98724-6

NO. 35035-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROY HOWARD MURRY,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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Roy Howard Murry requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Murry seeks review of an Opinion published in part by Division III of the Court of Appeals dated June 4, 2020. (Appendix "A" 1-32)

3. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals correctly conclude that the relevant scientific community for purposes of the *Frye*[1] rule is "the community of experts who are familiar with the use of the technique in question" as opposed to the "criminal forensics community"?

2. Do the discrepancies/uncertainties in the completed analysis using the transmission electron microscope (TEM) arise to a significant degree so as to discount the conclusions reached by the witnesses?

3. Does the Court of Appeals decision correctly analyze the evidentiary challenges as being habit evidence as opposed to character evidence?

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[1] *Frye v. United States,* 293 F. 1013, 1014 (D.C. Cir.1923)

4. STATEMENT OF THE CASE

Terry Canfield, Lisa Canfield and John Constable died of multiple gunshot wounds on Memorial Day 2015. (Kerbs[2] RP 3987, ll. 13-17; RP 3989, ll. 16-20; RP 3991, ll. 3-5; ll. 20-22; RP 3995, l. 25 to RP 3996, l. 1; RP 4007, ll. 22-25; RP 4014, ll. 21-22; RP 4016, ll. 14-20; RP 4025, ll. 20-24; RP 4027, ll. 7-13; RP 4030, l. 18 to RP 4031, l. 1; RP 4032, ll. 21-25; RP 4037, ll. 20-25; RP 4050, ll. 1-8; ll. 10-14; RP 4057, ll. 4-14; ll. 17-25; RP 4060, ll. 1-16; RP 4061, ll. 18-19; RP 4067, ll. 19-22; RP 4075, ll. 7-8; RP 4078, ll. 17-24)

The Canfield house and barn were set on fire following the shootings. Terry Canfield's body was found mostly incinerated inside the barn. Lisa Canfield and John Constable's bodies were found inside the house. (Hicks RP 413, ll. 15-21; RP 423, ll. 6-25; RP 426, l. 18 to RP 427, l. 13; RP 474, ll. 12-14; Kerbs RP 1502, ll. 1-2; RP 1721, l. 24 to RP 1722, l. 3)

The fire was reported to 9-1-1 by a neighbor at 2:00 a.m. Other neighbors later told of hearing gunshots between midnight and 1:00 a.m. (Hicks RP 324, ll. 20-21; RP 325, ll. 3-8; RP 326, ll. 13-22; RP 327, l. 13 to RP 328, l. 25; RP 329, ll. 1-21; RP 355, ll. 1-11; RP 356, l. 16 to RP 357, l. 4; RP 361, l. 25 to RP 362, l. 5; RP 367, ll. 12-17; RP 368, ll. 3-14)

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[2] Unless otherwise noted all RP references are to the Kerbs RP

Fire department personnel, law enforcement and arson investigators, along with K-9's, conducted extensive searches at the scene, in the surrounding area following a security breach, and pursuant to search warrants. (Hicks RP 493, ll. 22-23; RP 497, l. 13 to RP 498, l. 5; Kerbs RP 1499, ll. 4-6; RP 1502, ll. 8-11; RP 1684, l. 24 to RP 1685, l. 17; RP 1762, ll. 3-16; RP 1868, ll. 13-18; RP 1877, ll. 16-21; RP 1923, ll. 12-25; RP 1924, ll. 3-17; RP 2011, ll. 5-16; RP 2033, l. 24 to RP 2034, l. 7; RP 2160, ll. 12-17; RP 2164, l. 25 to RP 2165, l. 2; RP 2170, ll. 2-9; RP 2189, ll. 17-20; RP 2197, l. 2 to RP 2198, l. 5; RP 2209, ll. 6-8; RP 2211, ll. 18-24; RP 2217, ll. 14-20; RP 2220, ll. 15-16)

Roy Howard Murry, Lisa Canfield's son-in-law, soon became the prime suspect. Mr. Murry's military background was of particular interest to the State. Mr. Murry was wounded while on duty in Iraq. He received a bronze star and a purple heart for his actions in that encounter. (RP 3137, l. 22 to RP 3138, l. 4; RP 3139, ll. 9-16; RP 3145, ll. 18-20; RP 3147, ll. 3-5; RP 3163, ll. 2-10; RP 3164, l. 21 to RP 3165, l. 2; RP 3360, ll. 1-12)

Search warrants were executed and served at Mr. Murry's Lewiston apartment, his storage unit in Pullman, at his parent's residence in Walla Walla and on his car. (RP 1839, ll. 6-25; RP 2224, ll. 6-8; RP 2360, ll. 1-9; RP 2362, ll. 5-25; RP 2411, ll. 19-22; RP 2433, l. 19 to RP 2434, l. 6; RP 2481, ll. 3-6; RP 2518, ll. 1-3; ll. 17-24; RP 2568, ll. 1-5)

The search warrants resulted in the seizure of various weapons, vast amounts of ammunition, military gear, medical supplies, Trioxane, and a vial of Accudure. (RP 2411, ll. 19-22; RP 2415, l. 2 to RP 2424, l. 18; RP 2426, l. 2 to RP 2427, l. 13; RP 2433, l. 19 to RP 2459, l. 25; RP 2481, l. 3 to RP 2482, l. 25; RP 2520, ll. 7-16; RP 2529, l. 1 to RP 2555, l. 7; RP 2569, l. 2 to RP 2618, l. 10; RP 2621, l. 5 to RP 2636, l. 11)

Spent .22 casings were found at the scene. They were later sent to the Washington State Patrol Crime Lab (WSPCL). Bullets recovered at the autopsies were also provided to WSPCL. WSPCL received a DNA swab from Mr. Murry. Carpet samples from his car and apartment, along with carpet samples from the scene were examined for blood and/or accelerants. (RP 1716, ll. 14-21; RP 1719, ll. 17-18; RP 1720, l. 19 to RP 1721, l. 7; RP 1721, ll. 20-23; RP 1723, l. 10 to RP 1724, l. 4; RP 1727, l. 25 to RP 1728, l. 12; RP 1754, l. 18 to RP 1755, l. 18; RP 3657, l. 19 to RP 3658, l. 2; RP 3688, l. 25 to RP 3689, l. 3)

WSPCL analysts were unable to establish with any certainty that Mr. Murry was involved with either the murders or the arson. (RP 2520, ll. 24-25; RP 3417, ll. 3-5; ll. 9-10; RP 3426, l. 20 to RP 3437, l. 15; RP 3445, ll. 2-3; RP 3541, ll. 12-15; RP 3544, ll. 1-15; RP 3588, l. 24 to RP 3589, l. 4; RP 3591, ll. 22-25; RP 3592, ll. 1-23; RP 3592, l. 25 to RP 3593, l. 20; RP 3657, l. 19 to RP 3658, l. 2; RP 3661, ll. 9-21; RP 3701, ll. 11-19; RP

3703, l. 20 to RP 3704, l. 10; RP 3709, l. 24 to RP 3710, l. 19; RP 3713, ll. 7-16; RP 3714, ll. 9-20; RP 3715, ll. 9-18; RP 3716, ll. 1-10; RP 3717, l. 13 to RP 3718, l. 1; RP 3719, ll. 2-14; RP 3752, ll. 19-25; RP 3757, ll. 7-12; RP 3759, ll. 13-24)

The trial court conducted a *Frye* hearing involving the scanning electron microscope (SEM) and transmission electron microscope (TEM) on November 4, 2016.

In addition to the *Frye* hearing multiple other motions were argued concerning the admissibility of various items of evidence. These included songs that had been found on Mr. Murry's Facebook page; his gun collection; and a supposed hit list. (RP 223, l. 4 to RP 225, l. 8; RP 241, ll. 7-17; RP 243, l. 11 to RP 244, l. 19; RP 242, ll. 12-16; ll. 19-21; RP 251, l. 12 to RP 253, l. 14; RP 257, l. 21 to RP 258, l.13; RP 262, l. 9 to RP 263, l. 7; RP 435, l. 19 to RP 440, l. 25; CP 372; CP 793; CP 925)

Judgment and Sentence was entered on January 12, 2017. (CP 2575)

Mr. Murry filed his Notice of Appeal on January 19, 2017. (CP 2593)

The Court of Appeals issued a decision on June 4, 2020. It was published in part.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision conflicts with both prior Supreme Court and Court of Appeals cases on the application of the *Frye* criteria as outlined below. See RAP 13.4 (b)(1), (2).

A. EXPERT TESTIMONY (*FRYE*) HEARING

ER 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

William Schneck of the WSPCL and Richard Brown of MVA Scientific Consultants, testified concerning the SEM and TEM. Both devices were used to try and identify the substance located on shell casings from the crime scene.

Mr. Schneck had never seen this type of particle before. His use of the term "inclusive" means "I can't render an opinion as if that particle came or did not come from a particular material." (RP 342, ll. 13-18)

Mr. Brown indicated that this was the first time that he knew of when the TEM was used in a criminal case. He himself had never done any testing in a criminal case. (RP 355, ll. 11-17; RP 381, ll. 3-7)

Mr. Brown described what MVA does when a material is submitted to it for analysis. He referred to it as a forensic environmental analysis. "We have particulate we collect, we identify it, and we analyze it and then we interpret what the meaning of our analyses are as they pertain to law and science matters." (RP 381, ll.17-23)

A comparability analysis was then done in connection with the Accudure sample. Mr. Brown's testing indicated that the particles had a similar elemental composition. However, the testing showed lead particles adhering to and associated with the magnesium silicate particles. None of the crime scene casings had lead particles on them. He could not explain that difference. (RP 391, ll. 17-25; RP 392, l. 8 to RP 393, l. 16)

Neither Mr. Schneck nor Mr. Brown tested any other gun lubricants which are sold to the public. They did not know the elemental composition of those gun lubricants. The most they could say was that the nanoparticles from the Accudure vial were "consistent with" the nanoparticles found on the cartridge(s). Nevertheless, "consistent with" is not the same as "conclusive." (RP 394, ll. 6-16; RP 406, l. 2 to RP 407, l. 2)

The trial court determined that the TEM analysis met the *Frye* standard and entered Findings of Fact and Conclusions of Law in support of its determination. (RP 435, l. 19 to RP 440, l. 25; CP 1142)

The trial court's determination that the *Frye* standard was met is flawed. The use of the TEM has not been accepted by the community of criminal forensic scientists.

> The application of an accepted scientific theory by analogy to a different material, in a new and different area of science and in a new context, is an issue of first impression in Washington state. When a proponent seeks to apply techniques to a whole different field, those techniques must undergo controlled testing conforming to the scientific method. [Citation omitted.] The scientific method comprises the following six-step analytical process used to generate a theory or conclusion considered reliable by scientists generally: (1) observations of a phenomenon are made; (2) an explanatory theory is proffered; (3) observable hypotheses are generated from the theory; (4) studies are designed to test these hypotheses; (5) empirical test results are used to revise older theories or generate different, more reliable theories; and (6) the process repeats itself.

Moore v. Harley Davidson Motor Co., 158 Wn. App. 407, 419, 241 P.3d 808 (2010).

Using a scanning electron microscope (SEM), Mr. Schneck located an anomalous residue on cartridge cases recovered from the scene of the shootings. Due to the fact that the SEM was unable to magnify the residue to a sufficient degree for identification he contacted MVA Scientific Consultants for use of their transmission electron microscope (TEM). (RP 304,

ll. 19-21; RP 305, ll. 2-4; RP 312, l. 22 to RP 313, l. 1; RP 318, l. 14 to RP 320, l. 5; RP 322, ll. 1-22)

Mr. Brown, of MVA, a senior forensic microscopist, determined that the anomalous residue consisted of nanoparticles containing magnesium silicate and aluminum. (RP 346, ll. 8-9; RP 347, ll. 3-6; l. 19; RP 364, l 20 to RP 365, l. 1)

Both Mr. Schneck and Mr. Brown also examined a sample of Accudure. They determined that Accudure, a proprietary compound developed by Pavlo Rudenko, contained magnesium silicate. Mr. Schneck's testing was inconclusive as to the presence of Accudure on the fired cartridges recovered from the scene. Prior to sending the cartridges to MVA a series of test firings was performed using Accudure. (RP 311, ll. 23-24; RP 314, ll. 2-3; RP 318, l. 4 to RP 320, l. 5; RP 320, l. 23 to RP 321, l. 16; RP 323, ll. 17-18; RP 325, l. 14 to RP 326, l. 16; RP 340, ll. 16-25)

Mr. Murry acknowledges the individuals expertise. He also acknowledges that the SEM and TEM are recognized devices for examination of minute particles such as nanoparticles. He questions which scientific community is to be considered.

QUERY: Is it the general scientific community? Is it only criminal forensics?

> When techniques are applied to a significantly different field, they must still meet the *Frye* standard, i.e., they must be accepted in the relevant scientific community. [Citation omitted.] Generally acceptance in the same scientific community may be established through empirical testing using the scientific method or by publication in a scholarly journal. [Citations omitted.]

Moore v. Harley Davidson Motor Co., supra 420.

The *Moore* case involved a comparability analysis of metal splatter to blood splatter. The Court determined that the metal splatter analysis was not admissible because it was not generally accepted in the relevant scientific community, to wit: the engineering community.

The *Moore* case is applicable to Mr. Murry's case. The relevant community is not the community of experts familiar with the TEM; but the criminal forensics community.

> Without testing the methodology's application in a manner generally accepted in the scientific community demonstrating the techniques accuracy when applied to the novel purpose, it is not admissible. *Tranowski* [*United States v. Tranowski*, 659 F.2d 750, 757 (7th Cir. 1981)]

Moore v. Harley Davidson Motor Co., supra 420.

The SEM is recognized in that field. The TEM is not. It is hard to conceive that there is a significant dispute among qualified scientists when a particular device has never been used to examine evidence in a criminal proceeding.

Neither Mr. Schneck's nor Mr. Brown's testimony varied much from the testimony at the *Frye* hearing. Mr. Schneck testified that he could identify the particles as magnesium and silica; but could not determine their shape because they were nanoparticulates. (RP 3555, ll. 7-22)

Mr. Brown, at trial, described the operation of the TEM. It passes electrons through a sample and it in essence results in looking at the shadow of what they passed through. (RP 3914, ll. 5-11)

Mr. Brown stated that the test fired casings reflected the presence of magnesium silica consistent with a sample of Accudure. Pavlo Rudenko has a PhD and is certified as a lubricant and grease specialist. He developed Accudure using nanoparticles[3]. (RP 3452, ll. 15-22; RP 3455, l. 25 to RP 3456, l. 5; RP 3931, ll. 23-25; RP 3936, ll. 12-18)

Accudure was not being sold in 2015. Mr. Murry was involved with Mr. Rudenko in the potential marketing of Accudure. (RP 2739, ll. 11-21; RP 3346, ll. 14-24; RP 3461, ll. 15-17)

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[3] A nanoparticle is a particle with at least one dimension which has one hundred nanometers or less. (RP 3905, ll. 23-24)

He further indicated that the magnesium silicate particles were not exclusive to the Accudure; but just consistent with it. There may be other sources within the environment of which he was unaware. It was the first time he had ever seen this type of particle. (RP 3939, l. 16 to RP 3940, l. 20; RP 3941, ll. 3-16; RP 3961, ll. 5-15)

On cross-examination Mr. Brown admitted that MVA had never used the TEM in a criminal case. He was unaware of any scientific journal articles in existence that would reflect the particular testing done in Mr. Murry's case. (RP 3952, ll. 3-9; ll. 14-19)

Mr. Brown noted that the casings from the test firing had lead associated with them. The lead was within the particular magnesium silicate nanoparticle. This differed from the crime scene casings. Mr. Brown further described this as a variable without explanation. (RP 3962, ll. 3-25; RP 3963, ll. 2-19)

Mr. Brown did not examine any other gun lubricants. He could not conclusively say that the particulates on the casings came exclusively from Accudure. (RP 3966, ll. 19-25; RP 3969, ll. 6-15)

The Court in discussing the *Frye* standard in *State v. Hayden*, 90 Wn. App. 100, 103-04, 950 P.2d 1024 (1998) held:

> Under this test, scientific evidence is admissible if it is generally accepted in the relevant scientific community…. …[I]f the evidence

> does not involve new methods of proof or new scientific principles, then the *Frye* inquiry is not necessary. [Citation omitted.] Full acceptance of a process in the relevant scientific community obviates the need for a *Frye* hearing. [Citation omitted.]

The *Hayden* Court was discussing digital photography and the enhancement of the photos by computer software. The Court determined that it was the forensic use of the tools that was relatively new as opposed to the process itself. The *Hayden* Court when on to analyze the admissibility the evidence under the *Frye* standard. The Court ruled at 107:

> Review of admissibility of evidence under the *Frye* test is de novo. [Citation omitted.]. Because no Washington court, and no other court in a published opinion, has determined that the digitally enhanced print process satisfies the *Frye* test, this court must examine the record, the available literature and cases from other jurisdictions to determine whether enhanced digital imaging is generally accepted in the relevant scientific community *State v. Cauthron*, 120 Wn.2d 879, 888, 846 P.2d 502 (1993).

The Court of Appeals comparison of the TEM with the colposcope in *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991) is an apt analogy. However, it is not controlling. The challenge is not to the TEM. It is to the conclusions reached by Mr. Brown and Mr. Schneck.

> …[E]xpert testimony couched in terms of "could have," "possible," or "similar" is uniformly admitted at trial. The lack of certainty goes to the weight to give the testimony, not to its admissibility. This is so, in part, because the scientific process involved often allows no more certain testimony.

State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

The Court of Appeals relied upon *Commonwealth v. Lykus*, 367 Mass. 191, 203, 327 N.E. 2d 671 (1975) which dealt with the admissibility of voice identification by spectrography. The Court in that case analyzed the difference between the polygraph and spectrograph.

The portion of the *Lykus* case relied upon by the Court of Appeals relates only to the particular instrument involved. It does not pertain to the conclusions drawn, especially where they are speculative in nature.

Moreover, it is questionable if the testimony was helpful to the trier of fact. Mr. Schneck's inconclusive determination indicates otherwise. Mr. Brown testified that the TEM had not been used in criminal forensic science to his knowledge. Mr. Brown had never done testing in a criminal case before this case. Mr. Brown indicated that the type of analysis that was done in Mr. Murry's case (comparability of evidence) had never been done by him before.

Additionally, Mr. Brown was only able to determine that the material found on the cartridge was "consistent with," which is not the same as "conclusive," with Accudure. (RP 406, l. 2 to RP 407, l. 2; RP 3961, ll. 8-15)

In *Davidson v. Metropolitan Seattle,* 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986), the Court stated:

> The rule governing the admissibility of expert testimony is ER 702. **Once the court is satisfied with the witnesses' expertise, the test for admissibility is whether the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue**." ER 702; 5 A K. Tegland, Wash. Prac. § 291 (1982); *State v. Petrich,* 101 Wn.2d 566, 575, 683 P.2d 173 (1984). The court should also consider whether the issue is of such a nature that an expert could express "**a reasonable probability rather than mere conjecture or speculation**." 5A K. Tegland, at 36. In addition, **when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert**. *United States v. Fosher,* 590 F.2d 381 (1st Cir. 1979).

(Emphasis supplied.)

An abuse of discretion standard is applied in deciding whether or not a trial court has erred in ruling on the admissibility of expert testimony. An abuse of discretion occurs

> "[w]here the decision or order of the trial court is … manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex. rel. Carroll v., Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Finally, Mr. Murry argues that the SEM and TEM comparability analysis in his case is substantially similar to the gas chromatography accelerant comparisons conducted in *State v. Huynh,* 49 Wn. App.. 192, 196-98, 742 P.2d 160 (1987).

When a particular type of comparability analysis is conducted, that has never previously been done, then it is a novel procedure. A novel procedure which does not give conclusive results, is not peer reviewed, and does not have some type of scientific control, is unacceptable in a court of law.

B. CHARACTER EVIDENCE- HABIT

The misuse of character evidence, i.e., songs and a hit list, along with the introduction of testimony involving Mr. Murry's survivalist tendencies and belief in governmental conspiracies was an unnecessary attack on his character. The Court of Appeals determination that it was evidence of habit is in error.

> Care must be taken to assure that the evidence is really relevant to the dispute at hand, and that it does not divert attention to collateral issues. [Citations omitted.] Also, the habit in

> question must be just that: "one's regular response to a repeated specific situation so that doing that habitual act becomes semi-automatic." See Comment, ER 406. Caution is essential in dealing with habit evidence because it verges on inadmissible evidence of character. See ER 404; R. Aronson, *Evidence in Washington* § IV at 34 (1986).

Norris v. State, 46 Wn. App. 822, 826, 733 P.2d 231 (1987).

ER 404(a) states, in part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> > *(1) Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same ….

Mr. Murry never offered any character evidence. He did not testify. He did not call any witnesses. The State, by introducing character evidence, violated the rule. It adversely impacted Mr. Murry's constitutional right to a fair trial.

ER 405(b) states:

> **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Mr. Murry asserts, as he did as to the ER 404(a) inadmissible character evidence, that ER 405(b) was violated.

(1.) Gun Ownership

The trial court limited the admissibility of evidence concerning Mr. Murry's ownership of guns as follows:

> **The State is prohibited from introducing evidence of a gun collection just to support its assertion that because he has a gun collection, therefore he must have committed these offenses.**

(Kerbs RP 257, l. 21 to RP 258, l. 13) (Emphasis supplied.)

The State introduced a significant amount of testimony concerning Mr. Murry's familiarity with guns and how he would only handle ammunition with gloves. (RP 2291, ll. 6-12; RP 2369, ll. 6-9; ll. 16-20; RP 2725, ll. 15-24; RP 2736, ll. 3-17; RP 2737, ll. 3-10)

However, the overwhelming amount of evidence concerning the number of guns, the thousands of rounds of ammunition, their location in Walla Walla, Lewiston, Pullman and Mr. Murry's car all contributed to an impression that Mr. Murry was some type of a fanatic. When combined with the survivalist testimony the State placed Mr. Murry's character at the far side of the extremist movement.

It would appear that the argument at the motion in limine on gun ownership was well-taken. In *State v. Rupe*, 101 Wn.2d 664, 706-07, 683 P.2d 571 (1984):

> … [T]he challenged evidence directly implicates defendant's right to bear arms. Const. art. 1, § 24…
>
> Although we do not decide the parameters of this right, here, defendant's behavior - possession of legal weapons - falls squarely within the confines of the right guaranteed by Const. art. 1, § 24. Defendant was thus entitled under our constitution to possess weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use. Our conclusion follows from the clear language of Washington's constitution.

(2.) Survivalist

The fact that Mr. Murry may be a survivalist, and fears the eventual collapse of the government, does not have any bearing on whether or not he committed any of the offenses.

The testimony and exhibits pertaining to Mr. Murry as a survivalist arose from the search warrants, testimony of his friends/acquaintances, and Amanda Constable. (RP 2313, l. 21 to RP 2314, l. 7; RP 2370, ll. 1-17; RP 2708, l. 18 to RP 2709, l. 7; RP 2720, l.24 to RP 2721, l.6)

This particular testimony poisoned the jury by essentially declaring that Mr. Murry is a dangerous individual and not to be trusted.

(3.) Conspiracy Theorist

There was considerable testimony concerning Mr. Murry's belief in conspiracy theories. Many of the witnesses described Mr. Murry's conspiracy beliefs. These beliefs were not a recent development with Mr. Murry. In fact, he continually referred to Russian involvement, various governmental agencies, and his belief that Lisa Canfield and his wife were Russian agents.

There are many people who believe in government conspiracies. Just because a person believes in a government conspiracy does not make them a cold-blooded killer.

Just because someone is a survivalist does not make them a cold-blooded killer.

Just because someone owns multiple guns does not make them a cold-blooded killer.

> Character is an "essential element" in comparatively few cases. 22 C. Wright & K. Graham, *Federal Practice § 5235 (1978).* In criminal cases, character is rarely an essential element of the charge, claim, or defense. 5 K. Tegland, Wash. Prac., *Evidence* § 126, at 312 (1982). For character to be an essential element, character must itself determine the

> rights and liabilities of the parties. 2 J. Weinstein & M. Berger, *Evidence* ¶ 404 [02] (1979).

State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984)

Mr. Murry's defense was general denial. Character was not a necessary element of that defense. Character was not a necessary element of any of the charged offenses.

As the *Kelly* Court noted at 200:

> The restrictions on the use of extrinsic evidence of prior specific instances of conduct are thus a recognition of the axiom that a defendant should be tried only for the offense charged. *State v. Mack,* 80 Wn.2d 19, 21, 490 P.2d 1303 (1971); *State v. Emmanuel,* 42 Wn.2d 1, 253 P.2d 386 (1953).

(4.) SONGS

The State argued during a pre-trial motion in limine that certain songs which Mr. Murry had posted on Facebook were relevant to the offenses charged. The songs were "Gasolina" by Daddy Yankee; "Face Everything and Rise" by Papa Roach; and "Revolution" by Diplo. (Kerbs RP 223, ll. 8-19)

The trial court ruled that the songs had minimal relevance and if the State sought to introduce them that the defense could provide the lyrics or a video. (Kerbs RP 241, ll. 7-17)

The Court went on to say, after an inquiry from the State, that if Mr. Murry was the one who posted the songs he was adopting the messages of the songs. It was also determined that the songs were in Spanish and that the State was interpreting them into English. (Kerbs RP 243, l. 11 to RP 244, l. 19)

Later, at that same hearing, the State brought up another song entitled "Burn it Down" by Linkin Park. The trial court ruled that it also was admissible. (Kerbs RP 262, l. 9 to RP 263, l. 7)

Finally, at trial, the State not only introduced the songs previously ruled upon by the trial court; but also introduced videos entitled "Terminator 4," "Hitman Absolution," "Hitman Absolution (Trailer)," "Agent 47 Hitman Absolution," "Hitman Absolution Sniper," and "Hitman Absolution, Nuns, Guns and Agent 47." (RP 3237, ll. 3-14; RP 3239, ll. 1-2; ll. 8-9; ll. 13-15; RP 3240, l. 1 to RP 3241, l. 23)

Eventually, the music videos were played for the jury. (RP 3270, ll. 8-25; RP 3271, ll. 10-18; Exhibits 1011, 1012, 1013 and 1014)

Even though the music videos were introduced and played by the defense, the necessity for doing so was the direct result of the trial court's ruling that the songs were admissible.

If the trial court had not ruled the songs admissible, then, in that event, Mr. Murry's rights would not have been impacted by the prejudicial inferences that the music videos had some relationship to the offenses.

Moreover, Detective Keyser's testimony concerning the Facebook songs constituted a further intrusion into the realm of speculation. (RP 3791, l. 24 to RP 3792, l. 11)

Finally, the State emphasized the nature of the songs in its closing argument. The argument was emotional in nature and aimed at inflaming the jury toward Mr. Murry through his choice of rather violent music. (Appendix "C")

The Supreme Court expressed its dismay with the introduction of musical evidence in connection with gang involvement in *State v. Juarez-Deleon*, 185 Wn.2d 478, 374 P.3d 95 (2016). The Court stated at 489:

> Lastly, we are concerned by some of the questionable musical evidence presented by the State as evidence of gang involvement. This evidence was cited by the Court of Appeals as "untainted" evidence of gang membership. *Deleon,* 185 Wn. App. at 205. For example, the Court of Appeals noted that a song by Los Tigres Del Norte was stored on Anthony Deleon's cellphone, and indicated that this was evidence of gang involvement. *Id.* at 187. We find this conclusion troublesome. Los Tigres Del Norte has been one of the more prominent bands in Latin music for decades. Since forming in 1968, Los Tigres Del Norte have sold 32 million albums. They

> have won five Latin Grammy awards, and they have performed in front of United States troops serving abroad. There is no support in the record for the contention that enjoying their music is evidence of gang involvement. While this may not be the primary issue in this case, we felt that it was nonetheless important to take this opportunity to remind courts to exercise far more caution when drawing conclusions from a defendant's musical preferences.

Mr. Murry recognizes that evidentiary error is not an error of constitutional magnitude. Nevertheless, he asserts that it was so prejudicial that it is not harmless, and that within a reasonable probability the outcome of his trial was materially affected by the error. (*See: State v. Kelly, supra,* 199)

(5.) <u>HIT LIST- OPENING THE DOOR</u>

Query: Does a "hit list" actually exist? Does it exist only in the mind of Mr. Murry?

The Court of Appeals reliance upon *State v. Rushworth*, 12 Wn. App.2d 466 (2020) is inaposite. The *Rushworth* Court declared the curative admissibility doctrine inapplicable in the criminal sphere as a violation of a defendant's due process right to a fair trial. In doing so, it discussed both the invited error doctrine and the open door doctrine.

As to the open door doctrine the Court stated at 476:

> When a defendant does not merely open the door to a newly relevant topic, but attempts to introduce incompetent evidence such as hearsay, the prosecutor's recourse is to object. If the objection is successful, nothing more need be done to correct the record (other than a possible motion to strike). If unsuccessful, the prosecutor may either seek an interlocutory appeal or (more realistically,) accept the trial court's ruling as the law of the case and introduce responsive evidence within the terms of the court's ruling. In the latter scenario, the doctrine of invited error will likely protect against reversal on appeal….

Amanda Constable never saw a written "hit list." She had no idea if there were any names on that list. She did not know if her family was on that list. (RP 2899, ll. 14-16) (RP 2897, ll. 2-22; RP 2904, ll. 5-7)

The "hit list" was described as follows:

> He just -- throughout our relationship he had like a shit list, just a -- a list of people who had betrayed him that had -- did the opportunity arise, he would kill them. And that was a continuous theme that -- I mean, it wasn't just a one time. He mentioned it just throughout our whole relationship. When something would happen, he would say something about it.

(RP 2893, ll. 15-21)

The State took the position that a question concerning any verbal threats by Mr. Murry to his wife during the marriage opened the door. The State is in error.

> The "opening the door" doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. The term is used in two contexts:
>
> > (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.
>
> 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, 66-67 (5th ed. 2007). **Because this "opening the door" doctrine pertains to the admissibility of evidence, it must give way to constitutional concern such as the right to a fair trial.** *See State v. Frawley*, 140 Wash. App. 713, 720, 167 P.3d 593 (2007) (ruling that constitutional concerns trump strict application of court rules); *and see* ER 402 (allowing trial court to rule that otherwise relevant evidence is inadmissible if admission would violate constitutional protections). Thus, even if [the defendant] had "opened the door" to evidence or examination of a particular subject at trial, the prosecutor is not absolved of her ethical duty to ensure a fair trial by presenting only competent evidence on this subject.

State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2003); *see also Seattle v. Pearson*, 192 Wn. App. 802, 819, 369 P.3d 194 (2016) (discussing the limitations inclusive of the *Geffeler* factors [*State v. Geffeler*, 76 Wn.2d 449, 458 P.2d 17 (1969)]). (Emphasis supplied.)

The *Geffeler* case held at 455:

> …[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or re-direct examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Under the facts and circumstances of Mr. Murry's case, the testimony concerning the "hit list" came in on the State's redirect of Amanda Murry. The problem which arises is that Ms. Murry did not know if a "hit list" even existed. Mr. Murry had only talked about it during their marriage.

Even if the "hit list" existed, Ms. Murry did not know if her name was on it. All of the testimony concerning the "hit list" is mere speculation and conjecture.

C. CONCLUSION

Mr. Murry is entitled to a new trial. The testimony pertaining to the conclusions drawn by the witnesses relating to the comparability analysis of the nanoparticles observed by use of the TEM does not comply with the *Frye* requirements.

The conclusions are speculative and uncertain. There is a lack of confirmation that the components of Accudure are unique as opposed to other gun lubricants.

The Court of Appeals designation of the scientific community in general as the community to he considered under the facts of this case is contrary to established caselaw.

Evidentiary error compounds the fairness of Mr. Murry's trial. If a new trial is ordered then the character evidence should be excluded unless it is established as relevant to an element of the crimes charged.

Dated this 6th day of July, 2020.

Respectfully submitted,

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Appendix “A”

FILED
JUNE 4, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ROY H. MURRY, Appellant.	)	No. 35035-5-III OPINION PUBLISHED IN PART

KORSMO, J. — Roy Murry appeals from convictions for three counts of aggravated first degree murder, one count of attempted first degree murder, and one count of first degree arson. Due to an admitted defect in the charging document, we reverse the attempted murder conviction without prejudice. Because the evidence of identity was sufficient, and because the trial court did not abuse its considerable discretion in resolving evidentiary challenges, we affirm the remaining convictions.

In the published portion of this opinion, we address Murry's *Frye*[1] challenge and the inadequacy of the attempted murder charging language.

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[1] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

FACTUAL BACKROUND

Although extensive evidence was admitted during the lengthy trial, the nature of the appellate challenges counsels we leave more detailed discussion of the voluminous facts to the appropriate argument. Accordingly, there need only be a generalized discussion of the factual background of this case.

Murry, who lived in Lewiston, Idaho, was estranged from his wife, Amanda Constable.[2] She worked in Spokane as a nurse and lived with her mother and stepfather, Lisa and Terry Canfield, at their Colbert-area residence. Also residing there was her brother, John Constable. Amanda Constable was contemplating a divorce.

On the night of May 25, 2015, Memorial Day, Amanda Constable worked her standard shift at a Spokane hospital and was expected to return home around 12:00 to 12:15 a.m. on May 26. A co-worker called in ill and Amanda Constable had to work until 3:38 a.m. to cover. When she finally reached the family home, she discovered that law enforcement had responded to a crime scene.

The Canfields and John Constable had been murdered. Each had been shot multiple times and their bodies set on fire.[3] Both the house and an outbuilding where Terry Canfield's body was found were burned. The subsequent investigation determined that both gasoline and barbecue lighter fluid had been used as accelerants in multiple

[2] Constable used the name Murry prior to the dissolution of the couple's marriage.
[3] In each instance, the cause of death was attributed to the gunshot wounds.

areas of the house. Investigators did not identify the ignition sources, but several possible fire starters were located.

Burglary and theft were ruled out as motives for the crime since the only item missing from the scene was a .38 caliber revolver taken from Amanda's bedroom; the weapon had been a gift from Murry. $3,000 in cash was left undisturbed in the same room and other valuables in the house were not taken. Suspicion almost immediately fell on Murry.

Detectives twice interviewed him within four days of the killings. He claimed to have been camping with friends along the Snake River, but declined to name his companions. Extensive efforts ensued to verify the alibi, but no corroborating evidence was located.

Prosecutors filed the noted charges and a lengthy jury trial ensued in the Spokane County Superior Court. The identity of the killer was the primary contested issue at trial. Due to the circumstantial nature of the case, numerous witnesses were called to testify about Mr. Murry's habits, his behavior leading up to the killings, and his motive. That testimony is discussed later as necessary.

The jury found Mr. Murry guilty on the five noted charges and the court imposed the mandatory sentence of life in prison on the three aggravated first degree murder convictions. Mr. Murry timely appealed to this court. A panel heard oral argument of the case.

ANALYSIS

The published portion of this case addresses two issues. We first consider what is the relevant scientific community for purposes of a *Frye* analysis. We then turn to the adequacy of the attempted first degree murder charging language.

Frye Community

We conclude that the relevant scientific community is not the "criminal forensics community," but, is instead the community of experts who are familiar with the use of the technique in question.[4]

This issue arises from the discovery of strangely shaped nanoparticles on some of the shell casings recovered from the crime scene. William Schneck, a forensic scientist from the Washington State Patrol Crime Laboratory, used a Scanning Electron Microscope (SEM) to examine the casings. The SEM is the most powerful microscope at the lab. He believed the particle might be AccuDure, a firearms lubricant, but his opinion was inconclusive. He therefore sent the samples to MVA Scientific Consultants, a private laboratory in Georgia. Richard Brown of MVA used a Transmission Electron

[4] Mr. Murry's related issues concerning the nanoparticle testimony largely derive from his belief that the trial court erred in its analysis of the *Frye* community and will not be separately addressed. To the extent that he also challenges the use of the Transmission Electron Microscope under *Frye*, we consider the challenge foreclosed by the holding of *State v. Noltie*, 116 Wn.2d 831, 850-51, 809 P.2d 190 (1991), that there is nothing novel about using a magnifying glass to enhance vision.

Microscope (TEM) and concluded that the samples were unique, synthetic silicon-based nanoparticles that were consistent with the distinctive component of AccuDure.[5]

Washington uses the test of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) to limit expert testimony to principles generally accepted in the scientific community. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996); *State v. Canaday*, 90 Wn.2d 808, 812, 585 P.2d 1185 (1978). The reviewing court considers the issue de novo and is expected to conduct a searching review that may include scientific materials developed after trial. *Copeland*, 130 Wn.2d 255-56. If the scientific principle satisfies *Frye*, the trial court applies ER 702 in determining whether to admit the individual expert's testimony. *In re Det. of Pettis*, 188 Wn. App. 198, 204-05, 352 P.3d 841 (2015).

A witness may qualify as an expert by knowledge, skill, experience, training, or education. ER 702. After an expert's qualifications are established, any deficiencies in the expert's knowledge goes to the evidentiary weight of the testimony. *Keegan v. Grant County Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 283, 661 P.2d 146 (1983). This court reviews the trial court's decision to admit expert witness testimony for abuse of discretion. *Pettis*, 188 Wn. App. at 205. Discretion is abused if it is exercised on

[5] Murry was the only known user of the lubricant and the evidence figured prominently in establishing the identity of the killer.

untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A *Frye* hearing was conducted prior to trial. Mr. Murry alleged that the TEM was not used in the "criminal forensics community" and that, accordingly, *Frye* precluded consideration of TEM evidence in Washington. Mr. Murry had an expert listen to the *Frye* hearing testimony, but, ultimately, he did not present any evidence or testimony at the hearing. The State presented testimony from Brown, Schneck, and the developer of AccuDure, Pavlo Rudenko, Ph.D. Dr. Rudenko used both a SEM and a TEM while developing AccuDure and also hypothesized that he would use a TEM in order to protect his patent should the need arise. He testified that differences between lubricants are discernable under a microscope.

Mr. Brown, who had used the TEM for 35 years, testified to the history of TEM, a microscope developed during the 1940s that became useful in forensic work in the 1980s due to its ability to distinguish asbestos fibers. He explained that due to the high resolution offered by TEM, it is the most common tool for examining nanoparticles. In addition to forensics, TEM commonly is used by medical device manufacturers and also by the Center for Disease Control to identify viruses.

Brown explained that TEM is the most powerful microscope for purposes of magnification and resolution. The difference between SEM and TEM is the difference between looking at the surface level of a particle (SEM) or at the atomic level (TEM).

Brown also explained that there was no debate in the scientific community concerning use of TEM.

The trial court rejected the defense effort to classify the relevant scientific community for *Frye* purposes as the criminal forensic community. Concluding that the more general scientific community was appropriate, the court ruled that the testimony about the AccuDure nanoparticles was admissible.

In this court, Mr. Murry reprises his challenge to the trial court's determination of the relevant scientific community for the *Frye* assessment. One enduring criticism of *Frye* has been the court's failure to define the scientific community by which to judge the acceptance of novel scientific methods. DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1.5, at 9 (2005-2006 ed.). This problem becomes complicated because various overlapping scientific disciplines use the same information and techniques. *Id.*[6]

Washington courts have not squarely addressed this issue. A commonly cited answer to this challenge was provided by the Massachusetts Supreme Court: "the requirement of the *Frye* rule of general acceptability is satisfied, in our opinion, if the

[6] The Washington Supreme Court acknowledged: "When determining whether a witness is an expert, courts should look beyond academic credentials. For example, depending on the circumstance, a nonphysician might be qualified to testify in a medical malpractice action. The line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses." *L.M. v. Hamilton*, 193 Wn.2d 113, 135, 436 P.3d 803 (2019) (citation omitted) (internal quotation marks omitted).

principle is generally accepted by those who would be expected to be familiar with its use." *Commonwealth v. Lykus*, 367 Mass. 191, 203, 327 N.E.2d 671 (1975).

We believe the *Lykus* standard is consistent with the actual application of *Frye* by the Washington Supreme Court. The mechanics of child birth injuries were at issue in a recent medical malpractice case. *L.M. v. Hamilton*, 193 Wn.2d 113, 135, 436 P.3d 803 (2019). In addition to hearing from the obstetrics community, the court permitted the testimony of a biomechanical engineer despite his lack of expertise with the biomechanics of childbirth. *Id.* at 138. In the seminal criminal cases that paved the way for use of DNA evidence at trial, the court looked at evidence from experts in multiple disciplines. In the case involving statistical DNA analysis, the court heard from forensic scientists, a university genetics professor, a university genetics researcher, and a university statistics professor. *State v. Kalakosky*, 121 Wn.2d 525, 542, 852 P.2d 1064 (1993). In the case involving DNA typing, the court heard from a large number of university researchers, geneticists, biochemists, and a statistician, in addition to forensic scientists. *State v. Cauthron*, 120 Wn.2d 879, 884, 846 P.2d 502 (1993).

In none of these cases did the experts belong solely to the civil or criminal forensics community. Mr. Murry has not identified a single *Frye* case where our courts have excluded expert testimony from outside the forensic community. Limiting testimony solely to those who use the science or equipment, instead of those also familiar with the principle, unduly narrows the field to those who favor the science in question. It

also discourages innovation by excluding the opinions of cutting-edge researchers who may be demonstrating the utility of a new principle or a device.

The Massachusetts standard is consistent with the Washington practice and we adopt it. Accordingly, we hold that scientists familiar with the use of the scientific principle in question constitute the relevant scientific community for purposes of a *Frye* analysis.

Here, the trial court heard from scientists familiar with the examination of nanoparticles and properly based its ruling on their testimony. The trial court did not err in determining that examination of nanoparticles by a Transmission Electron Microscope was accepted in the scientific community familiar with the technology. Accordingly, its ruling is affirmed.

Charging Document Sufficiency

Mr. Murry next argues that the attempted murder count was inadequately charged. Precedent agrees with that argument and we reverse the attempted murder conviction without prejudice to refiling.

A defendant has the constitutional right to be informed of the charges against him. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). This requires that the charging document include each essential element of the charged offense; merely citing to the appropriate statute is insufficient. *Id.* The rationale for this rule is that the defendant must be informed of the allegations so he or she can properly prepare a

defense. *State v. Simon*, 120 Wn.2d 196, 198, 840 P.2d 172 (1992). Further, the statutory manner or means of committing a crime is an element that the State must include in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). When a charging document fails to state a crime, the remedy is to dismiss the charge without prejudice to the State's refiling of a correct charge. *Vangerpen*, 125 Wn.2d at 792-93.

Mr. Murry argues that the charging document erroneously omitted the element of premeditation. Despite the fact that premeditation actually is not an element[7] of attempted first degree murder, he is correct. *Vangerpen* is dispositive.

In that case, the original charging document[8] alleged that the defendant, with the intent to kill, attempted to do so.[9] At the close of the prosecution's case, the defense moved to dismiss for failure to state a crime. The State agreed that the original document charged only attempted second degree murder since the element of premeditation was missing. *Id.* at 785. In its subsequent review, the Washington Supreme Court agreed that

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[7] *State v. Boswell*, 185 Wn. App. 321, 335-36, 340 P.3d 971 (2014) (elements are specific intent to commit first degree murder and taking a substantial step toward committing the crime); *State v. Reed*, 150 Wn. App. 761, 772-73, 208 P.3d 1274 (2009).

[8] The trial court had granted the prosecution's motion to amend the information after the State had rested to add premeditation. *Vangerpen*, 125 Wn.2d at 785-86.

[9] Although the charging document is not discussed in the Supreme Court's version of *Vangerpen*, it is set forth in the Court of Appeals opinion. *See State v. Vangerpen*, 71 Wn. App. 94, 97 n.1, 856 P.2d 1106 (1993).

the charging document was defective and expressly stated that premeditation was an element of attempted first degree murder for charging purposes. *Id.* at 791.

It is possible to distinguish *Vangerpen*, as the prosecutor urges we do, on the basis that the information filed in *Vangerpen* was improper due to failure to recite the statutory elements of the crime, while the information in this case correctly recited those elements. *See State v. Boswell*, 185 Wn. App. 321, 335-36, 340 P.3d 971 (2014) (elements are specific intent to commit first degree murder and taking a substantial step toward committing the crime). We decline to do so for two reasons.

First, the rulings of the Washington Supreme Court are binding on this court. *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). Even if possible to distinguish the *Vangerpen* pronouncement, we have declined to do so in the past. *E.g.*, *State v. Mellgren*, No. 35312-5-III (Wash. Ct. App. Dec. 11, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/353125_unp.pdf. Similarly, Division Two of this court has recognized the *Vangerpen* pronouncement as requiring the element of premeditation in a charging document. *Boswell*, 185 Wn. App. at 335-36 (declining to extend *Vangerpen* to jury instructions).

Secondly, leaving premeditation out of an attempted first degree murder charging document would create an additional problem. First degree murder can be committed in three ways: (1) premeditated intentional murder, (2) extreme indifference, and (3) felony murder. RCW 9A.32.030(1)(a)-(c). However, it is impossible to attempt murder by

extreme indifference or felony murder because neither offense requires proof of intent to kill. *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991) (extreme indifference); *State v. Wanrow*, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978) (intent to kill not an element of felony murder). Thus, a charging document that merely states that a defendant took a substantial step toward committing first degree murder would fail to state a crime unless premeditated murder was identified as the basis for the charge.

Since only attempted premeditated murder can constitute attempted first degree murder, the charging document must, in some manner, identify the premeditation element lest it commit the same error as in *Vangerpen*. Accordingly, although the charging document used in this case adequately conveyed the elements of the offense, it still failed to state a crime. For that reason, we reverse the conviction for attempted first degree murder without prejudice and remand for further proceedings. *Vangerpen*, 125 Wn.2d at 792-93.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

UNPUBLISHED ISSUES

The appeal raises numerous other challenges including the sufficiency of the evidence of identity on all charges as well as a contention that the killer did not take a

substantial step toward killing Amanda Constable. We group those two challenges together before turning to look at his evidentiary arguments, another topic that we treat as one. Next, we briefly consider Mr. Murry's challenges to his mental competency and legal financial obligations (LFOs). Finally, we briefly address Mr. Murry's statement of additional grounds (SAG).

Sufficiency of the Evidence

The overriding issue in this appeal is the sufficiency of the evidence to establish Mr. Murry as the killer. He also argues that the evidence did not permit the jury to determine that a substantial step was taken toward killing Amanda Constable. The evidence permitted the jury to make those determinations.

These challenges are controlled by long-settled standards of review. Evidence is sufficient to support a verdict if the jury has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The evidence is viewed in the light most favorable to the prosecution. *Green*, 94 Wn.2d at 221. Appellate courts defer to the trier-of-fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial evidence is as reliable as direct evidence. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*,

152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State's proof of identity was entirely circumstantial. The facts are known to the parties and will not be repeated here except in a summary form. Murry had a motive to kill his estranged wife—both of them were contemplating divorce—and disliked her family, who he blamed for turning his wife against him. The killings occurred at a time when someone knowledgeable about her schedule would expect she should have just returned home. Each victim received multiple fatal wounds—strong evidence of both premeditation and murder committed by someone motivated to kill.

The physical evidence tied Murry to the scene. The most damaging evidence was the AccuDure particles discovered on some of the shell casings. Dr. Rudenko testified that there were only two vials of AccuDure in existence—one belonged to Murry (and was discovered in his car) and the other vial Dr. Rudenko turned over to the WSP Crime Laboratory. Rudenko did not own or use firearms, while Murry was a gun enthusiast who owned numerous weapons. A .22 caliber gun missing from Murry's collection had been used to test AccuDure. The victims were killed by .22 caliber Remington rimfire hollow-point bullets. The same ammunition was found in Murry's car and his residence.

Traces of a fire starter, Trioxane, were discovered on a headlamp found inside Mr. Murry's car. He gave away his remaining Trioxane supplies shortly after the killings. Investigators believed that Trioxane could have been used to set the fires. Flares were

identified as another possible ignition device. Flares also were recovered from Murry's car. The arson was committed by the same person who killed the victims.

In summary, the killer used AccuDure to lubricate his weapon. Mr. Murry was one of two people to possess that unique synthetic lubricant, and the only one of the two who had a motive to kill the family. He owned the same ammunition as the killer. The gun Murry used to test the AccuDure fired the same ammunition and was missing from his collection. Based on this evidence, the jury could conclude beyond a reasonable doubt that Mr. Murry was the killer and the arsonist. The evidence supported the verdicts.

In order to convict a person of attempted first degree murder, the evidence must allow the jury to conclude that a defendant intended to commit first degree murder and took a substantial step toward committing the offense. RCW 9A.28.020(1); RCW 9A.32.030(1)(a); *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 539-40, 167 P.3d 1106 (2007). "A 'substantial step' is conduct strongly corroborative of the actor's criminal purpose." *Borrero*, 161 Wn.2d at 539.

A nonexhaustive list of factors suggesting that a substantial step had been undertaken was derived from the Model Penal Code by *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Those factors are:

> (a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
(c) reconnoitering the place contemplated for the commission of the crime;
(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Id. at 451 n.2.

At least three of these factors were present in this case. Factor (f) was established by Mr. Murry's appearance at the residence, armed, at a time Amanda Constable was expected to be present. His subsequent use of the weapon against her family members established his intent to kill. Even standing alone, factor (f) supported the existence of a substantial step.

The State argues, correctly, that factor (a) also was present. After arriving at the scene and killing the family, Mr. Murry appears to have waited more than an hour before setting fire to the victims and the buildings, an act that announced his intent to leave the scene and cover his tracks. There was no reason to delay his departure except for waiting for Amanda Constable; his continued presence at the crime scene increased the likelihood he would be apprehended there.

Finally, factor (d) also appears to be present, although this factor overlaps to an extent with the previous one. Murry was not an invited guest and appears to have unlawfully entered the house and immediately killed the victims. If he was unaware at that time that Amanda Constable had not returned, the jury could also find that he initially entered the house with the intent to kill her and was forced by circumstances to change his plans.

The evidence allowed the jury to determine that Roy Murry had taken a substantial step toward killing Amanda Constable. Accordingly, the evidence was sufficient to support that element of the attempted murder charge.

Evidentiary Objections

Mr. Murry raises a host of evidentiary arguments, most of which are wholly or largely not properly before us. We preliminarily will discuss the standards of review governing evidentiary claims as well as several of the error preservation doctrines that Mr. Murry attempts to evade. We will then consider, often in very summary manner, the individual challenges raised in this appeal.

With respect to preserved challenges, this court will review the trial court's evidentiary rulings for abuse of discretion. *State v. Young*, 160 Wn.2d 799, 805-06, 161 P.3d 967 (2007); *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985). As noted earlier, discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Junker*, 79 Wn.2d at 26.

With respect to unpreserved challenges, several doctrines are in play. A proper objection must be made at trial to perceived errors in admitting or excluding evidence; the failure to do so precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. "'[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.'" *Id.* (quoting *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)). The party must have challenged the admission of evidence at trial on the same basis that it raises on appeal. *Id.* at 422. As explained there:

> As to statement (d), counsel objected but on the basis that it was not proper impeachment nor was it within the scope of redirect. A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.

(Citation omitted.)

The *Guloy* specificity requirement is a particular application of the general principle of waiver—if a party forgoes a challenge, even one of constitutional significance, the challenge is waived. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Another species of waiver involves claims that result from a party's own actions at trial. One cannot cause an error and then attempt to benefit from the error on appeal. This is known as the doctrine of invited error. *E.g.*, *State v. Studd*, 137 Wn.2d 533, 545-49, 973 P.2d 1049 (1999).

The waiver, objection specificity, and invited error doctrines apply to multiple arguments Mr. Murry raises. Other relevant doctrines that apply only to a single claim will be addressed within those particular arguments. An additional argument of general application that needs to be discussed is Mr. Murry's peculiar take on the cumulative error doctrine.

The cumulative error doctrine is a recognition that multiple errors, none of which alone were significant enough to justify relief, can still result in a trial that was unfair due to the cumulative harm resulting from the errors. *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 311, 457 P.3d 1144 (2020). It is not a doctrine for avoiding error preservation requirements. *Id.* Rather, it is an additional method of looking at the prejudice engendered by multiple errors. Mr. Murry, however, treats cumulative error as allowing appellate courts to consider the impact of unpreserved claims in conjunction with other preserved or unpreserved arguments. It does not. Only if an argument is properly presented to the trial court by timely objection or timely posttrial motion will we consider the cumulative impact of multiple errors. *Id.*

Thus, we reject Mr. Murry's cumulative error argument as it relates to unpreserved claims. We now turn to the individual evidentiary objections he raises in this appeal.

Gun Collection. Mr. Murry argues that evidence that he owned a large number of guns, habitually carried a handgun, and always handled ammunition with gloves and wiped the ammunition down, constituted improper character evidence in violation of ER

404 and ER 405. We disagree with his characterization of the evidence. It is not a "bad act" to own or carry guns, let alone to regularly clean ammunition. This evidence is more properly classified as habit evidence governed by ER 406.

Mr. Murry did object to most of this testimony and has preserved his argument.[10] Nonetheless, the court properly admitted the testimony because evidence about the gun collection was highly relevant. A thorough investigation showed that Murry owned and regularly carried weapons capable of firing the ammunition used in the killings. Several weapons were tested and shown not to have been the murder weapon; other potential murder weapons were missing from his collection, raising the possibility that one had been used and discarded.

No fingerprints or DNA were recovered from the shell casings collected at the scene. Mr. Murry's habit of cleaning his ammunition and handling it with gloves explained the absence of any trace evidence. Once again, this was highly relevant evidence.

The habit evidence was relevant and not prejudicial. The trial court did not abuse its discretion by admitting it.

"Prepper" Evidence. Testimony was elicited from several witnesses that Mr. Murry was a "prepper"—a person preparing to survive the breakdown of society by

[10] The defense did not challenge the statement by one witness that Murry was "obsessed" with guns. That claim is waived.

stockpiling supplies and weapons. His belated challenge to this testimony on appeal fails. He did not object at trial, thus waiving his argument. He also elicited the prepper testimony from three of the four witnesses who testified on the subject and then used the testimony in closing to explain why he possessed the weapons and other survival gear. Thus, his challenge also is precluded by the invited error doctrine.

Similarly, he did not challenge trial testimony describing his survival equipment. This component of his "prepper" challenge also is waived.

Conspiracy Theories. Evidence of Mr. Murry's belief in conspiracies, including his belief that Amanda Constable and her family were working with the Russian government against him, was presented through several witnesses who repeated Mr. Murry's statements to them. This evidence was the subject of a pre-trial hearing to identify which statements were being offered by the prosecution.

Mr. Murry withdrew objections to many of the statements, thus waiving any claim of error as to them. For the remaining statements, the defense objected on the basis of relevance. His appellate argument alleges that the evidence constituted improper character evidence. However, the failure to challenge this testimony on those grounds in the trial court not only prevented that court from assessing the argument, it runs afoul of the *Guloy* objection specificity doctrine. For both reasons, this challenge is not preserved.

Internet Search History and Song Posting. Mr. Murry next argues that evidence of his Internet search history concerning Trioxane and other fire starters, and his posting of four songs to his social media accounts while he was doing his searches, was unduly prejudicial. At trial, he challenged this evidence on the basis of authenticity. Thus, his current challenge is not preserved in this court. *Guloy*, 104 Wn.2d 412.

Since we do not consider this claim, we do not address the State's arguments distinguishing this case from *State v. DeLeon*, 185 Wn.2d 478, 374 P.3d 95 (2016). We also note that Mr. Murry does not believe the evidence warrants reversing his convictions. Br. of Appellant at 38-39. Instead, he argues this unpreserved claim as part of the cumulative error argument we rejected previously. For this reason, too, we need not consider the claim.

Internet Aliases. Mr. Murry argues that the court erred in permitting testimony that he used aliases while on the Internet. He did not object to the testimony at trial. The contention is waived. It also was one of the claims he hoped to resurrect under his cumulative error theory. For both reasons, this issue is not before us.

Amanda Constable's Testimony. Mr. Murry next presents multiple challenges to the testimony of Amanda Constable. All fail for varying reasons, but we address the claims separately for that same reason.

Mr. Murry first argues that her entire testimony was precluded by the spousal competency and spousal communication privileges found in RCW 5.60.060(1). This contention fails for multiple reasons.

First, the statute is not applicable when one spouse is the victim of a crime committed by the other spouse. In relevant part, the statute provides:

> A spouse or domestic partner shall not be examined for or against his or her spouse . . . without the consent of the spouse or domestic partner; nor can either during marriage . . . or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage . . . . But this exception shall not apply . . . to a criminal action or proceeding for a crime committed by one against the other.

RCW 5.60.060(1).

This privilege is two-fold: a spousal competency privilege that prevents one spouse from testifying against the other, and a communications privilege forbidding one spouse from disclosing communications from the other spouse. *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). By its terms, the statute did not bar the testimony of Amanda Constable. She was a victim and permitted to relate statements made during the marriage that were relevant to this case.

Equally important, the defense expressly waived any application of the statute, writing in response to the State's pretrial memorandum: "The defense is not intending to invoke the marital privilege with regard to Amanda Murry." Clerk's Papers at 362. Further, much of Amanda Constable's testimony was elicited by the defense in support of

its theory of the case. Thus, he also invited the error he now claims. For all three reasons, the statutory argument is utterly without merit.

Mr. Murry also argues that certain statements related by Ms. Constable were entered in violation of ER 402 and ER 403. Although we disagree with that assertion, we do not address it because he did not object to the statements at trial and does not support his contention with reasoned argument. RAP 10.3(a)(6); *State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200 (1991). For both reasons, we decline to consider this unpreserved claim.

The one aspect of Mr. Murry's challenge to Ms. Constable's testimony that was preserved for appeal was an objection to his former spouse testifying about his "shit list" of people against whom he would seek revenge if the circumstances permitted. No written list existed, but Mr. Murry would routinely put people on his mental list if they wronged him or breached his trust. He not only would hold a grudge, but he would repeatedly talk about how he would take revenge if he could. Testimony at trial indicated that Mr. Murry believed "trust is everything" and that Amanda Constable was one of two people in the world he trusted.

Evidence of "other bad acts" is permitted to establish specific purposes such as the identity of an actor or the defendant's intent or purpose in committing a crime. ER 404(b). Those purposes, in turn, must be of such significance to the current trial that the evidence is highly probative and relevant to prove an "essential ingredient" of the current

crime. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Evidence admitted under ER 404(b) is considered substantive evidence rather than impeachment evidence. *State v. Laureano*, 101 Wn.2d 745, 766, 682 P.2d 889 (1984), *overruled in part by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989). The decision to admit evidence of other bad acts under ER 404(b) is a matter within the discretion of the trial court. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *Lough*, 125 Wn.2d at 863.

Citing to ER 404, the trial court initially excluded the evidence on the basis that the probative value did not outweigh the prejudice to Mr. Murry. The State did not address the topic with Ms. Constable. During cross-examination, defense counsel elicited testimony that Mr. Murry had not expressly threatened her and had never physically harmed her. Prior to redirect examination, the prosecutor sought permission to address the "list" in response to the cross-examination. The prosecutor believed the evidence admissible to establish both premeditation and the reason Ms. Constable feared Murry.

The court concluded that the testimony was relevant both to establish premeditation and to show how Mr. Murry would respond to a breach of trust.[11] In the court's words, the testimony established Mr. Murry's "belief system." Report of Proceedings at 2880. On redirect examination, Ms. Constable answered two questions

[11] The trial court correctly ruled that evidence of Ms. Constable's fear of Murry was not relevant. *See State v. Parr*, 93 Wn.2d 95, 103, 606 P.2d 263 (1980).

from the prosecutor on the topic. She explained that he maintained the "list" of people who had betrayed him and that was the reason why she did not want to bring up the topic of divorce with him. On re-cross, defense counsel asked ten questions related to the list.

The trial court correctly concluded that Mr. Murry had "opened the door" to this topic. This court recently discussed this topic at length in *State v. Rushworth*, __ Wn. App. __, 458 P.3d 1192 (2020). There we noted that "the open door doctrine is a theory of expanded relevance." *Id.* at ¶ 17. When relevant evidence initially is excluded for policy reasons, such as undue prejudice to one party, the protected party "can waive protection from a forbidden topic by broaching the subject." *Id.* That is what happened here.

Despite the relevance of Mr. Murry's penchant for planning revenge on those who wronged him, the trial court excluded the evidence for the purpose of protecting Mr. Murry. He, however, used the opportunity to suggest that Ms. Constable's fear of him was unreasonable and, implicitly, that he was of peaceful character.[12] Having broached the subject, he waived the protection of the court's earlier ruling. *Id.*

The trial court had tenable grounds for admitting the testimony. Accordingly, it did not abuse its discretion in permitting limited testimony about the "list" on redirect examination.

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[12] It appears that the "list" testimony was relevant character evidence. *See State v. Brush*, 32 Wn. App. 445, 648 P.2d 897 (1982). Since the trial court did not address this

Mr. Murry has not identified any evidentiary error among his preserved arguments. Accordingly, we need not address the remainder of his cumulative error claim.

Mental Competency

In light of testimony about Mr. Murry's belief in aliens and being a shapeshifter, as well as his paranoia, he now argues that the trial court erred by not ordering a competency evaluation sua sponte. He has not established error.

A person is not competent to stand trial if he or she lacks "the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense." RCW 10.77.010(15). Whether a hearing should have been ordered is reviewed for abuse of discretion. *In re Pers. Restraint of McCarthy*, 193 Wn.2d 792, 802, 446 P.3d 167 (2019).

Simply having delusions is not itself sufficient reason to question a defendant's competency. *Id.* at 805. Instead, there must be a current reason to question the defendant's ability to understand the proceedings or assist in the defense. *Id.* at 806-07. There was no indication of either concern in the trial record of this case. Mr. Murry's precharging symptomology does not appear to have affected his competency at trial.

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issue, we do not do so either.

There is no support in the record for believing Mr. Murry's competency was impaired during trial. Accordingly, the trial court did not abuse its discretion by failing to act sua sponte.

Legal Financial Obligations

By supplemental brief, Mr. Murry asked that the $200 criminal filing fee be struck from the judgment and sentence. The trial court is directed to strike the fee in accordance with *State v. Ramirez*, 191 Wn.2d 732, 735, 426 P.3d 714 (2018).

Statement of Additional Grounds

Mr. Murry raises numerous claims in his SAG. None have merit. We will address, in summary form, some of those claims.

RAP 10.10(a) authorizes a pro se statement of grounds that "the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." In the event that issues of possible merit have been identified, the court may require both counsel to address the SAG issues. RAP 10.10(f). Only documents in the record may be considered when assessing a SAG argument. RAP 10.10(c).

The latter requirement also is an obligation of any brief filed in the appellate courts. An appellate court need not consider an issue raised for the first time on appeal when the record does not contain sufficient facts to resolve the claim. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Typically, the remedy in such situations is for the defendant to bring a personal restraint petition in which he can

present his evidence. *E.g.*, *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

With those general observations, it is time to turn to Mr. Murry's arguments. His first and fifth arguments, and inferentially in his second argument, allege that the State failed to preserve, find, or present evidence in his favor. He misunderstands the government's obligation.

Very well established case law governs our review. The State has a duty to preserve evidence that is both material and exculpatory. *State v. Donahue*, 105 Wn. App. 67, 77-78, 18 P.3d 608 (2001). When dealing with evidence that is not exculpatory, but only potentially useful to the defense, Washington courts apply the federal analysis found in *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). *See State v. Straka*, 116 Wn.2d 859, 810 P.2d 888 (1991). Under *Youngblood*, a defendant must establish that evidence was destroyed (or not preserved) because of *bad faith* on the part of the government. If bad faith is not established, the due process inquiry is at an end. 102 L. Ed. 2d at 289. In addition, there is no police duty to seek out or test evidence. *Donahue*, 105 Wn. App. at 77-78. Mr. Murry's arguments all fail under these standards. He has not pointed to any exculpatory evidence that was not preserved, nor has he shown that any potentially useful evidence was destroyed in bad faith.

The third and fourth SAG issues allege that witnesses testified differently than expected and that trace evidence may have been contaminated. Neither of these issues was

raised at trial and, therefore, neither is preserved for our review. Also, there is no factual support in the record for the third argument. His eighth argument fails for both of these reasons.

The sixth argument alleges that counsel performed ineffectively in nine different instances. This argument also is assessed under well-settled standards of review. An attorney must perform to the standards of the profession; the failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *McFarland*, 127 Wn.2d at 334-35. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, to prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-92. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697.

The first, third, fifth, and eighth rationales for asserting ineffective assistance all refer to alleged facts outside the trial record. Accordingly, there is no basis for adjudging these claims. The second, third, fourth, fifth, sixth, seventh, and ninth sub-arguments all fault counsel for not cross-examining or calling witnesses, or for failure to object to arguments or exhibits offered by the State. The decisions whether to cross-examine a

witness, call a witness, and to object to evidence all involve trial tactics. *E.g.*, *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004) (cross-examination); *State v. Robinson*, 79 Wn. App. 386, 392, 902 P.2d 652 (1995) (call witness); *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (object). A reviewing court presumes that a "failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing cases). Accordingly, none of these arguments overcome the *Strickland* presumption of effectiveness. The ineffective assistance claim is without merit.

The final SAG argument is a contention that the prosecutor engaged in misconduct during closing argument by misrepresenting some of the evidence. His first two sub-contentions fail because they were reasonable inferences from the evidence. The final claim is that the State's closing argument was speculative and inconsistent. It was not. The prosecutor noted that the evidence did not allow the State to determine the order in which the victims died, but he consistently argued that Mr. Canfield died first. Again, this was a reasonable inference from the evidence. It also was largely irrelevant to the jury's determination of who the killer was. Even if there had been some minor error in making this argument, it was of absolutely no consequence to the outcome of the trial. Mr. Murry has not established misconduct.

The SAG is without merit.

Reversed in part and remanded for further proceedings consistent with this opinion.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Pennell, C.J.

APPENDIX "B"

- Burning an old cellphone so the government couldn't tap it. (RP 2267, ll. 14-19);
- Discussing conspiracy theories with a customer at Café de Vapor. (RP 2278, ll. 15-17; RP 2280, ll. 1-5);
- Describing his wife as the enemy and that the Russians were involved. (RP 2310, ll. 7-22);
- Amanda's involvement with foreign governments and infiltration in the Spokane area. (RP 2502, ll. 6-20);
- Mr. Murry throwing Hailey Gentry's cellphone out the car window on a trip to Montana saying it was bugged. (RP 3023, l. 20 to RP 3024, l. 3)
- Amanda is a "sparrow"; *i.e.,* a mole going into a military installation to infiltrate and gather information. (RP 3047, l. 20 to RP 3048, l. 6; RP 3153, ll. 12-24);
- CIA involvement in connection with foreign governments and being targeted by the Russians. (RP 3061, ll. 13-25);
- The Russian Mafia is involved with Amanda and Lisa. (RP 3294, ll. 2-7);
- In addition to Mr. Murry's claim that he was working for the CIA he also stated that the Russian FSB was recruiting him and that Amanda and Lisa were already part of it. He referenced "Bobby" Caswell as being in the FSB and having a dark team that could have committed the murders. (RP 3862, l. 22 to RP 3863, l. 10; RP 3867, l. 14 to RP 3868, l. 24)

APPENDIX "C"

And he also listened to these songs. I want to talk briefly about the songs because as we're going to talk more about what Mr. Murry posted on his Facebook on the next day. He posted three songs, you'll recall; Gasolina, Face Everything and Rise, and Revolution. And then on the night previous, on the 24th in the evening, he -- he hooked himself up with Burn it Down.

You've seen all those videos and you know the evidence in the case. And if you've ever done a workout, if you've ever played a big game, if you've ever had to get up for something, you turn to, among other things, music. Music reflects your mood. Music reflects where you either are or you want to be. And the State would submit to you that this has a great deal to do with Mr. Murry's state of mind in this now ever shortening number of hours between the time that he's doing this research and the time that these three people were killed up at 20 East Chattaroy.

And that's why it's pertinent to say that it's especially important to look at what he was doing then because if -- if you have any doubt as to who did this, this -- fact that this was going on this particular weekend with Roy Murry is pertinent because of the fact that's when the murders happened; right after the weekend.

The next morning -- again, as I've alluded to on the May 25th, between 7:34 and 7:43 in the morning Mr. Murry posted those other three songs that we talked about, Face Everything and Rise, Revolution, and Gasolina. You know the facts of the case. You know what happened up there at 20 East Chattaroy. It's relevant. It's relevant to not only what happened, but it's also relevant to his state of mind.

(RP 4175, l. 14 to RP 4176, l. 19) (Emphasis supplied.)

35035-5-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ROY HOWARD MURRY, Defendant, Appellant.	)))))))))))	SPOKANE COUNTY NO. 15 1 02422 2 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 6th day of July, 2020, I caused a true and correct copy of the *Petition for Discretionary Review* to be served on:

Court of Appeals, Division III
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