Supreme Court No. _____

Court of Appeals No. 49026-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VERNON L. CURRY, JR.,

Petitioner.

ON REVIEW FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

Sean M. Downs
Attorney for Petitioner

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

Statutes

Washington State Constitution

A. IDENTITY OF PETITIONER

Vernon L. Curry, Appellant, by and through counsel, Sean M. Downs, hereby seeks for the relief sought in part B.

B. COURT OF APPEALS DECISION

Mr. Curry requests review of the unpublished opinion of the Court of Appeals in 49026-9-II, filed on April 24, 2018. A copy of the decision is attached as Appendix A. The Court of Appeals subsequently denied a motion to publish, with that opinion issued on June 13, 2018 (attached as Appendix B).

C. ISSUES PRESENTED FOR REVIEW

1. Whether this court should accept review of the trial court's error in not granting Mr. Curry's Motion to Dismiss for Prosecutorial Misconduct and/or Mismanagement for Interfering with Mr. Curry's Right to Counsel.
2. Whether this court should accept review of the trial court's error in allowing improper impeachment of Mr. Curry about gang activity or Y Gang Entertainment.
3. Whether this court should accept review of the trial court's error in refusing to instruct the jury that they could consider first degree manslaughter as a lesser included offense to the charge of first degree murder.

D. STATEMENT OF THE CASE

On September 7, 2014, Michael Allen Ward was shot and killed in Tacoma, Washington. There were no eye witnesses to the shooting, however, some surveillance videos were recovered from some nearby businesses that appeared to show the shooter as a black man in a mask. RP 1303-1304. Two men, Mr. Campbell and Mr. Henderson, admitted to firing gunshots close in time and proximity to the homicide. RP 437, 441; RP 383. Days later, a mask was found in the yard of a home close in proximity to the homicide, which was later tested and found to contain DNA from Mr. Curry and an unidentified individual. RP 1001, 1228. Mr. Curry was subsequently charged with the crime of Murder in the First Degree and Unlawful Possession of Firearm in the First Degree. CP 1, 167-168.

Before trial, Mr. Curry's appointed attorney, Gary Clower, was forced to withdraw because of the extremely negative position the elected prosecutor had towards Mr. Clower in that the prosecutor's office would not negotiate any favorable deals with him. CP 13. There was not a hearing on the merits regarding this withdrawal. RP 29.

The morning of the first day of trial, the Court heard the defense's Motion to Dismiss based on violations of Mr. Curry's Right to Counsel. RP 23; CP 150-163. An affidavit by Mr. Clower was filed indicating that

there existed a conflict between the elected Pierce County Prosecuting Attorney and himself due to Mr. Clower's representation of a defendant that ultimately resulted in civil litigation against the Pierce County Prosecuting Attorney's Office. CP 150. The elected prosecutor thereafter decided that Mr. Clower was not to receive favorable consideration in the negotiation and settlement of future criminal case. CP 150. The prosecutor reportedly referred to Mr. Clower as the head of a "confederacy of dunces", comprised of about thirty attorneys that the elected prosecutor was unwilling to negotiate any decent offers with. CP 153. Mr. Curry expressed concern to Mr. Clower about receiving fair treatment from the prosecuting attorney due to this issue. CP 151. Mr. Clower believed that his representation of Mr. Curry was undermined and therefore was forced to withdraw as counsel. CP 151. The motion to dismiss was denied because it was the court's interpretation that it was Mr. Curry's choice to replace Mr. Clower because of concerns that he had. RP 24-31.

Lieutenant Robert Maule testified that on September 7, 2014 at approximately 4:00am, he was in his patrol car doing paperwork on the side of the road on 38th Street in Tacoma. RP 164, 167. At about 4:09am, he heard gunshots fired down the block. RP 172-173. He then observed a person sprinting down the sidewalk. RP 173. The person was described as a black adult male who had light-colored gloves on and an object in his

right hand. RP 174. Lt. Maule chased after the person in his vehicle when he heard more gunshots approximately thirty seconds after the first gunshots. RP 178, 182. Lt. Maule stopped his chase of the person and returned to the area of 38th and Yakima. RP 182.

Cory Foote testified that he saw a person run in front of a neighbor's house, across the street, described as black, 5'10"–6'2", 180–220 pounds, jeans and a t-shirt, with hair 1" long or shorter. RP 711-712. Mr. Foote observed some cars traveling around, one that he describes as a red Acura, which stopped near his house. RP 714-715. He described a person get out of the Acura as someone different than who he saw in front of his neighbor's house. RP 716. He was shorter, black, wearing sweat pants and a baseball cap, and he was looking for something in the bushes. RP 715, 718. He did not indicate that there was any front or rear damage as Mr. Curry later testified existed on his vehicle. RP 716, 1562. Police later recovered a gun found at Korlina Henson's house on the right side near the fence line. RP 736-737. No latent fingerprints were found on the gun or the magazine. RP 940.

Jennifer Hayden testified that she is a Forensic Scientist with the Washington State Patrol Crime Laboratory and the DNA collected from the aforementioned hat/mask and the DNA from the reference sample of Mr. Curry matched. RP 975. The defense DNA expert found a second

profile on the back side of the mask. RP 1001. No profile was obtained from the gun because the DNA was too low to continue testing. RP 994.

Detective Jeffrey Katz testified that he was assigned as lead detective on this case. RP 1220. No one in the club reported seeing the shooting that led to Mr. Ward's death. RP 1226. A mask had been recovered in an area consistent with Lt. Maule's information regarding a fleeing suspect. RP 1228. Det. Katz testified that Mr. Curry indicated that he had worn a mask in a promotional shoot but didn't know what had become of it. RP 1263. Mr. Curry was shown the mask and testified that it was probably one of the masks he used during the photo shoot and which was stolen from his car. RP 1581, 1695. No clothing linked to the murder was recovered from Mr. Curry's home. RP 1291. The defense questioned the detective about a noticeable amount of blood on the outside of Mr. Ward's vehicle. RP 1341. No items of clothing taken from Mr. Curry's home were ever tested for blood splatter. RP 1342.

Ms. Woods testified that she is an acquaintance of Mr. Curry's. RP 1417-1452. She testified that on September 7, 2014 she was with Mr. Curry at a club in Seattle celebrating her birthday until approximately 2:30am. RP 1419. A photo was introduced of her with Mr. Curry at the club. RP 1419. She was with Mr. Curry at his house until the next day. RP 1421. She identified the car belonging to Mr. Curry and the one he left the

club in as a burgundy Acura. RP 1425. Once back at his residence they had sex and went to sleep. RP 1432. She could not be certain of the time she woke up but thought it was 7:00 or 7:30 in the morning. RP 1437. Ms. Woods and Mr. Curry then went back to Seattle. RP 1439. They were together until Sunday around 5:00pm. RP 1445.

Edward Baker testified that he owns Video Consultants Northwest, he is a private consultant on video surveillance, image analysis, and professional instructor in the forensic sciences. RP 1452-1485. He retired from the City of Tacoma Police Department in 2009 after 24½ years. RP 1453. He has been doing video enhancement comparing and consulting for 17 years. RP 1454. He was asked to do a comparison of three pairs of shoes that were in custody, shoes that were shown worn by a subject in photographs, as well as photos that were created by a surveillance video system. RP 1455. He did a comparison of the shoes of the suspect in the surveillance with the shoes that Mr. Curry was wearing in the photo and concluded that they did not appear to be the same shoe. RP 1467.

Larry Karstetter testified that since 1991 he owns a computer repair company and since 2002 he has been retained as a computer and digital forensics expert to perform computer and digital forensics for criminal cases and testified for the defense in this case. RP 1485-1535. He testified regarding the phone call from Mr. Curry's phone at 9:40-9:42 am

that Mr. Curry's phone was not within the radius of cell towers near the homicide location. RP 1505. He opined that if Mr. Curry had been around the homicide location at 7:14am he would have expected the data to show a small graphic but there was no graphic. RP 1503.

Mr. Curry testified on his own behalf. RP 1557-1582, 1690-1710. He testified that after going to Seattle, he and Ms. Woods drove back to Tacoma in different cars arriving in Tacoma around 3:00–3:30am and they did not leave his house until early in the morning. RP 1565-1566. He and Ms. Woods then went back to the Seattle area but they argued and he came back that morning. RP 1611. He testified that he thinks she got her days mixed up when she testified because they went to Gucci on Friday. RP 1611.

He testified that his black Dodge Challenger had been broken into and a theft occurred. RP 1571. A diamond necklace, a watch, his iPad, his iPod, and a container containing merchandise from the company was taken. RP 1572. Mr. Curry identified a photo of his shoes and explained that he is collector of Jordan shoes and sometimes sells them. RP 1573. He testified he did not own or possess a gun on September 7, 2014 and stated that he knew Mr. Ward since they grew up together. RP 1574. He indicated that he had been to the after-hours club in June 2014 when his car had been broken into. RP 1575.

YLyfe was identified as a record, video and media company involved with hip hop music. RP 1592. Mr. Curry denied that this hip-hop music condoned street violence when cross-examined by the State. RP 1592. Mr. Curry was asked by the State if he had other business dealings with YG Entertainment or Young Gangster Entertainment, which he denied. RP 1593. The State then wished to impeach Mr. Curry about being a legitimate businessman and introduce evidence of a hip-hop video produced by YLyfe that allegedly promoted street violence. RP 1600-1601, 1616. The defense objected, indicating that it was a backdoor method to improperly introduce alleged gang evidence as ER 404(b) character evidence. RP 1595. Mr. Curry made an offer of proof that the referenced video was a political one about the death of Trayvon Martin. RP 1620. The court excluded the video, but allowed a photo showing Mr. Curry associated with the term "Y Gang". RP 1623. The court believed that Mr. Curry had denied involvement with Y Gang, instead of merely being questioned about YG Entertainment or Young Gangster Entertainment. RP 1623. Mr. Curry then identified a photo of him posing in a "Y Gang Entertainment" photo. RP 1698-1699.

The defense requested Manslaughter in the First and Second Degree as lesser included offenses. RP 1654-1655. The court did not

permit Manslaughter but permitted Murder in the Second Degree as a lesser included offense. RP 1655.

Mr. Curry was subsequently found guilty of Murder in the First Degree with deadly weapon enhancement and of Unlawful Possession of a Firearm in the First Degree. CP 302-304.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

1. This court should accept review of the trial court's error in not granting Mr. Curry's Motion to Dismiss for Prosecutorial Misconduct and/or Mismanagement for Interfering with Mr. Curry's Right to Counsel.

The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds. *Caplin & Drysdale, Chartered v. United States*, 491 U.S.

617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). This right provides a particular guarantee: that "the accused be defended by the counsel he believes to be best." *United States v. Gonzales-Lopez*, 548 U.S. 140, 146, 126 S.Ct 2557, 165 L.Ed.2d 409 (2006); *see also*, Wash. Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."). Among the components of the constitutional right to counsel is "the right to a reasonable opportunity to select and be represented by chosen counsel." *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir.1978); *see also, e.g., State v. Chase*, 59 Wn.App. 501, 506, 799 P.2d 272 (1990); *United States v. Lillie*, 989 F.2d 1054, 1055 (9th Cir.1993); *Wilson v. Mintzes*, 761 F.2d 275, 278 (6th Cir.1985). "It is settled law that under the Sixth Amendment criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice." *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir.1986) (internal quotation marks omitted). Prosecutors act as quasi-judicial officers who "represent the people and presumptively with impartiality in the interest of justice," and therefore "must subdue courtroom zeal for the sake of fairness to the defendant." *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

A party may motion the court to dismiss due to arbitrary action or governmental misconduct when there has been prejudice to the rights of

the accused which materially affects the accused's right to a fair trial. CrR 8.3(b). Denial of a motion to dismiss under this rule is reviewed for abuse of discretion. *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868, 870 (2000) (citing *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). An appellate court finds abuse of discretion only "when no reasonable judge would have reached the same conclusion." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989). To support dismissal under this rule, a defendant first must show arbitrary action or governmental misconduct. *Garza*, 99 Wn. App. at 295. The arbitrary action or mismanagement need not be evil or dishonest; simple mismanagement is enough. *Id*. Second, the defendant must demonstrate the arbitrary action or misconduct resulted in prejudice affecting his right to a fair trial. *Id*. Dismissal may be the appropriate remedy in certain cases involving the deprivation of the right to counsel. *State v. Cory*, 62 Wn.2d 371, 376, 382 P.2d 1019 (1963).

The government misconduct in this case is clear: the elected prosecutor announced to his staff that he would not be negotiating any criminal cases with Mr. Clower. This information became public from a news article, which understandably caused Mr. Curry concern as to whether he would be treated fairly by the prosecutor's office, especially considering the serious nature of his case. There is no other reason cited

for the change of counsel but for the conduct by the elected prosecutor against Mr. Clower. RP 24-31. There is no indication that Mr. Curry did not think Mr. Clower was a good attorney or that he was not doing a good job for Mr. Curry to that point in time. The substitution of counsel was not something that Mr. Curry initiated himself but something that was initiated as a result of the conduct of the elected prosecutor. Mr. Clower had no choice for his client's best interests but to withdraw as counsel. The fact that Mr. Curry was denied counsel of his choosing is inherently prejudicial.

Moreover, the denial of Mr. Curry's right to counsel is a structural error under the Sixth Amendment. *United States v. Gonzalez–Lopez*, 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Requiring a showing of specific prejudice and showing the effects of the error for an issue such as this are simply too hard to measure. *Chapman v. California*, 386 U. S. 18, 24 (1967). Likewise, some errors always result in fundamental unfairness, for example, when an indigent defendant is denied an attorney. *See Gideon v. Wainwright*, 372 U. S. 335, 343–345 (1963). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182, 1191 (1985). Intentional violations of the Sixth Amendment are never harmless because they necessarily

render a trial fundamentally unfair. *Garza*, 99 Wn. App. at 299-300 (citing *Shillinger v. Hawarth*, 70 F.3d 1132, 1142 (10th Cir., 1995)).

In the instant case, a showing of specific prejudice would be impossible to speculate on unless there was an ineffective assistance of counsel claim. The denial of Mr. Curry's right to counsel was a structural error necessitating dismissal. In the alternative, reversal of the convictions and remand for a new trial would be the appropriate remedy for the court not considering an intermediate remedy of imposition of a special prosecutor, per the Respondent's suggestion in previous briefing.

The Court of Appeals decision indicates that Mr. Curry did not demonstrate prejudice. However, the interference with the right to counsel is itself prejudicial. That is why the Court of Appeals has previously ruled in *Garza, supra*, that an intentional violation of the Sixth Amendment is presumed to be prejudicial. As such, the trial court abused its discretion in denying Mr. Curry's motion for dismissal due to the State's violation of his right to counsel.

This issue involves a significant question of law under the Constitution of the State of Washington and the United States Constitution. RAP 13.4(b)(3).

2. This court should accept review of the trial court's error in allowing improper impeachment of Mr. Curry about gang

activity or Y Gang Entertainment.

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). The final measure of error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he was afforded a fair trial. *State v. Green*, 71 Wn.2d 363, 428 P.2d 540 (1967). A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial. *State v. Devlin*, 145 Wn. 44, 258 P. 826 (1927).

A witness cannot be impeached on an issue collateral to the issues being tried. *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140, 142 (2006) (citing *State v. Descoteaux*, 94 Wn.2d 31, 37, 614 P.2d 179 (1980) overruled on other grounds). An issue is collateral if it is not admissible independently of the impeachment purpose. *Descoteaux*, 94 Wn.2d at 37–38, 614 P.2d 179. Put another way, a witness may be impeached on only those facts directly admissible as relevant to the trial issue. *Fankhouser*, 133 Wn. App. at 693 (citing *State v. Oswalt*, 62 Wn.2d

118, 121–22, 381 P.2d 617 (1963); *State v. Fairfax*, 42 Wn.2d 777, 780, 258 P.2d 1212 (1953)).

YLyfe was identified as a record, video and media company involved with hip hop music. RP 1592. Mr. Curry denied that this hip-hop music condoned street violence when cross-examined by the State. RP 1592. Mr. Curry was asked by the State if he had other business dealings with YG Entertainment or Young Gangster Entertainment, which he denied. RP 1593. The State then attempted to impeach Mr. Curry about being a legitimate businessman and introduce evidence of a photo showing Mr. Curry associated with the term "Y Gang". RP 1623. The court mistakenly believed that Mr. Curry had denied involvement with Y Gang, when in fact he was only questioned about YG Entertainment and Young Gangster Entertainment. RP 1623.

The State should not have been allowed to impeach Mr. Curry on this evidence since he answered the question correctly. The supposedly impeaching material was regarding Y Gang Entertainment. Furthermore, the impeachment evidence was too attenuated from the material issues at trial. Information about YLyfe was used for purposes of tying Mr. Curry to a black mask that was supposedly similar to one found near the homicide scene. Information about Y Gang has no probative value – the only value it has is for attempted impeachment. Furthermore, this effort by

the State was an attempt to impugn Mr. Curry's character, and simply backdoor evidence of gang affiliation. Det. Katz testified that a burner phone is used for business which you wouldn't want on your regular phone. RP 1344. He also associated Mr. Henderson and Mr. Curry as friends, and indicated that Mr. Henderson was picked up by the gang unit officers, thereby suggesting that Mr. Henderson and Mr. Curry are gang members or gang affiliated. RP 1246.

Given the above, the court abused its discretion in allowing supposed impeachment evidence when the court was simply mistaken about what was actually testified to. The court also abused its discretion in allowing impeachment evidence regarding a collateral matter. This improper evidence prejudiced Mr. Curry in that the jury was allowed to view Mr. Curry as supposedly involved in gang culture.

This issue involves a significant question of law under the Constitution of the State of Washington and the United States Constitution. RAP 13.4(b)(3).

3. This court should accept review of the trial court's error in refusing to instruct the jury that they could consider first degree manslaughter as a lesser included offense to the charge of first degree murder.

Under the Washington Constitution, the accused in a criminal trial has the right to be informed of the nature and cause of the offense against

which he or she must defend at trial. Const. art. I, § 22 (amend.10). Generally, a defendant can be tried and convicted only of crimes with which he or she is charged. *State v. Irizarry,* 111 Wn.2d 591, 592, 763 P.2d 432 (1988). However, at common law, a jury was permitted to find a defendant guilty of a lesser offense necessarily included in the offense charged. *Beck v. Alabama,* 447 U.S. 625, 633, 100 S.Ct. 2382, 2387, 65 L.Ed.2d 392 (1980). Washington codified this common law rule at RCW 10.61.006. In *Workman,* the Washington Supreme Court explicitly established a two-part test to serve as the basis for our lesser included analysis. *State v. Workman,* 90 Wn.2d 443, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *Workman,* 90 Wn.2d at 447-48, 584 P.2d 382. When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense. *State v. Parker,* 102 Wn.2d 161, 166, 683 P.2d 189 (1984).

The *Berlin* Court went on to state that [a] lesser included instruction is available to both the prosecution and the defense, the constitutional requirement of notice is incorporated into the *Workman* test, and the test allows both parties to effectively argue their theory of the

case. *State v. Berlin,* 133 Wn.2d 541, 548, 947 P.2d 700, 703 (1997). Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense. *Id.*

State v. Berlin along with its companion case, *State v. Warden,* presents the issue of whether jury instructions may be given for manslaughter when a defendant is charged with both felony murder and intentional or premeditated murder. *State v. Berlin,* 133 Wn.2d 541, 543, 947 P.2d 700, 701 (1997); *State v. Warden,* 133 Wn.2d 559, 947 P.2d 708 (1997). The Court held that manslaughter is a lesser included offense of intentional or premeditated murder in this case. *Berlin, supra*. The State is not required to elect between the alternative means of committing second degree murder. *Id*. However, the jury must be instructed that manslaughter is a lesser included offense of intentional murder only. *Id*. Refusal to give an instruction that prevents the defendant from presenting his theory that a killing was unintentional is reversible error. *Warden,* 133 Wn.2d at 564 (citing *State v. Jones,* 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the instant case, the legal prong of the *Workman* test is satisfied as discussed in *Warden, supra*.

The factual prong of the *Workman* test as applied in this case supports an inference that only the lesser included offense may have been committed. It is certainly possible that a gunman could recklessly discharge a firearm at a vehicle without having the specific premeditated intent to kill. A person can commit the physical act of aiming and firing a firearm into a vehicle and nevertheless not have the intent to kill an occupant of said vehicle. Firing into a vehicle could be intended to be a scare tactic. Not wanting to get caught in the act of shooting by wearing a mask and gloves does not necessarily mean that an intent to kill was present.

The evidence in this case would permit the jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense. However, the jury in this case was required to choose between only convicting Mr. Curry of a greater offense or acquitting him. Accordingly, Mr. Curry's conviction for Murder in the First Degree must be reversed and remanded for a new trial.

This issue involves a significant question of law under the Constitution of the State of Washington and the United States Constitution. RAP 13.4(b)(3).

F. CONCLUSION

Given the foregoing, Petitioner respectfully requests this court to grant review.

DATED this 13th day of July, 2018.

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Okanogan County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on July 13, 2018 to email address PCpatcecf@co.pierce.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Petitioner, Vernon Curry, a true and correct copy of the document to which this certification is affixed via first class mail postage prepaid to Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VERNON L. CURRY, JR. Appellant.	No. 49026-9-II UNPUBLISHED OPINION

SUTTON, J. — A jury found Vernon Lewis Curry, Jr. guilty of one count of first degree murder with a firearm enhancement and one count of unlawful possession of a firearm. Curry appeals, arguing that the trial court erred by (1) denying his motion to dismiss based on government misconduct, (2) denying his motion for a mistrial based on improper opinion testimony, (3) admitting improper impeachment evidence, and (4) refusing to instruct the jury on the lesser included offense of first degree manslaughter. Curry also argues that the prosecutor committed misconduct during closing argument by improperly vouching for the credibility of its witnesses and relying on evidence outside the record.

The trial court did not err by denying Curry's motion to dismiss, motion for a mistrial, or request for an instruction on the lesser included offense of first degree manslaughter. Curry waived

his argument regarding improper impeachment evidence. And, Curry's prosecutorial misconduct claim fails. Accordingly, we affirm.[1]

FACTS

At approximately 4:00 AM on September 7, 2014, Michael Ward, Jr. was shot and killed in his car near an after-hours club in Tacoma. Curry was arrested for Ward's murder. The State charged Curry with one count of first degree murder with a firearm enhancement and one count of unlawful possession of a firearm.[2]

Curry moved to dismiss the charges based on government misconduct. Curry alleged that the elected Pierce County prosecuting attorney's behavior toward his prior appointed counsel undermined the relationship between Curry and his former counsel. Curry relied on a declaration filed by his former attorney. Curry's former counsel stated that the Pierce County prosecuting attorney had referred to him as a member of a "confederacy of dunces." Clerk's Papers (CP) at 155. And "the 'dunces' were not to receive favorable consideration in the negotiation and settlement of criminal cases." CP at 155.

Curry saw the "confederacy of dunces" comment reported in a newspaper article and became concerned about his former counsel's ability to represent him. Ultimately, Curry became so concerned about his former counsel's ability to represent him that his former counsel felt it was appropriate to withdraw. Curry's former counsel explained,

[1] Curry also asks that we decline to impose costs on appeal. If the State chooses to file a cost bill on appeal, Curry may then object, and a commissioner of this court may determine whether imposition of costs is warranted. RAP 14.2. Accordingly, we do not address whether to impose costs on appeal.

[2] RCW 9A.32.030(1)(a); 9.94A.533(3); 9.41.040(1)(a).

> Deputy Prosecuting Attorney Jesse Williams was representing the state at the time that I withdrew from representing Mr. Curry. I informed Mr. Williams of the situation and my decision to withdraw, and also informed Mr. Williams that I did not believe I had been treated unusually or unfairly by him. However, I expressed to him my client's concern was the reason for my withdrawal.

CP at 156.

The trial court concluded that Curry did not have the right to choose his appointed attorney and denied his motion to dismiss. Curry proceeded to trial with the counsel appointed to him following his former counsel's withdrawal.

Isaiah Campbell and Xavior Henderson were both near the after-hours club on the night Ward was shot and killed. Campbell testified that he was standing outside the club when he heard several gunshots from nearby. Then Campbell saw Ward's car backing up. When Campbell approached Ward, he realized that Ward had been shot several times and was struggling to breathe. Campbell grabbed a gun from out of Ward's car and fired several shots toward a car coming up the street. Henderson testified that when he heard gunshots, he immediately began running. As Henderson was running, he fired three shots toward a brick wall.

Saundra Blanchard lived a few blocks from where the shooting occurred. Several hours after the shooting, Blanchard and one of her neighbors, Korlina Henson, found a black ski mask in her yard. A crime scene technician was notified and collected the black ski mask. Forensic testing found Curry's DNA on the inside front of the ski mask. Curry's own expert agreed with the forensic findings, but also found an unidentifiable second profile on the outside back of the ski mask.

Several days after the shooting, Henson found a firearm in her yard. The firearm was collected by a forensic specialist. Forensic testing confirmed that the firearm was the murder weapon.

Detective Jeff Katz of the City of Tacoma Police Department was the lead investigator assigned to Ward's murder. Detective Katz reviewed security video footage of the area surrounding the murder from several sources. One video showed a man in gloves pulling a ski mask down over his face while walking toward the murder scene. And another video showed what appeared to be the same subject firing a gun in the direction of Ward's car.

During Detective Katz's testimony, the following exchange took place:

> [STATE]: Starting first with the total number of shooters. Were you able to identify the total number of people that had been discharging a firearm that night?
>
> [KATZ]: Yes, sir.
>
> [STATE]: How many?
>
> [KATZ]: Three.
>
> [STATE]: One of those people was the person involved in killing Mr. Ward. Is that right?
>
> [KATZ]: Correct.
>
> [STATE]: Second person, identity of that person was who?
>
> [KATZ]: Isaiah Campbell.
>
> [STATE]: And the identi[t]y of the third person was who?
>
> [KATZ]: Xavior Henderson.
>
> [STATE]: Looking over the entirety of the investigation, did you develop any evidence that Isaiah Campbell had in any way been involved in the murder of Michael Ward?
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object to this line of questioning, as to opinion as to guilt.
>
> [COURT]: I'm going to overrule the objection.

> [STATE]: Looking at the totality of your investigation, are you aware of any evidence that suggested Isaiah Campbell had been involved in the homicide of Mr. Ward?
>
> [KATZ]: No.
>
> [STATE]: Question same for Mr. Henderson. Are you aware of any evidence that suggests - -
>
> [DEFENSE COUNSEL]: Same objection.
>
> [COURT]: Overruled.
>
> [STATE]: Are you aware of any evidence that suggested Mr. Henderson had been involved in the homicide of Mr. Ward?
>
> [KATZ]: No.

XII Report of Proceedings (RP) at 1237-39. The trial adjourned for four days. When the trial resumed, Curry moved for a mistrial based on Detective Katz's allegedly improper opinion testimony. The trial court denied Curry's motion. However, the trial court agreed to give a curative instruction before resuming Detective Katz's testimony. Prior to resuming Detective Katz's testimony, the trial court gave the following instruction:

> The jury is the sole judge of credibility and the facts. The jury will disregard any opinion testimony from Detective Jeff Katz as [to] the involvement of Isaiah Campbell and Xavior Henderson in the September 7, 2014, shooting of Michael Ward. Such testimony is stricken.

XIII RP at 1282.

Curry testified in his own defense. Curry explained that he had a media company called Ylyfe Entertainment. As part of a photo shoot for Ylyfe, Curry wore a black ski mask similar to the one worn by the shooter and found in Blanchard's yard. However, Curry testified that the mask was in a container that was stolen from his car months prior to the shooting. During Curry's cross-examination, the State asked Curry if he had ever heard of YG Entertainment or Young

Gangster Entertainment. Curry denied hearing of YG Entertainment or Young Gangster Entertainment.

In response to Curry's testimony, the State moved to introduce two photographs showing Curry associated with Y Gangster Entertainment (Exhibit 174A) and a photograph with Curry displaying the logo for Y Gangster Entertainment (Exhibit 175). Curry objected. The trial court admitted Exhibit 174A as "direct impeachment for what he just testified to." XV-XVI RP at 1595. Then the trial court admitted Exhibit 175 "because [Curry] denied that that was the symbol for Y Gang and it's obvious that it is." XVII RP at 1705.

Prior to presenting the photographs, the State proposed a limiting instruction that informed the jury that the photographs and associated line of questioning may be considered "for assessing the defendant's credibility and for no other reasons." XVII RP at 1686. However, Curry specifically stated that he did not want the trial court to give the proposed instruction. Therefore, the trial court did not give the jury a limiting instruction regarding the Y Gangster Entertainment evidence.

The trial court instructed the jury on first degree premeditated murder and second degree intentional murder. Curry also proposed the lesser included offense instructions for first degree manslaughter. The trial court refused to give the lesser included offense instructions for first degree manslaughter, ruling that the evidence did not support a finding that the shooter acted recklessly.

During closing argument, the prosecutor made the following statements,

> And then our professional witnesses are very similar, okay, like police officers, forensics technicians. DNA folks. These people -- it's their job to show up and do work in criminal investigations. They came in, they don't have any

> interest in the case, they don't have any bias. They just came in and told you what happened. Okay.

XVII RP at 1792. Curry did not object to any of the prosecutor's statements. And during rebuttal argument, the prosecutor stated,

> DNA in this day and age has great power. You hear about it all the time. Innocence Project, evidence that's tested, new DNA, evidence that couldn't be tested ages ago that's now re-tested and we learn that the person that's been incarcerated isn't the man who committed the crime. It has the power to exonerate. It has just as much power to convict.

XVII RP at 1821-22. Curry did not object.

The jury found Curry guilty of one count of first degree murder with a firearm enhancement and one count of unlawful possession of a firearm. The trial court imposed a high-end, standard range sentence of 450 months on the first degree murder conviction. The trial court also imposed a mandatory 120 month firearm enhancement to run consecutively. Curry appeals.

ANALYSIS

I. MOTION TO DISMISS—GOVERNMENTAL MISCONDUCT

Curry argues that the trial court erred by denying his CrR 8.3 motion to dismiss. We disagree.

We review a trial court's decision on a CrR 8.3(b) motion to dismiss for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Michielli*, 132 Wn.2d 240. CrR 8.3(b) states,

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

To grant a CrR 8.3(b) motion to dismiss, the trial court must find (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The governmental misconduct at issue need not be evil or dishonest, simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

Here, Curry argues that the Pierce County prosecuting attorney's attitude toward his former counsel undermined his former counsel's representation, and left his former counsel with no choice but to withdraw. But Curry has not demonstrated any conduct by the State that prejudiced his right to a fair trial. Curry, relying on his former counsel's declaration, alleged that the elected Pierce County prosecuting attorney referred to his former counsel as part of a "confederacy of dunces" and that the prosecuting attorney stated that the "confederacy of dunces" would not receive favorable negotiations. CP at 155. However, Curry's former counsel acknowledged that he had not been treated unfairly by the deputy prosecutor handling the case. And Curry's former counsel withdrew of his own accord.

Furthermore, we note that "indigent defendants with appointed counsel do not have the right to their counsel of choice." *State v. Hampton*, 184 Wn.2d 656, 662-63, 361 P.3d 734 (2015). Curry has not shown any actual prejudice resulting from his former attorney's withdrawal. Accordingly, Curry has failed to demonstrate that the State engaged in conduct that prejudiced his right to a fair trial.

Because the State did not engage in conduct that prejudiced Curry's right to a fair trial, the trial court did not abuse its discretion by denying Curry's motion to dismiss based on government misconduct.

II. MOTION FOR A MISTRIAL—IMPROPER OPINION TESTIMONY ON GUILT

Curry argues that the trial court erred by denying his motion for a mistrial based on Detective Katz's improper opinion testimony. We disagree.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court abuses its discretion when no reasonable judge would have reached the same conclusion. *Emery*, 174 Wn.2d at 765. Appellate courts determine whether a mistrial should have been granted by considering (1) the seriousness of the trial irregularity, (2) whether the trial irregularity involved cumulative evidence, and (3) whether a proper instruction to disregard cured the prejudice against the defendant. *Emery*, 174 Wn.2d at 765. We give deference to the trial court because the trial court is in the best position to discern any prejudice. *State v. Garcia*, 177 Wn. App. 769, 777, 313 P.3d 422 (2013).

Here, the alleged irregularity is Detective Katz's testimony that there was no evidence indicating that Campbell or Henderson were responsible for Ward's death. Opinion testimony as to the guilt of the defendant invades the exclusive province of the jury and may be reversible error because it violates the defendant's right to a trial by jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). To determine whether testimony is an improper opinion on guilt, we consider,

> "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact."

Kirkman, 159 Wn.2d at 928 (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Considering these factors, we hold that Detective Katz's testimony was an improper, although weak, opinion on guilt. Here, Detective Katz's testimony contains the implication that Curry was guilty if the State's premise that Curry was the man in the black ski mask is true. Detective Katz's opinion, although weak, was improper.

However, a proper instruction to disregard improper opinion testimony cures any prejudice against the defendant. *See State v. Johnson,* 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Here, the trial court gave a curative instruction. The instruction informed the jurors that they should "disregard any opinion testimony from Detective Jeff Katz as [to] the involvement of Isaiah Campbell and Xavior Henderson in the September 7, 2014, shooting of Michael Ward." XIII RP at 1282. Therefore, the trial court properly instructed the jury to disregard Detective Katz's improper opinion testimony and the instruction cured any prejudice.

Although Detective Katz's improper opinion testimony constitutes a trial irregularity, it was cured by the trial court's instruction to disregard the opinion testimony. Accordingly, the trial court did not abuse its discretion by denying Curry's motion for a mistrial.

III. IMPROPER IMPEACHMENT EVIDENCE

Curry argues that the trial court erred by admitting evidence regarding his association with Y Gangster Entertainment. However, we hold that Curry waived his challenge to the admission of the Y Gangster Entertainment evidence.

Curry has waived his challenge to the admission of evidence regarding Y Gangster Entertainment by refusing a limiting instruction. "When an error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested." *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991).

Curry argues that the Y Gangster Entertainment evidence was prejudicial because it allowed the jury to believe that Curry was involved in gang culture. If the jury had been given the limiting instruction that the State proposed, the prejudice Curry complains of would have been cured because the jury would not have considered the evidence for any purpose other than credibility. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009) (We presume the jury follows the trial court's instructions.).

Because the prejudice could have been cured by a limiting instruction that Curry explicitly refused, he has waived the error on appeal. Therefore, we decline to address whether the trial court erred by admitting evidence of Curry's association with Y Gangster Entertainment.

IV. LESSER INCLUDED OFFENSE INSTRUCTION

Curry argues that the trial court erred by refusing to instruct the jury on the lesser included offense of first degree manslaughter. We disagree.

A party is entitled to a jury instruction on a lesser included offense if (1) the elements of the lesser included offense are a necessary element of the charge and (2) the evidence supports an inference that the lesser included offense was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, the first prong of the *Workman* test is satisfied; first degree manslaughter may be a lesser included offense of premeditated first degree murder. *State v. Warden*, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997). Accordingly, the issue is whether the

evidence supported giving instructions for first degree manslaughter under the second prong. *See Warden*, 133 Wn.2d at 563.

We review the trial court's decision on the second prong of the *Workman* test for an abuse of discretion. *State v. Chambers*, 197 Wn. App. 96, 120, 387 P.3d 1108 (2016). Under the factual prong,

> [T]he court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. The evidence must affirmatively establish the commission of the lesser offense; it is not enough that the jury might disbelieve the evidence pointing to guilt. If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense. In determining whether the evidence supports an inference that the lesser crime was committed, we review the evidence in the light most favorable to the party requesting the instruction.

Chambers, 197 Wn. App. at 120 (citations omitted) (internal quotation marks omitted).

A person is guilty of first degree manslaughter when he or she recklessly causes the death of another person. RCW 9A.32.060. "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

Here, the evidence did not affirmatively establish that the person who caused the death acted recklessly. The evidence established that the person who shot and killed Ward walked directly down the street with a gun and emptied the ammunition clip into Ward's body while wearing a mask to disguise his identity. Therefore, the evidence presented at trial establishes that the person who committed the shooting acted intentionally. Because the evidence at trial does not support a jury finding of recklessness, the evidence does not affirmatively establish that the lesser

included offense of first degree manslaughter was committed to the exclusion of the greater charged offense of first degree murder.

Because the evidence does not affirmatively establish that only first degree manslaughter was committed, the trial court did not abuse its discretion by ruling that Curry had not satisfied the factual prong of the *Workman* test. Accordingly, Curry was not entitled to a lesser included offense instruction for first degree manslaughter and the trial court did not err.

V. PROSECUTORIAL MISCONDUCT

Curry argues that the prosecutor committed misconduct during closing argument by making improper remarks bolstering the credibility of DNA evidence based on evidence outside the record and by improperly vouching for police witnesses' credibility. We disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *Emery*, 174 Wn.2d at 756. First, we determine whether the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If the prosecutor's conduct was improper, the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Emery*, 174 Wn.2d at 760-61. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Emery*, 174 Wn.2d at 760.

However, if a defendant does not object, he or she is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial

likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making a prejudice determination, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

Curry argues that the State improperly bolstered the credibility of DNA evidence by relying on evidence outside the record. Curry also argues that the prosecutor improperly vouched for the law enforcement witnesses by arguing that the law enforcement witnesses had no interest in the case and, therefore, they had no bias.

Even assuming that the prosecutor's comments were improper, Curry did not object at trial and, therefore, he must show that the prosecutor's comments were so flagrant and ill intentioned that they could not have been cured by an instruction. Curry baldly alleges that the prejudice from the prosecutor's statements could not have been cured. However, an instruction to disregard the prosecutor's statements would have cured any prejudice. *See Anderson*, 153 Wn. App. at 428. Therefore, Curry has failed to meet his burden to show that the prosecutor's conduct was flagrant and ill intentioned. Accordingly, Curry's claim of prosecutorial misconduct fails.

VI. CUMULATIVE ERROR

Curry also argues that the cumulative error doctrine requires reversal of his convictions. "The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). Here, there were three possible errors in Curry's trial: (1) improper impeachment evidence, (2) improper vouching during closing argument, and (3) improper bolstering of the value of DNA evidence. However, even when taken

together, the errors did not deprive Curry of a fair trial. Accordingly, the cumulative error doctrine does not require reversal.

We affirm Curry's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Lee, A.C.J.
LEE, A.C.J.

Worswick, J.
WORSWICK, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

June 13, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VERNON L. CURRY, JR., Appellant.	No. 49026-9-II ORDER DENYING MOTION TO PUBLISH OPINION

Appellant moves for publication of the Court's opinion filed April 24, 2018, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

FOR THE COURT:

PANEL: Jj. LEE, WORSWICK, SUTTON

Sutton, J.
JUDGE

GRECCO DOWNS, PLLC

July 13, 2018 - 4:47 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent v. Vernon L. Curry, Jr., Appellant (490269)

The following documents have been uploaded:

- PRV_Petition_for_Review_20180713164719SC409224_1258.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Curry Petition for Review w attachments.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- jruyf@co.pierce.wa.us

Comments:

Sender Name: Sean Downs - Email: sean@greccodowns.com
Address:
500 W 8TH ST STE 55
VANCOUVER, WA, 98660-3085
Phone: 360-707-7040

Note: The Filing Id is 20180713164719SC409224