this claim because it is based on facts or evidence not in the record. We do not know whether Pope's trial counsel attempted to, or obtained, the restraining order documentation.

Finally, Pope argues that we should reverse his convictions due to the cumulative effect of ineffective assistance of counsel. Pope's challenges fail, so he is not entitled to a new trial due to cumulative error.

Affirmed.

Spearman, J.

WE CONCUR:

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74408-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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