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Division I
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STATE OF WASHINGTON
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No. 81045-6-I

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DONALD BANGO, Petitioner

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JUDGE JOHN HICKMAN

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. IDENTITY OF PETITIONER AND DECISION

Petitioner Donald Bango, the appellant below, asks the Court to review the decision of Division I of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Donald Bango seeks review of the Court of Appeals unpublished opinion in *State v. Bango,* 2021 WL 1091506 entered on March 22, 2021. The decision is attached in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. This criminal case involves the prosecution's use of a peremptory challenge to strike the only African-American Asian American Pacific Islander juror from the venire.

1. Did the trial court err in granting the State's peremptory challenge of Juror 26?

2. Did the Court of Appeals incorrectly apply the standard set out by this Court in *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018)?

B. Washington law holds that words alone do not constitute sufficient provocation to warrant giving a first aggressor instruction where the defendant has claimed self-defense.

1. Did the trial court err when it gave a first aggressor instruction where the provocation was only words?

C. Has the time come for this Court to reconsider whether criminal interrogations must be recorded to be admissible at a trial?

IV. STATEMENT OF THE CASE

In December 2015, Donald Bango arranged with a middleman, Wikstrom, to buy drugs from Jeffrey Shaw. 6/1/17 RP 81. As they waited in a parking lot Bango showed his 12-gauge pump shotgun. 6/1/17 RP 84,93; RP 1327.

When Shaw arrived Wikstrom asked for the money to pay for the drugs. Bango wanted Shaw to come to his vehicle. RP 1323,1352, 1338-39. Shaw wanted Bango to come to him. RP 1342, 43. Wikstrom reportedly saw Bango put on black gloves. RP 1344.

Angry at the back and forth, Wikstrom returned to Shaw's car and reportedly said Bango had guns, no money, and he would rob them. 6/1/17 RP 122; RP 1174, 1345,1347-48. Shaw drove away. Bango called, and they agreed to meet at a 7-11; a public place that was lighted. RP 1347-49; Exh. 370; CP 177.

When Shaw, Wikstrom and the driver arrived at the 7-11, Bango approached the passenger side to talk with Shaw. He put

his cell phone on the car roof and said he was not trying to do "anything funny." RP 1141, 1217, 1354. Bango retrieved a scale from his car for Shaw to weigh the quarter ounce of heroin. RP 1012, 1217; Exh.118. Bango handed 294 dollars to Shaw. CP 179, 197, Exh. 370. Shaw told Bango he had a .40 caliber gun. RP 1348-49.

Bango saw the gun, and described it as a 1911 Para Ordinance, stainless and black, with writing toward the front of the barrel. CP 179; Exh. 370. Police later recovered a gun from Shaw's car. RP 2433.

After a short conversation, Bango became concerned they would steal his money and drive away. CP 180; Exh.370. He saw Shaw reach for his gun. Exh. 370; CP 197. Bango opened his jacket, pulled out a lanyard with a JRA[1] badge and said he was a police officer. RP 1358. He told Shaw to get out of the car. RP 1358; CP 197; Exh. 370.

As Bango saw Shaw grab his gun, he heard him tell the driver to leave. RP 1359; Exh. 370. Wikstrom and the driver testified they saw Bango reach inside of his coat and immediately

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[1] Juvenile Rehabilitation Agency RP 1897.

ducked. RP 1023, 1359. Neither of them saw what Shaw was doing. RP 1485. Bango believed he heard and saw Shaw pull the trigger of his gun. CP 180. Bango stepped back and fired his gun twice. CP 181; Exh. 370. Shaw's car sped away. Exh. 370; CP 182.

Wikstrom later confided to Bango's wife he thought Bango was startled by the sound of the automatic shift being put in reverse. RP 1401-02. He said the gear shift made a loud popping sound; however, at trial, he changed his story and said he had been speculating. RP 1404. He also told Bango's wife that Bango truly believed he was in danger[2]. RP 1403.

The driver proceeded to the hospital. He grabbed Shaw's black and silver gun and hid it under the seat. He took Shaw's 340 dollars. RP 1023-1024, 1049, 1114. Wikstrom grabbed Shaw's heroin and left. RP 1030, 1052, 1231, 1233. Shaw died. RP 1074.

Interrogation

After his arrest, Bango was transported for interrogation. He signed a *Miranda* notice. RP 112. The interrogation was not recorded for the first 15 minutes. Instead, one officer took

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[2] At trial Wikstrom said his statement to Bango's wife was completely fabricated because he just wanted information from her. RP 1402. He made his sworn statement that the loud popping noise startled Bango "just to say it." RP 1404.

handwritten notes while the other spoke with Bango. The note taker destroyed her notes and wrote only a summary report about three and a half weeks later. RP 165, 167.

Somewhere in the 15 minutes, Mr. Bango invoked his right to counsel. RP 114-115. The officers testified that within one minute he changed his mind. The officer then used his personal tape recorder. RP 117; Exh. 370. Neither officer could explain what happened between the time Bango invoked his right to counsel and when he agreed to talk with officers again, or for the four minutes before the recording began. RP 141-42, 144, 157. The officer agreed that he usually said the interrogation was over, the individual was under arrest and he was going to jail. RP 142.

Mr. Bango's experience was markedly different from that of the officer. Bango said he was taken to the interrogation room, advised of his rights, and invoked his right to counsel. RP 187, 190. He said he never told anyone that he did not need an attorney. RP 193. The officer told him he had all the information and wanted Bango's side of the story. RP 190. Bango repeated he needed a lawyer. The officer responded that a SWAT team was already searching his hotel room and the same team would execute a search warrant on his home for drugs and guns. RP 191-92. The

officer said if the items were found, it would have implications for his family and his children could be taken from their mother. RP 191. Bango felt threatened that SWAT would go to his home and was coerced into waiving his right to counsel. RP 192, 194, 213.

The officer admitted that even if he could not have gotten a search warrant, there is “a certain amount of bluffing that goes on” when interrogating a suspect. RP 225-26. He denied saying he would get a search warrant for the Bango home. RP 223.

The trial court held there was no record of the conversation between the officers and Bango about the alleged threat, and Bango did not make a record on tape of the remarks of his unwillingness to talk without counsel. RP 417. With redactions, the interrogation was admitted as evidence. Exh. 370.

Voir Dire and Peremptory Challenge

Juror 26 was the only African American in a potential seated jury. CP 551, RP 810. She identified as African American and Asian American, Pacific Islander.(AAPI). RP 380. She earned her Ph.D. in multicultural ethnicity. She worked as an educator and trainer for educators and the Washington State Department of Personnel, to facilitate understanding others who are multiracial and multicultural. RP 579-582. Her Ph.D. advisor encouraged her to create a word to

describe what it was like to be from more than one cultural frame of reference, and she created the neologism “Multicentric”. RP 579. The prosecutor noted she had a “unique world view” and “you probably see things a little differently than that kid that grew up in Bellevue.” RP 581.

Juror 26’s sister had been murdered approximately 40 years earlier. The juror believed the outcome of the trial had been fair. She said she could “absolutely” decide the current case on the facts and evidence. RP 576-77.

The State asked her had she ever called the police and she described an incident in 1991 when someone called her the “N-word.” The operator asked if she was offended, and the juror was so surprised she hung up. RP 578.

The State supplied its reasons for exercising a peremptory challenge for Juror No. 26: (1) there were two other people of color on the panel[3]; (2) The Juror’s sibling had been murdered and it was not a good case for her; (3) the State worried the Juror would be forgiving of Mr. Bango’s perception of danger; and (4) the Juror’s field of study meant she may not see the rules of the court as

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[3] The two people of color did not identify as African-American. RP 818.

applying to her: "She is going to interpret Mr. Bango's perception how she wants, as opposed to what the evidence is going to show."[4] RP 801-807.

Defense counsel objected, arguing the peremptory challenge was being exercised in a discriminatory fashion: "And so, to come forward with we don't believe that she's going to follow the law and we don't like her perspective on the world because it doesn't match ours is exactly what Batson is all about." RP 807-808.

The court analyzed the challenge under *Rhone. State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010) .RP 817. The court noted (1) there were other minorities on the jury of either Asian or Filipino descent. RP 818; (2) there was no history of dismissing jurors on a *Batson* challenge on a regular and consistent basis and neither party targeted Juror 26. RP 818, 820;(3) the State simply did not "agree with her world view of things, and their concern about sympathy or prejudice that she may have towards a defendant, whether black, white or any minority or race." RP 820.

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[4] The State did not challenge Juror 50, who had a bad experience with police, and though he believed he could be impartial, he did not think anyone would want him on a jury. RP 659. Juror 63 was excused by agreement after he discussed the murder of his nephew 3 years earlier, and which still upset him. RP 684.

Days after the jury found Mr. Bango guilty, the Court issued its opinion in *City of Seattle v. Erickson,* 188 Wn.2d 721, 398 P.3d 1124 (2017). In response to *Erickson,* the defense requested a new trial. CP 484-486. At that hearing, the State boiled its argument down for the court: "We're prosecuting a homicide case. I need her to follow the absolute norms of society when it comes to following the law." 10/15/18 RP 95.

The court issued a written decision finding (1) no prima facie case of racial discrimination (2) the State did not conduct a fishing expedition based on racial motivation or unconscious bias in its extensive questioning of Juror 26; (3) there was not a pattern of eliminating all people of color or ethnic minorities by the State; and (4) the state articulated sufficient race-neutral reasons for excusing the juror. CP; 550-553.

Over defense objection, the court gave a first aggressor instruction, and did not include the admonition that words alone are insufficient provocation. The State's theory for the instruction was that a jury could conclude that pulling the JRA badge resulted in the car being put in reverse, Shaw grabbing for the gun, and the defendant shooting. Or that the defendant started this whole

process by pulling the badge and instigated a robbery, and Shaw pulled a gun to defend himself. RP 2601.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court Incorrectly Applied *Jefferson* Unfairly Excluding Potential Qualified And Unbiased Jurors.

Based on race or ethnicity violates equal protection. *Powers v. Ohio,* 499 U.S. 400, 409, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Juries must reflect society. *State v. Pierce,*195 Wn.2d 230, 243, 455 P.3d 647 (2020).

In *Erickson,* this Court held that prima facie showing of discrimination is automatically made if a party strikes the only member of a cognizable racial group from the jury. *Erickson,* 188 Wn.2d at 734. The following year, this Court held that the question for courts in conducting a *Batson* analysis, is whether an objective observer could view race or ethnicity as a factor in using the peremptory challenge. If so, then the peremptory strike must be denied. *Jefferson,* 192 Wn.2d at 249.

This Court has held that when the sole member of a racially cognizable group has been struck from the jury it is evidence of a discriminatory purpose. *See Erickson,* 188 Wn.2d at 734. Here,

Juror No. 26 was the only African American, juror with any possibility of being on the jury panel.

Two of the reasons for striking Juror 26 are not supported by the record. Juror 26 was clear she could absolutely follow the law as given by the court. She was equally clear that she believed justice had been done when her sister's assailant had been brought to justice 40 years earlier. Even if she had not felt justice was done, under *State v. Listoe,* 15 Wn. App. 2d 308, 475 P.3d 534 (2020), parties may no longer rely on expressions of distrust of law enforcement or statements about having a close relationship with people involved in a crime. *Id.* at 323.

The State also argued there were two other people of color on the jury[5]. Under *Jefferson,* the issue is not whether there were other people of color on the jury, the issue is whether Juror 26 was improperly excused based on race or ethnicity.

The State expressed its concern that Juror 26 was not raised like someone from Bellevue, and that her experience and education in multicentrism would make her more sympathetic to the

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[5] This was a reference to the individuals of Filipino or Asian descent.

defendant: that she would not follow the norms of society. These justifications are presumptively invalid. *Pierce,* 195 Wn.2d 230.

These reasons reflect a differential treatment of someone based on ethnicity. Ethnicity is the state of belonging to a social group that shares a common cultural or national tradition. It looks to the traits that are shared with the identified cultural/social construct. Here, an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge.

This matter warrants review by this Court because the opinion by the Court of Appeals conflicts with the holdings of this Court in *Erickson, Jefferson and Pierce.* and the appellate court's ruling in *Listoe.* Further, unfairly excluding potential jurors based on race or ethnicity violates the constitutionally guaranteed equal protection of the law. RAP 13.4 (b)(1),(2),(3).

B. The State Was Relieved Of Its Burden To Prove Bango Did Not Act In Self Defense When The Court Gave A First Aggressor Instruction.

An error affecting a self-defense claim is constitutional and cannot be deemed harmless unless it is deemed harmless beyond a reasonable doubt. *State v. McCullum,* 98 Wn.2d 484, 497, 656 P.2d 1064 (1983).

A first aggressor instruction directs the jury to determine whether a defendant's acts precipitated a confrontation with the victim. *State v. Riley,*137 Wn.2d 904, 909-10, 976 P.2d 644 (1999). *Kee* held "when there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, WPIC 16.04 is inadequate to convey the law established in *Riley.*" *State v. Kee,* 6 Wn. App. 2d 874, 882, 431 P.3d 1080 (2018). The defendant must have taken some intentional act that could reasonably be likely to provoke a belligerent response. *See State v. Anderson,* 144 Wn. App. 85, 89, 180 P.3d 885 (2008). Where words alone constitute the asserted provocation, it is error to give a first aggressor instruction. *Riley,* 137 Wn.2d at 910-11

Under the State's theory, Bango's intentional act was the display of his JRA badge and his command to Shaw to get out of the car. RP 2600.

The Court of Appeals here acknowledged the use of words alone are insufficient to warrant a first aggressor instruction. *Slip Op.*at *9. However, the Court wrongly concluded that the State's theory that Bango was preparing to rob Shaw, despite him never

demanding gun, money, or drugs warranted not giving the "words alone" instruction.

The court's holding conflicts with the holding in *Kee* and *Riley* and warrants review by this Court. The prejudicial error of the first aggressor instruction and failure to provide the instruction that words alone are insufficient require reversal of the convictions. *State v. Townsend,* 142 Wn.2d 838, 848, 145 P.3d 145 (2001).

C. The Time Is Ripe For This Court To Consider A Rule Requiring Interrogations To Be Recorded.

Custodial questioning by its nature is coercive and law enforcement officers must advise a suspect of his rights before questioning, and then scrupulously honor his assertion of those rights. *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Here, the State cannot account for the first 15 minutes of the unrecorded interrogation. At 8:39 pm Bango was taken into an interrogation room equipped with audio and visual recording. The officers did not record using either the official AV system or the officer's tape recorder. RP 2442. Both officers reported he invoked his right to counsel at 8:49 pm and then waived his right at 8:50 pm. Neither officer remembered what was said before or after he

invoked. And neither could explain why he so suddenly changed his mind. RP 2449. There is no record of what happened during the unrecorded 15 minutes. At trial the State agreed that if Bango's recitation of events was accurate, any statements should have been suppressed. RP 246.

Wisconsin, Minnesota, Indiana, Utah and Alaska have either recognized a state constitutional due process right that a custodial statement must be electronically recorded to be admissible, or exercised supervisory authority through an evidence rule, requiring a recording for admissibility. *Stephan v. State,* 711 P.2d 1156, 54 USLW 2355 (1985)*;* Utah Rule of Evidence 616 (2016); Indiana Rule of Evidence 617 (2011)*; State v. Scales,*518 N.W.2d 587 (Minn. 1994)*; In re Jerrell C.J.,* 283 Wis.2d 145, 699 N.W.2d 110 (2005)*(*requires all juvenile custodial interrogations be electronically recorded).

In 2014, the federal DOJ created a presumption that its investigatory agencies, FBI, DEA, ATF, and US Marshalls Services agents would electronically record custodial interviews. (See Appendix B).

Historically, lower appellate courts in Washington have found no state constitutional due process right requiring interrogations to

be recorded to be admissible. *State v. Turner,* 145 Wn. App. 899, 187 P.3d 835 (2008); *State v. Spurgeon,* 63 Wn. App. 503, 820 P.2dd 960 (1991). To date, this Court has declined to exercise supervisory authority and adopt a ruling excluding evidence from interrogations not electronically recorded.

With the capability of law enforcement officers to wear body cameras for evidence gathering, surveillance, police accountability, and a way to counter wrongful claims of police misconduct, the time to convene and consider an evidence rule requiring electronic recording of interrogations has arrived.

Beginning in 2009, Washington jurisdictions implemented the use of body cameras for law enforcement officers[6] . In 2016, RCW 10.109.900 mandated the legislature to convene a task force to study and make recommendations regarding all aspects of body worn cameras by law enforcement officers. RCW 10.109.030; RCW 10.109.900(9). Research has found the electronic recording policies have resulted in not only a reduction in police use of force, but improved behavior among both officers and citizens, and

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[6] Chapman, Brett, National Institute of Justice, NIJ Journal No. 280 (December 2018).

served as a way to substantiate or dismiss claims of police misconduct[7] .

The Courts should not place a burden on the trial judge to fill in the blanks where a Fifth Amendment right is at stake. Here, the incomplete record is troublesome. The trial judge overlooked the glaring omission of the interrogation before the recording started and found the officer's account credible. The result is a perpetuation of incidents where defendants testify to one thing and law enforcement testifies to the opposite; the defendant who was potentially coerced or intimidated into waiving his rights cannot substantiate his experience because police did not make a recording. It is unjust for a court to determine lack of credibility of a defendant when the circumstances of interrogation are entirely within the State's control.

Mr. Bango respectfully asks the Court to review this issue as it is a matter of substantial public interest and affects the constitutional rights of individuals who are interrogated by law enforcement. RAP 13.4(b)(3), (4).

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[7] Id.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bango respectfully asks this Court to accept review of his petition.

Submitted this 21st day of April 2021.

Marie Trombley
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CERTIFICATE OF SERVICE

I, Marie Trombley, do certify under penalty of perjury under the laws of the State of Washington, that April 21, 2021 I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a copy of the Petition for Review to: Pierce County Prosecuting Attorney at pcpatcecf@co.pierce.wa.us and to Donald Bango/DOC#410585, Stafford Creek Correctional Center, 191 Constantine Way, Aberdeen, WA 98520.

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APPENDIX A

FILED
3/22/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DONALD WILLIAM BANGO, Appellant.	No. 81045-6-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Donald W. Bango seeks reversal of his convictions for second degree murder, criminal impersonation, and tampering with a witness. He argues that a juror was excluded in violation of Batson v. Kentucky,[1] that the State failed to prove that he had not acted in self-defense, and that the court erred in giving an aggressor instruction, admitting his statements in violation of Miranda v. Arizona,[2] constraining his cross-examination of a witness, and violating the prohibition against double jeopardy. In a pro se statement of additional grounds for review, he alleges prosecutorial misconduct during the State's closing argument and ineffective assistance of counsel. We accept the State's concession that Bango's conviction for felony murder should have been vacated and remand for correction of that error. We otherwise affirm.

[1] 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
[2] 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

FACTS

Background

On December 13, 2015, Donald Bango called Curtis Wikstrom to act as a middleman in buying heroin from Jeffrey Shaw. Sometime after midnight, Bango picked up Wikstrom in a rented black sport utility vehicle (SUV). Bango backed the SUV into a space in the parking lot of an apartment building. Bango and Wikstrom talked as they waited for Shaw to arrive, but Bango started to get impatient after about 20 or 25 minutes. Wikstrom testified that Bango cocked a 12-gauge pump shotgun on the floorboard, pointed to an AK-47 in the back seat of the car, and took a pistol from the pocket of his jacket. He told Wikstrom that he had money for the heroin in the glove box, but Wikstrom did not find any money there.

Jesse Neil testified that Shaw asked him for a ride to meet Wikstrom. Before they left Shaw's house, Neil saw Shaw put a gun in his waistband. Neil drove Shaw to the apartment building. Wikstrom asked Bango for the money to pay for the drugs. Bango told Wikstrom to have Shaw come to him. Wikstrom gave Shaw the message and walked back toward the SUV intending to tell Bango to come to Neil's car when he saw Bango pulling on black gloves. Wikstrom was afraid of getting shot, so he ran back to Neil's car, jumped in the back seat, and told Neil to drive away. Neil drove out of the parking lot and started heading back to Shaw's house. Wikstrom told Shaw and Neil that Bango had a lot of guns with him and no money.

Bango immediately started calling Wikstrom's phone. Shaw answered the phone and agreed to meet Bango in a public place but told him that he had a gun. Bango suggested a 7-Eleven near the apartment complex. When they arrived, Bango walked out of the store and approached the passenger side of the car. Bango retrieved a scale from his vehicle, and Shaw placed it on the center console of Neil's car. Shaw weighed the heroin and told Bango to take a look at it. Bango looked in the window, then revealed a badge and told them there were cops all around and to get out of the car. Shaw told Neil that Bango was not a cop and to get out of there. Wikstrom saw Bango reaching for the jacket pocket where he had previously put the pistol and yelled that he was pulling his gun. Neil put the car in reverse and heard gunshots as he was pulling out.

Bango fired two shots, one of which hit Shaw in the chest. Neil sped away and drove directly to the hospital. Neil was sure that Shaw never pulled his gun while they were in the 7-Eleven parking lot because Neil grabbed the gun from Shaw's waistband on the way to the hospital and put it under the driver's seat. Shaw died about 15 minutes after he arrived at the hospital. Officers later recovered a silver and black Kahr .40-caliber semiautomatic pistol from beneath the driver's seat of Neil's car. Bango was charged with first degree murder, second degree murder, criminal impersonation, and witness tampering.

CrR 3.5 Hearing

The court held a CrR 3.5 hearing before jury selection. Detective Brian Vold and Detective Louise Nist interviewed Bango after his arrest. Vold testified that he began the interview by advising Bango of his Miranda rights. He read through a

standard form used by the Tacoma Police Department and asked for Bango's acknowledgement after each statement. Bango and Nist signed the form. Vold testified that he spent the next part of the interview getting basic personal information from Bango and building rapport while Nist took notes. After about ten minutes, Bango "made an unequivocal request for an attorney." Vold testified that it was his practice to stop an interview after such a request and agreed that he would normally advise the interviewee that they would be transported to the jail. However, Bango rescinded the request within a minute and indicated that he would speak to the detectives. Because of Bango's "back and forth decisions about talking" to the detectives, Vold informed him that the conversation would be recorded from that point on. Vold then began recording and reviewed Bango's Miranda rights again. Bango verbally consented to speak with detectives without an attorney present, and the interview continued for nearly two hours.

Bango testified at the 3.5 hearing that, after he asserted his right to speak with an attorney, Vold informed him that he was going to be arrested, that the SWAT team would have to search his house, and that there "could be implications for [his] wife and children." Bango recalled Vold saying that "DSHS[3] could get involved" if evidence of drug use or sales was found in the house. Bango took this as a threat and agreed to speak with the detectives to avoid involving his family. He denied that he had ever told the detectives that he wanted to waive his rights but admitted to acknowledging his rights and then continuing to answer questions.

[3] Washington State Department of Social and Health Services

When recalled as a rebuttal witness, Vold testified that he never suggested to Bango that he would obtain a search warrant for Bango's house, that he would have Bango's wife arrested, or that he would arrange for DSHS to take Bango's children. The court found that the detectives' questioning was cut off as soon as Bango invoked his right to counsel, that no further interrogation occurred after assertion of this right, that the police did not engage in tactics designed to coerce Bango into waiving his right, and that Bango's subsequent waiver was knowing and voluntary. The court admitted the recording of the interrogation with redactions.

Voir Dire

During jury selection, the parties and the court questioned Juror 26 individually. She identified three extended family members who worked in law enforcement. She also reported that her sister had been shot and killed in a nightclub altercation about 40 years before. The shooter had been prosecuted and went to prison. When the court asked if she felt that the system had worked in that case, Juror 26 responded, "Yes. We felt that—the whole family felt that it was fair and just." The court asked if she believed that she could "judge this case simply on the facts and evidence" despite her sister's death, and she responded, "Absolutely." She also described an incident that occurred about 25 years before, just after she had moved to her neighborhood, in which someone called her a racial slur used against African Americans. When she called the police to report the incident, the person on the phone asked if the term offended her, and she was so surprised that she hung up without responding.

Juror 26 is multiracial and lived in Japan and Germany as a child. She described her work as an educator and trainer for a nonprofit that she developed to research and teach the world view of individuals who process and communicate information through more than one cultural frame of reference. The State asked, "How do you think—I mean, it's obviously rather a unique world view, perspective on how you access information. I mean, it sounds like you're taking it from different—you probably see things a little differently than the kid that grew up in Bellevue." She responded, "Well, I would say so," and described an occasion in which a co-worker smelled gasoline and she remarked that it also smelled like kimchee to her. She described this as showing that "you have many ways to look at something."

The State sought to exercise a peremptory strike against Juror 26. Bango raised a Batson[4] challenge, and the court conducted a hearing outside the presence of the jury. Bango argued that Juror 26 was one of only two prospective jurors who appeared to be people of color and the only prospective juror who appeared to be of African American descent. Bango argued that there was nothing in her background that would suggest that she could not be fair and impartial.

The State disagreed with Bango's characterization of the venire, noting that there were at least two other people of color that the State had passed on excluding. The State first noted its concern that "this isn't a good case for this particular juror" because her sister had been murdered. It also noted that Juror 26's comments "about perceptions and how some people perceive things very

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[4] 476 U.S. 79.

differently than others" suggested that she might be "very forgiving" of Bango's claim of "self-defense based on [his] perception of what he saw." The State also cited the fact that she had "come up with her own words and her own field and her own way to look at the system" as a potential indication that she would be disinclined to follow the rules of the court.

Bango responded that there were two other African Americans in the venire, "one of which we will never get to, just exercising all the peremptories. So essentially she's out of the pool." He argued that there was "nothing in the individual questioning that would lead this Court to believe that she would fail to follow the law or fail to follow the Court's instruction."

The court relied on State v. Rhone[5] to analyze the challenge. The court stated that Juror 26 represented the only person seated on the jury of African American descent. After walking through each of the factors, the court stated that it could not find circumstances to support a Batson challenge. The court did not think that the State had shown a pattern of eliminating jurors of color or had targeted Juror 26 during voir dire "as someone that might be biased towards one party or the other." It did not believe that the strike was biased or discriminatory in nature. The court stated that it could not "infer that based on the exercise of this peremptory alone . . . that the State was doing this purposefully for discriminatory purposes." The court excused Juror 26.

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[5] 168 Wn.2d 645, 229 P.3d 752 (2010) (plurality opinion), abrogated by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017).

Trial

During trial, the jury heard Bango's description of the incident through the redacted version of his interview with Vold and Nist. Bango admitted that he was wearing a lanyard around his neck with a badge[6] on it as a "little security policy" to keep him from getting robbed. Bango stated that he approached the passenger window of the car at the 7-Eleven and handed Shaw $294. He saw a gun in the center console of Neil's car that he described as a stainless and black "1911 style Para Ordinance" with writing toward the front of the barrel. While Bango was talking to Shaw, he noticed that Neil had his hand on the gear shift and became concerned that "something [was] getting ready to happen." Bango said he saw Shaw reach for the gun in the console with his left hand, so he pulled out the badge and told them to get out of the car. He said that Shaw pulled the trigger, but the gun did not fire. Bango recalled seeing the hammer move and hearing an audible click. At the same time, Bango fired a shot that hit the door of the car, which then sped out of the parking lot.

The jury heard testimony from Johan Schoeman, a forensic scientist and firearm and tool marks examiner with the Washington State Patrol crime laboratory. Schoeman examined both guns related to this case. He stated that he had tested the Kahr .40 caliber pistol recovered from Neil's vehicle and found it to be fully operable. He did not find any evidence that the gun had misfired. He also testified that the Kahr does not have a visible hammer.

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[6] The gold badge had the seal of the State of Washington and the words "JRA Transportation Officer" on it. JRA stands for Juvenile Rehabilitation Agency.

Defense counsel sought to elicit testimony from Wikstrom that Bango had shown him pictures of guns on his cell phone and told him that the guns had been stolen from him. The defense argued that the statement was relevant to explain why Bango had displayed the pictures to Wikstrom. The State argued that this was inadmissible hearsay. The court ruled that Bango could testify as to why he showed Wikstrom the pictures but that defense counsel would not be permitted to elicit Bango's explanation from Wikstrom. Bango chose not to testify at trial.

Bango proposed a jury instruction on justifiable homicide. The State proposed an aggressor instruction, to which Bango objected. The court permitted both instructions. The jury was instructed that homicide is justifiable when committed in self-defense, that the law does not impose a duty to retreat, that a person is entitled to act on appearances in defending himself, and that "[n]o person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill, use, offer, or attempt to use force upon or toward another person."

Before the end of the trial, the State filed a third amended information listing the charges as count one: murder in the first degree, count two: murder in the second degree, count three: murder in the second degree while committing or attempting to commit the crimes of assault in the second degree and/or criminal impersonation in the first degree, count four: criminal impersonation in the first degree, and count five: tampering with a witness. The jury found Bango not guilty of murder in the first degree. However, Bango was found guilty on the murder in the second degree charges described in counts two and three of the third amended

information. The jury found that Bango was armed with a firearm when he committed the murder and that he committed or attempted to commit both assault in the second degree and criminal impersonation in the first degree. Bango was also convicted of criminal impersonation in the first degree and tampering with a witness as charged in counts four and five. The court dismissed the felony murder conviction on count three of the charging document.

Post-Trial Proceedings

Days after the jury rendered its verdict, the Washington Supreme Court issued its opinion in City of Seattle v. Erickson.[7] Bango moved for a new trial based on the dismissal of Juror 26 in light of Erickson. The State agreed that the new Erickson test should apply but argued that the court's ruling satisfied the analysis under Erickson. The trial court considered Juror 26 to be of African American descent for purposes of the motion, found that the State had articulated sufficient race-neutral reasons for the strike under the Erickson analysis, and denied the motion for a new trial.

Bango was sentenced to a total of 260 months imprisonment: 200 months on the second degree murder conviction, plus 60 months for the firearm enhancement to run consecutively to the base sentence. The court also imposed 12-month sentences each on the criminal impersonation and witness tampering convictions, to be served concurrently with the murder sentence. Bango appealed.

[7] 188 Wn.2d 721, 398 P.3d 1124 (2017).

ANALYSIS

I. Custodial Statements

First, we address the trial court's admission of statements that Bango made during a police interrogation after he had asserted his right to counsel. He contends that these statements were obtained in violation of his constitutional right to an attorney and should have been excluded.

Challenged findings of fact entered after a CrR 3.5 hearing will be upheld if they are supported by substantial evidence in the record. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "'Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.'" State v. Wilson, 144 Wn. App. 166, 183, 181 P.3d 887 (2008) (quoting State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). We treat unchallenged findings of fact as verities on appeal. State v. Elkins, 188 Wn. App. 386, 396, 353 P.3d 648 (2015). We then determine de novo whether the findings support the trial court's conclusions of law. Id. at 396–97. Credibility determinations cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

First, Bango contends that the court erred in finding that police did not engage in tactics designed to coerce him into waiving his rights. Both detectives testified that they did not threaten or coerce Bango into continuing the interview without an attorney present. Although Vold admitted that he had likely informed Bango that he would be arrested and transferred to the jail while his request for an attorney was pending, he denied making comments about searching Bango's

house, arresting his wife, or removing his children. Despite Bango's testimony to the contrary, substantial evidence exists in the record to support the finding of fact that the police did not engage in coercive tactics.

Bango also challenges the court's conclusion that his statements were admissible. The State bears the burden to demonstrate by a preponderance of the evidence that a suspect knowingly and intelligently waived his Miranda rights before it may introduce incriminating statements made during a custodial interrogation. State v. Mayer, 184 Wn.2d 548, 556, 362 P.3d 745 (2015); State v. Radcliffe, 164 Wn.2d 900, 905–06, 194 P.3d 250 (2008). Signing a standard waiver of rights form is not determinative evidence of waiver but "it 'is usually strong proof of the validity of that waiver.'" State v. Woods, 34 Wn. App. 750, 759, 665 P.2d 895 (1983) (quoting North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)). Waiver may also be inferred under certain facts and circumstances even if not explicit. Id. at 759–60.

Here, the court found that the detectives scrupulously honored Bango's invocation of his rights and no further interrogation took place after that point, that the detectives did not coerce Bango's waiver, and that the subsequent signed waiver of his rights was knowing and voluntary. These findings support the conclusion that the State was permitted to introduce Bango's statements made during the interrogation.

Bango next argues that we should either recognize a constitutional due process right or adopt an evidence rule requiring interrogations to be electronically recorded in their entirety to be admissible. This court has squarely rejected the

argument that there is a due process right under the Washington Constitution requiring electronic recording of custodial police interrogations. See State v. Turner, 145 Wn. App. 899, 911, 187 P.3d 835 (2008). Bango contends that the implementation of body cameras for law enforcement officers since State v. Turner warrants reconsideration of this issue. However, as the State points out, the Washington Supreme Court considered and rejected a proposed court rule that would have required recording of "[c]ustodial and non-custodial interrogations of persons under investigation for any crime" in 2019.[8] We decline to consider this issue.

II. Peremptory Challenge

Bango contends that his right to equal protection under the Fourteenth Amendment of the United States Constitution was violated because the State improperly employed a peremptory strike to exclude the only other juror of his race.

"[T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race." Powers v. Ohio, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The United States Supreme Court established a three-part test to determine whether a party improperly used a peremptory strike to exclude a potential juror based on race. Batson, 476 U.S. at 93–94. First, the party challenging the exercise of the peremptory strike bears the

[8] Wash. State Admin. Office of the Cts., Washington State Court Rules Archive, http://www.courts.wa.gov/court_rules/?fa=court_rules.archivelist (last visited Dec. 18, 2020); Suggested New Criminal Rule CrR 3.7 Recording Interrogations, available at http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=669 (last visited Dec. 18, 2020).

burden of establishing a prima facie showing of purposeful discrimination. Id. at 93–94, 96. If such a showing is made, the burden shifts to the challenged party to give a race-neutral explanation for the strike. Id. at 97. The court then weighs all of the circumstances to determine whether the strike was racially motivated. Id. at 98.

The Washington Supreme Court has noted that "[t]he Batson framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection." State v. Saintcalle, 178 Wn.2d 34, 51, 309 P.3d 326 (2013), abrogated on other grounds by Erickson, 188 Wn.2d 721. Although the court had held that a trial court did not err in finding a prima facie showing of discrimination when a party sought to strike the last member of a racial or ethnic group from a jury, the court declined for many years to adopt a bright-line rule that such a strike would always constitute a prima facie case. See State v. Hicks, 163 Wn.2d 477, 491–92, 181 P.3d 831 (2008); Rhone, 168 Wn.2d at 653–54. However, soon after Bango was convicted, the Washington Supreme Court decided Erickson, which affected the first step of the Batson framework. Erickson, 188 Wn.2d 721. The Erickson court adopted the bright-line rule that a prima facie showing of discrimination is automatically made if a party strikes the only member of a cognizable racial group from the jury. Id. at 734.

In 2018, the Washington Supreme Court announced a change to the third step of the Batson framework in State v. Jefferson. 192 Wn.2d 225, 429 P.3d 467 (2018). The Jefferson court held that the relevant question for courts to answer in

the third step of the Batson inquiry is whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. Id. at 249.

A trial court's findings regarding the prima facie showing of discrimination have traditionally been reviewed for an abuse of discretion. Erickson, 188 Wn.2d at 730. Under the old Batson framework, appellate courts reviewed a trial court's ruling on a Batson challenge for clear error. Jefferson, 192 Wn.2d at 250. However, when the Supreme Court altered the third step of the analysis in Jefferson, it also determined that the new, objective test would be reviewed de novo. Id.[9]

Appellate courts have cautioned that trial courts should attempt to keep the three phases of the analysis separate so as not to "collapse" the Batson analysis. State v. Wright, 78 Wn. App. 93, 100–01, 896 P.2d 713 (1995). However, if the striking party offers a race-neutral reason for the challenge and the trial court rules on the ultimate question of racial motivation, then the reviewing court need not determine whether the prima facie showing of discrimination was established. Hicks, 163 Wn.2d at 492–93. Even if the striking party gives a race-neutral explanation for the record, "such an offer of proof would not render the issue of whether a prima facie case exists moot." Wright, 78 Wn. App. at 101. This issue is mooted only if "'the trial court has ruled on the ultimate question of intentional

[9] The State characterizes Jefferson as "a GR 37 case" and argues that the standard of review "remains clearly erroneous, giving great deference to the trial judge." However, the Washington Supreme Court found that it could not apply GR 37 to the Batson challenge in Jefferson because the rule was not yet effective at the time voir dire was completed. Jefferson, 192 Wn.2d at 249. Instead, the court "address[ed] the problems with step three of the Batson test directly" and modified the third step of the Batson analysis to conform with the requirements of GR 37. Id. at 249–50. In doing so, the court applied a de novo standard of review, noting that it was "a change from Batson's deferential, 'clearly erroneous' standard of review." Id.

discrimination.'" Hicks, 163 Wn.2d at 492 (quoting Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). Because the prima facie showing is unnecessary if the judge ruled on the question of racial motivation, we first consider whether the trial court ruled on this ultimate question.

After Bango made his objection to the State's attempted strike, the court allowed the State to present its race-neutral explanation for the strike. The court then conducted an analysis based on Rhone. The Rhone court considered only whether the appellant had established a prima facie case of discrimination. Id. at 655. The Washington Supreme Court declined to adopt the bright-line rule, later accepted in Erickson, that striking the last member of a cognizable racial group automatically led to an inference of discrimination. Id. Instead, Rhone cited Batson for the proposition that the party challenging a strike must show that the use of the peremptory challenge and "something more" raised the inference of discrimination. Id. Rhone listed eight examples of relevant circumstances to consider when determining whether the challenging party had established such an inference. Id. at 656.

Here, the court considered the circumstances listed in Rhone when performing its analysis. Because these factors were used pre-Erickson to determine whether a prima facie showing of discrimination had been made, if the court based its ruling on those factors alone, it follows that the ruling would concern only the prima facie showing, not the ultimate issue of racial motivation. It is not abundantly clear from the trial transcript whether the court intended to rule on only the first step of the analysis or on the ultimate issue. However, despite the court's

reliance on the Rhone factors in its analysis, its oral ruling suggested that it was deciding the ultimate issue of intentional discrimination:

> "I don't think the State has shown a pattern of exercising their discretion to purposefully eliminate minorities. I don't think that during either the general questioning or the individual questioning, that [Juror 26] was targeted by the State as someone that might be biased towards one party or the other. I feel that they have their own reason for wanting her off the jury. I don't believe it is a bias or discriminatory in nature. It may be that they just simply don't agree with her world view of things and their concern about sympathy or prejudice that she may have towards a defendant, whether black, white or any minority or race. And I can't infer that based on the exercise of this peremptory alone, that there are any other—that there's something more that the Court can hang its hat on that would say that the State was doing this purposefully for discriminatory purposes. And I can't make that inference on what has happened up to this point in time."

The court's later statements also support the conclusion that its ruling concerned the ultimate issue. During oral argument on the motion for a new trial, the trial judge stated that he recalled conducting "a [Batson] analysis even though [he] felt there wasn't a . . . prima facie case." The State agreed with this characterization of the previous decision and stated that, for the purposes of the Erickson analysis, "the Court should probably find a prima facie showing has been made" and, "for the sake of argument, the State would stipulate to that step." In its order denying the motion for a new trial, the court stated that, when ruling on the initial motion to strike the peremptory challenge, it "did not find that there was a prima facie case of racial discrimination," but, "despite this finding, the Court engaged in an analysis as if that test had been met."

Considering the court's ruling and the surrounding context, it appears that the court intended to rule on the ultimate issue of intentional discrimination.

Accordingly, the issue of whether Bango established a prima facie showing of discrimination is moot under Hicks, and we need not apply the modified rule from Erickson to the first step of the Batson analysis in this case.

Accordingly, we turn to the court's determination regarding racial motivation. The State concedes that the rule from Jefferson applies to cases that were pending on appeal when Jefferson was decided, which includes this case. Therefore, we apply the modified test from Jefferson and assess whether an objective observer could view race or ethnicity as a factor in the strike. The relevant objective observer for this analysis "is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways." Jefferson, 192 Wn.2d at 249–50. In Jefferson, the court found that the proffered race-neutral reasons for striking the sole African American juror were not supported by the record, which reflected differential treatment of that juror and could support an inference of implicit bias. Id. at 250–51.

In this case, an objective observer would not view Juror 26's race or ethnicity as a factor in the strike. The record does not reflect differential treatment of Juror 26. The State cited the fact that the juror's sister was a murder victim as one reason for the strike. Similarly, defense counsel used a peremptory strike against Juror 12, whose relative had been convicted of felony murder, even though Juror 12 stated that he believed he could separate that incident from the current situation. Despite the different roles occupied by the prospective jurors' relatives, both the prosecutor and defense counsel could reasonably have concluded that a

family member's prior involvement in a murder could consciously or unconsciously affect a juror's ability to be objective in a murder trial.

Although the questioning regarding the nature of Juror 26's work was unique among the potential jurors, this discrepancy is unsurprising given that she created her own field of study. The State argued that her scholarship suggested that she might be more forgiving of alternate perceptions than the average person. This was an especially important consideration because Bango claimed he acted in self-defense, which made his perception of the incident pivotal. The singular nature of her field set her apart regardless of race, and the State's justifications carried none of the historical hallmarks of improper discrimination. See, e.g., GR 37(h), (i).[10] An objective observer would not view race as a factor in the strike.

III. Limitation of Wikstrom's Testimony

Next, Bango contends that his right to a fair trial was violated when the court allowed the State to question Wikstrom about the photographs that Bango had shown him but denied defense counsel the opportunity to cross-examine Wikstrom about why Bango showed him the photographs. Bango argues that the evidence was relevant to rebut the State's theory that he "was intimidating Wikstrom in preparation for a robbery." A trial court's evidentiary rulings are reviewed for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A

[10] As the State notes, GR 37 was not yet in effect at the time of Bango's trial and does not apply to this case. See Jefferson, 192 Wn.2d at 249 ("[W]e hold that GR 37 applies prospectively to all trials occurring after GR 37's April 24, 2018 effective date. But because the 'triggering event' for its application was voir dire, we cannot apply GR 37 to the completed Batson challenge in this case.").

court abuses its discretion when its decision is based on untenable grounds or reasons. Id.

All relevant evidence is admissible except as limited by constitutional requirements, statutes, rules, or regulations. ER 402. Hearsay evidence is generally inadmissible unless allowed by the rules of evidence, other court rules, or statute. ER 802. Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). An out-of-court statement made by a party is not hearsay if it is offered against the speaker. ER 801(d)(2). However, if the out-of-court statement by a party is self-serving and tends to aid that party's case, it is not admissible under this exception. Finch, 137 Wn.2d at 824. "The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination." Id. at 825.

Here, defense counsel sought to introduce statements made by Bango to Wikstrom for their truth. These statements would have been offered to aid Bango's case by providing an alternative reason that Bango showed Wikstrom the photographs other than the State's theory that the photographs were an intimidation tactic. Therefore, the evidence was inadmissible hearsay. The court did not abuse its discretion in excluding this evidence.

IV. Aggressor Instruction

Bango also argues that the trial court erred in giving an aggressor instruction. Appellate courts review challenged aggressor instructions using the same standards applied to other jury instructions on review. State v. Grott, 195

Wn.2d 256, 270, 458 P.3d 750 (2020). Jury instructions are sufficient when they are supported by substantial evidence, permit the parties to argue their theories of the case, and, when read as a whole, properly inform the jury of the applicable law. State v. Woods, 138 Wn. App. 191, 196, 156 P.3d 309 (2007). Self-defense instructions are subject to heightened scrutiny, and the jury instructions must make the law of self-defense "'manifestly apparent to the average juror'" when read as a whole. Id. (quoting State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). Appellate courts review de novo whether the State produced sufficient evidence to justify an aggressor instruction. State v. Sullivan, 196 Wn. App. 277, 289, 383 P.3d 574 (2016). On appeal, we view the evidence in the light most favorable to the party who requested the instruction. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948 (2011).

Generally, the right of self-defense cannot be invoked successfully by an aggressor in an altercation. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). An instruction informing the jury of this principle is appropriate where there is credible evidence from which the jury could reasonably determine that the defendant provoked the need to act in self-defense. Id. at 909–10. If there is conflicting evidence as to whether the defendant's conduct precipitated a confrontation, the aggressor instruction is appropriate. Id. at 910. The Washington Supreme Court has cautioned that "'courts should use care in giving an aggressor instruction,'" but should give the instruction when called for by the evidence. Grott, 195 Wn.2d at 270 (quoting Riley, 137 Wn.2d at 910 n.2). "[A]ggressor instructions are disfavored only where they are not justified." Id. at 271.

Words alone do not constitute sufficient provocation to warrant an aggressor instruction. Riley, 137 Wn.2d at 910–11. This is so because the victim cannot lawfully respond with force to a defendant's use of words alone. State v. Kee, 6 Wn. App. 2d 874, 879, 431 P.3d 1080 (2018). However, "where there is evidence that the defendant engaged in a course of aggressive conduct, rather than a single aggressive act, 'the provoking act can be part of that "single course of conduct."'" Grott, 195 Wn.2d at 273 (emphasis omitted) (quoting Sullivan, 196 Wn. App. at 290). For example, Division Three of this court has found that a defendant's conduct "consisted of more than words" and an aggressor instruction was warranted when the defendant was yelling and leaning over another person with his hands on the arms of the chair that she was sitting in. State v. Anderson, 144 Wn. App. 85, 89–90, 180 P.3d 885 (2008).

Here, the State argued that the aggressor instruction was appropriate because "a jury could conclude that [Bango] pulling the badge . . . resulted in [Neil] throwing the car into reverse and Mr. Shaw grabbing for the gun and the defendant then shooting him. Or that the defendant started this whole process by pulling the badge and instigating a robbery." The State contends that the display of the badge and demand that everyone get out of the car, viewed in the context of Bango's other actions that night, constituted an aggressive act because it indicated that Bango was commencing the robbery.

Viewed in the light most favorable to the State, the evidence was sufficient to support the aggressor instruction. The State produced evidence that Bango had come to the drug deal with multiple guns and no money, that Wikstrom feared

Bango would start shooting when he saw him pulling on tactical gloves, and that Bango asked to enter Neil's car at the 7-Eleven. A jury could conclude that Bango's display of the badge and demand that they exit the car was the final step in a robbery.

Even if the aggressor instruction was warranted, Bango argues that the court erred in giving the instruction without also instructing the jury that words alone were insufficient to constitute provocation. "When there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, the language of WPIC 16.04 is inadequate to convey the law established in Riley." Kee, 6 Wn. App. 2d at 882. In State v. Kee, Division Two of this court concluded that the trial court failed to make the law of self-defense manifestly apparent when it did not convey this rule to the jury and the State argued that the defendant had initiated the confrontation by speaking to the victim. Id. at 880–82.

Although this situation is similar to Kee, here, the court did not err in failing to instruct the jury that words alone are not adequate provocation. The State does not appear to have argued that Bango's demand to get out of the car alone constituted an act of aggression. As noted above, the State's theory was that Bango's attempt to rob Shaw precipitated any need to act in self-defense. The court did not err in instructing the jury.

V. Sufficiency of the Evidence

Bango argues that the State failed to prove beyond a reasonable doubt that he did not act in self-defense. "A claim of insufficiency admits the truth of the

State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When a defendant challenges the sufficiency of the evidence in a criminal case, we draw all reasonable inferences from the evidence in favor of the State and against the defendant. Id. The evidence is sufficient if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Id. We "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

Viewed in the light most favorable to the State, the evidence was sufficient to prove that Bango did not act in self-defense. Although Bango claimed that he saw and heard Shaw pull the trigger of his gun, Neil and Wikstrom both testified that Shaw never drew his gun from the waistband of his pants. The State also produced evidence that Shaw's gun did not show signs of a misfire and did not have a visible hammer, despite Bango's assertion that he saw the gun's hammer move. Based on this testimony, a rational trier of fact could conclude beyond a reasonable doubt that Bango was not acting in self-defense when he shot Shaw.

VI. Double Jeopardy

Bango contends that the trial court erred when it dismissed but did not vacate his conviction for felony murder. He argues that the court's failure to vacate the conviction amounts to a violation of his constitutional right to be free from double jeopardy. At oral argument, the State conceded error and asked this court

to remand for vacation of the dismissed conviction. We accept the State's concession and remand.

VII. Statement of Additional Grounds for Review

A. Prosecutorial Misconduct

In a pro se statement of additional grounds for review, Bango contends that multiple instances of prosecutorial misconduct during the State's closing argument individually and collectively deprived him of a fair trial.

A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). We view allegedly improper statements in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The conduct is prejudicial if the defendant shows a substantial likelihood that the misconduct affected the jury's verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

When the objection is raised for the first time on appeal, the appellant "must also show 'that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.'" Walker, 182 Wn.2d at 477–78 (quoting Glasmann, 175 Wn.2d at 704). We focus not on the prosecutor's subjective intent but "on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice

could have been cured with a timely objection." Id. at 478. A closing argument provides

> an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present altered versions of admitted evidence to support the State's theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant's guilt.

Id.

1. State's Slideshow During Closing Argument

Bango first argues that the State committed prosecutorial misconduct when it presented a slideshow to the jury during closing argument that contained "pictures that were admitted into evidence that were altered with captions."

Defense counsel requested a copy of the State's slides before closing argument so that any objections could be made before the slides were shown to the jury. The court stated that it would review the slides before closing argument but did not intend to show them to defense counsel. After reviewing the slides, the court ordered the State to strike the heading "murder in the underworld" from one of its slides and to strike the phrase "defendant's greed" from another. The court permitted the statement that "greed for drugs, greed for money cost Jeffrey Shaw his life." Bango objected to these remaining phrases, but the court felt that the edited version of the slide was neutral.

Bango contends that the captions added to the admitted exhibits displayed in slides 5 and 6 impermissibly altered the evidence. Slide 5 showed an image of the bullet hole in the passenger door of Neil's car with the caption, "Defendant shot

at Jeffrey once." The next slide showed an autopsy photo of the bullet wound in Shaw's torso with the caption, "And twice."

In State v. Walker, the Washington Supreme Court found that "[t]he prosecution committed serious misconduct" when it presented a slideshow during closing argument that:

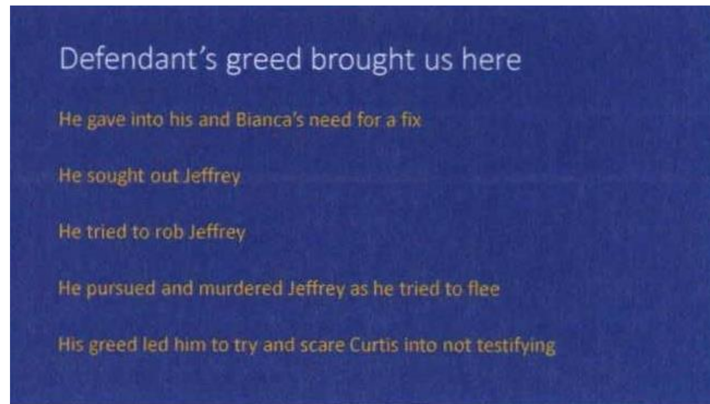
> [I]ncluded multiple exhibits that were altered with inflammatory captions and superimposed text; it suggested to the jury that Walker should be convicted because he is a callous and greedy person who spent the robbery proceeds on video games and lobster; it plainly juxtaposed photographs of the victim with photographs of Walker and his family, some altered with racially inflammatory text; and it repeatedly and emphatically expressed a personal opinion on Walker's guilt.

182 Wn.2d at 478 (emphasis omitted). Bango also cites In re Personal Restraint of Glasmann, in which the defendant's booking photograph, which had been admitted into evidence, was featured in at least five slides in the State's closing argument, with captions reading "DO YOU BELIEVE HIM?" and "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" and, near the end of the presentation, with the word "GUILTY" superimposed over the image multiple times in red letters. 175 Wn.2d at 701–02. The court found that "the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence." Id. at 706.

Here, the captions "Defendant shot at Jeffrey once," and "And twice," were not nearly as inflammatory as those in Walker and Glasmann. There had been testimony that Bango fired two shots, one that hit the passenger door of Neil's car and one that hit Shaw in the chest. Unlike Glasmann, the captions were not the

equivalent of adding unadmitted evidence. The use of these slides does not constitute misconduct.

Bango also challenges slide 90:



He argues that the use of the phrase "defendant's greed" in this slide and in the prosecutor's verbal argument after the court had stricken the phrase from another slide constituted misconduct. Bango did not object when the prosecutor used this term orally or when slide 90 was shown to the jury.

Even if the prosecutor's use of this phrase was improper, Bango cannot show prejudice. The State's theory of the case was that Bango set up the deal intending to rob Shaw. Explicitly stating that greed was the motivation for a robbery is unlikely to sway a jury. Bango has not shown misconduct.

2. Opinion on Bango's Guilt

Bango also argues that the State committed prosecutorial misconduct in closing argument because it presented numerous slides with the word "guilty" on them. He contends that these communicated the prosecutor's individual opinion of his guilt to the jury.

"Attorneys may use multimedia resources in closing arguments to summarize and highlight relevant evidence" as well as reasonable inferences from the evidence. Walker, 182 Wn.2d at 476–77. However, "a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case." Glasmann, 175 Wn.2d at 706. This court relied on Glasmann when finding similar tactics to be flagrant misconduct:

> The slides of Hecht's photograph with a large red "GUILTY" printed across his face were at odds with the prosecutor's duty to ensure a fair trial. No legitimate purpose is served by a prosecutor showing the jury a defendant's photograph with the word "GUILTY" superimposed over his face. Such images are the graphic equivalent of shouting "GUILTY." "A prosecutor could never shout in closing argument that '[the defendant] is guilty, guilty, guilty!' and it would be highly prejudicial to do so."

State v. Hecht, 179 Wn. App. 497, 505, 319 P.3d 836 (2014) (quoting Glasmann, 175 Wn.2d at 709). Even though the prosecutor's use of Hecht's driver's license photo was "arguably less severe" than the booking photo used in Glasmann, this court found that the graphics remained "clearly improper." Id. at 506. The visual presentation of the word "guilty" also influenced the court's conclusion: "the prejudicial impact of the word 'GUILTY' was magnified by the fact it was written in capital letters, in red, and on a diagonal, obvious graphic devices for drawing the eye, implying urgency of action, and evoking emotion." Id. The court was not swayed by the fact that "the prosecutor's verbal argument was largely temperate" because it did not "diminish the dramatic impact of the improper graphics" that "unfairly injected inflammatory extrinsic considerations into the argument." Id.

Bango objects to slides 76, 79, 83, 85, 87, 89, and 96 of the State's presentation:

CT I: Murder 1- GUILTY

No other reason defendant pulled badge: wanted them to get out of the car so he could take Jeffrey's money and drugs

Defendant set out to get drugs for him and Bianca

Defendant hid badge in Bianca's jeans

Defendant didn't mention badge to police

Evidence clear: He pulled badge in attempt to rob them and shot Jeffrey when they fled scene

COUNT II- Murder 2 (Intentional Murder)- GUILTY

Defendant intended to kill Jeffrey when followed, pointed, and aimed at Jeffrey and shot twice

Defendant's shot dead on:

bullet hit both heart arties (aorta and pulmonary) and lungs

Defendant upset they did not submit to his demands and so he shot Jeffrey as they fled

CT III- MURDER 2 (felony murder/Assault 2)- GUILTY

The defendant committed all 3 alternate means of Assault 2 and Jeffrey killed during the course/in furtherance of such crime

1) shot and caused SBH to Jeffrey

2) he assaulted Jeffrey with a deadly weapon when pointed gun at him 2x

3) he assaulted Jeffrey with intent to commit a felony (robbery and/or criminal impersonation in the first degree)

CT III – MURDER 2 (felony murder/CI1)- GUILTY

The defendant committed Criminal Impersonation in the First Degree and Jeffrey killed during the course/in furtherance of such crime:

-Defendant and witnesses confirm he id'd himself as cop

-Defendant and witnesses confirm he ordered them out of the car

-Defendant's unlawful purpose was to rob and/or unlawfully imprison them at the scene

CT IV- CRIMINAL IMPERSONATION IN THE FIRST DEGREE-

Jury Instruction No. 46

GUILTY

CT V- WITNESS TAMPERING- GUILTY

Defendant clearly attempted to induce Curtis not to testify

-Had opportunity

-Had motive to keep Curtis from testifying

-Knew Curtis' name, phone number, and role

-Glenn wouldn't have background on Curtis' info/role

-Glenn and Kelcie testified

-Glenn testified defendant paid him to do it

-Jail phone calls

-Facebook messages

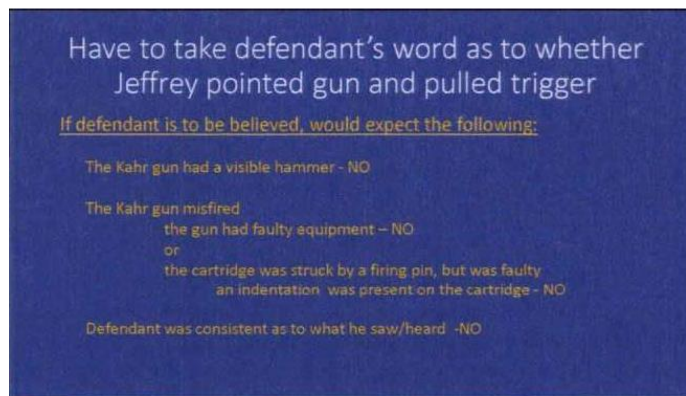
GUILTY

In the context of the State's verbal argument, it is clear that the prosecutor was not expressing a personal opinion of Bango's guilt. Rather, she was arguing that the State had met its burden of proving each of the charges beyond a reasonable

doubt based on the evidence and reasonable inferences from the evidence. Although the word "guilty" appears repeatedly, the presentation is considerably less dramatic than the slides in Glasmann and Hecht. Bango has not shown misconduct.

3. Misstatement of the Law of Self-Defense

Bango next contends that the prosecutor committed misconduct by misstating the law and presenting the jury with a "false choice" during closing argument. While discussing justifiable homicide, the prosecutor stated, "To believe homicide was justified, to believe this was self-defense, you'd have to take Mr. Bango's word as to whether or not [Shaw] pointed a gun and pulled the trigger." Bango identifies slide 61 of the State's slide show as objectionable:



He contends that these statements improperly shifted the State's burden by presenting the jury with the false choice that they could "find the defendant not guilty only if they believe his or her evidence or only if they believe the victim (State's witness) lied or was mistaken." Although Bango objected at trial to the explanation of justifiable homicide in slide 59 as a misstatement of the law, he did not raise an objection to slide 61.

"Although prosecutors have 'wide latitude' to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant." State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) (quoting State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)). It is a misstatement of the law and a misrepresentation of the role of the jury and the burden of proof for the prosecutor to argue that, to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. See State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

In State v. Fleming, this court found that the prosecutor misstated the law and misrepresented the role of the jury and the burden of proof when they argued to the jury in closing:

> [F]or you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.

Id. at 213 (alteration in original) (emphasis omitted). In State v. Miles, Division Two of this court found misconduct when the prosecutor argued that the State's and defendant's versions of events were mutually exclusive and that the jury had to choose whether the State's witnesses or the defense witnesses were correct:

> [T]o the extent the prosecutor's argument presented the jurors with a false choice, that they could find Miles not guilty only if they believed his evidence, it was misconduct. The jury was entitled to conclude that it did not necessarily believe Miles and Bell, but it was also not satisfied beyond a reasonable doubt that Miles was the person who sold the drugs to Wilmoth.

139 Wn. App. at 889–90.

Here, the prosecutor argued that the jury had to believe that Shaw tried to shoot at Bango to find that the homicide was justified:

> The State has the burden of proving beyond a reasonable doubt that the homicide was not justified. And if you find we have not, then it's your duty to return a verdict of not guilty. But, ladies and gentlemen, we have disproved justifiable homicide in this case and here's why. To believe homicide was justified, to believe this was self-defense, you'd have to take Mr. Bango's word as to whether or not the defendant pointed a gun and pulled the trigger.

Although this is a closer case than Miles or Fleming, in context, the State's argument here did not rise to the level of flagrant misconduct. The prosecutor explicitly acknowledged that the State had the burden to prove that Bango had not acted in self-defense. Read in context, the prosecutor's statement appears to be pointing out that there was no evidence apart from "Mr. Bango's word" that Shaw had pointed a gun at him and pulled the trigger. Bango has not shown that the prosecutor committed flagrant misconduct by misstating the law.

B. Ineffective Assistance of Counsel

Next, Bango contends that he received ineffective assistance when his attorney failed to object or renew an objection to the alleged instances of prosecutorial misconduct in the State's closing argument. Specifically, Bango alleges that his trial counsel should have objected to slides 5 and 6 of the State's slideshow, the prosecutor's opinion of guilt, the prosecutor's comment that a defense witness was biased, and the prosecutor's comment to the jury to "hold [the] defendant accountable."

A criminal defendant has the right to effective assistance of counsel under both the state and federal constitutions. Strickland v. Washington, 466 U.S. 668,

686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficient performance was prejudicial. Jones, 183 Wn.2d at 339.

Because we find no misconduct concerning slides 5 and 6 or the prosecutor's use of the word "guilty" in the slideshow, Bango cannot show that his counsel's performance was deficient in failing to object to this material. Bango has not shown that he received ineffective assistance when his attorney failed to object to the slides.

When reviewing the evidence in closing, the prosecutor commented on Bango's witness:

> His witness, George Niera, seemed—very nice person. Here it's clear he's the defendant's friend. He's biased. No disrespect to him. Consider what he told you. He wants you to believe that he and the defendant have engaged in the same training. He didn't attend the same training at the same time with the defendant, but he wants to convince you, to perhaps convince himself, the defendant acted accordingly with their training. And recall that Mr. Niera—no malintent—no one's suggesting he's trying to mislead anyone, but what all has he truly reviewed?

Bango's attorney did not object.

Bango does not provide any authority showing that this argument was objectionable, nor is relevant case law evident. Generally, "[t]he State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility" in closing argument. State v. Rodriguez-Perez, 1 Wn. App. 2d 448, 458, 406 P.3d 658 (2017). Bango has not shown that his attorney's failure to object to this argument constituted deficient performance.

In its rebuttal, the State concluded with the following:

> [C]ounsel wants you to believe it's just the State throwing stuff against the wall and hoping something sticks. No. Hold him accountable. The fact that he's guilty of three different versions, the fact that he committed murder in three different ways is not the State throwing it against the wall. It's the State insisting that he be held accountable for what he did. I ask you to do that and convict Donald Bango.

Again, Bango's attorney did not object.

Similarly, Bango does not point to any authority showing that his counsel's failure to object to this statement constituted deficient performance. This court has found that there was not "anything improper with stating that the defendant will be set free or held to account by a jury's decision; that is indeed the jury's responsibility and function." State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992). Bango has not shown that he received ineffective assistance for failure to object to this statement.[11]

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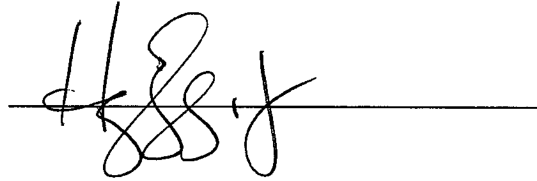
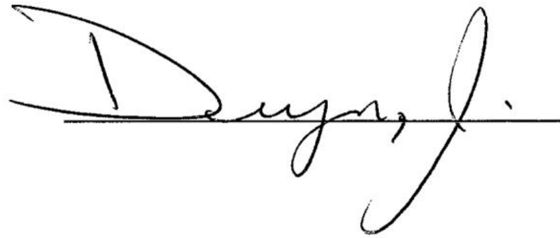
[11] Bango also contends that he received ineffective assistance when his trial counsel failed to investigate his mental health history and diagnoses as a possible foundation for a diminished capacity defense. Because Bango's allegation of ineffective assistance appears to concern facts outside the record before this court, we decline to reach this issue. See State v. Calvin, 176 Wn. App. 1, 26, 316 P.3d 496 (2013).

Affirmed in part, remanded for vacation of Bango's felony murder conviction.[12]



WE CONCUR:



[12] Bango also argues in his Statement of Additional Grounds for review that the court erred in excluding evidence of Shaw's reputation and prior convictions. The court denied the State's request to exclude this evidence but required Bango to "make an offer of proof via the witness outside the presence of the jury before introducing such evidence." The exclusion that Bango alleges was error does not appear to have taken place. Because this additional ground does not adequately inform the court of the nature and occurrence of the alleged errors, we decline to review it. See Calvin, 176 Wn. App. at 26.

APPENDIX B

HARVARD LAW REVIEW

CRIMINAL PROCEDURE

Dep't of Justice, New Department Policy Concerning Electronic Recording of Statements

Department of Justice Institutes Presumption that Agents Will Electronically Record Custodial Interviews

Recent Administrative Policy

2015
Rev. 1552

Since 2003, the number of states requiring law enforcement officers to electronically record some or all interviews conducted with suspects in their custody has grown from two to at least twenty-two.[1] Until recently, the U.S. Department of Justice (DOJ) has resisted this trend; under its previous policy, the DOJ's three chief investigative agencies — the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) — rarely recorded custodial interviews.[2] However, on May 22, 2014, the DOJ announced a substantial change in its policy, creating a presumption that FBI, DEA, ATF, and United States Marshals Service (USMS) agents will electronically record[3] custodial interviews.[4] This policy change is an important step in the right direction, reflecting a growing movement

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that has recognized the benefits of recording interviews; however, the new policy puts in place little express accountability for failure to comply with the presumption. Since experience with state and local recording policies suggests that programs without enforcement mechanisms are often undermined by ineffective and inconsistent application, the DOJ should ensure strong enforcement of the internal accountability measures in its policy, and Congress should be prepared to step in with statutory enforcement mechanisms if needed.

The federal government is relatively late to the game on promoting electronic recordings of custodial interviews. Reformers have been calling for more accurate record keeping during interrogations since the 1930s, and decades later state supreme courts began to heed their advice.[5] In 1985, the Alaska Supreme Court became the first state high court to require recording when it held recording a suspect's interrogation to be a requirement of state due process.[6] The Minnesota Supreme Court also imposed a recording requirement in 1994,[7] and a handful of state supreme courts have similarly instituted rules on recording interviews in recent years.[8] In 2003, Illinois became the first state to pass a statute mandating recording when it required police to electronically record custodial interrogations in homicide investigations.[9] At least fifteen states and the District of Columbia have followed Illinois and passed laws requiring recording under certain circumstances,[10] and several police departments across the country have individually created their own policies promoting or requiring recording.[11]

Before the recent shift, the DOJ's position was that custodial interviews generally should not be recorded. The major federal law enforcement agencies strongly resisted recording interrogations, citing fears that recording would interfere with rapport building, lay juries and judges would misinterpret acceptable interviewing techniques as improper, and the implementation would be logistically difficult.[12] These concerns led agencies to erect barriers to electronic recording and to rely instead on note-taking and agent memory. For example, the FBI's standard procedure was for an agent to take notes during the interview and later compile a summary known as a Form 302.[13] The Agency had an exception to this practice that allowed recording if the Special Agent in Charge (SAC) "deem[ed] it advisable."[14]

In all but the three largest FBI field offices, there is one SAC who runs the entire office.[15] Therefore, although the FBI claimed that its policy allowed "flexibility" in deciding when to record interviews,[16] internal DOJ analysis suggests that the policy actually inhibited agents' ability to exercise discretion regarding whether or not to record their own interviews, and created a "heavy presumption" against recording.[17]

Recent developments, however, expose the shortcomings of the DOJ's previous policy. After decades of experience on the state level with recording policies, many of the FBI's concerns about recording interviews have been proven false. For example, numerous studies have shown that "recording does not cause suspects to refuse to talk, fall silent, or stop making admissions."[18] And even where the concerns may prove well-founded, exceptions to recording requirements can easily address the problem; for instance, an exception could be granted for technological difficulties.[19] Moreover, some juries have met unrecorded interrogations with increasing skepticism in recent years, as evolving technology has also led to heightened expectations for "scientific" evidence.[20] And exonerations based on DNA evidence have sparked a change in public perception of the likelihood of false confessions and wrongful convictions.[21]

The DOJ's new policy, which went into effect on July 11, 2014, flips its previous presumption against recording to one in favor of it. Agents no longer need to obtain supervisory approval to record interviews: FBI, DEA, ATF, and USMS agents are now expected to electronically record statements of individuals suspected of any federal crime in their custody when in a "place of detention with suitable recording equipment."[22] The recording should begin when the suspect enters the interview room and should continue throughout the entirety of the interview with recording equipment in plain view or hidden.[23] Any decision not to record an interview that falls under the presumption should be documented and made available to the U.S. Attorney and reviewed as part of periodic assessments of the policy.[24] The DOJ also encourages agents to record in situations not covered by the presumption, such as interviews conducted with persons not in custody or not within a place of detention.[25]

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However, the memo carves out four exceptions. First, the presumption does not apply if the interviewee agrees to give a statement on the condition that it is not recorded.[26] Second, the agent and prosecutor may decide not to record an interview conducted for the purpose of gathering information related to public safety or national security.[27] Third, an interview need not be recorded if it would not be "reasonably practicable," for example, because of an "equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices."[28] Fourth, the SAC and U.S. Attorney may overcome the presumption in favor of recording if they believe there is a "significant and articulable law enforcement purpose" to do so.[29] Significantly, the DOJ makes clear that the policy does not "create any rights or benefits, substantive or procedural, enforceable . . . by any party against the United States."[30]

The DOJ's new presumption in favor of recording custodial interviews represents a significant improvement compared to the Department's previous procedure. There are numerous reasons to record custodial interviews — benefiting both defendants and law enforcement — and under the new policy, federal agents will record far more interrogations than before. However, additional enforcement mechanisms may be needed to realize this new presumption's many benefits. The DOJ should bolster the internal accountability measures in its policy to increase compliance and promote consistency across the department. Additionally, Congress should be prepared to pass a federal statute if the courts are needed to check the wide discretion that agents and prosecutors have under the current scheme.

The benefits of recording custodial interviews are numerous — including increased reliability and efficiency — and largely uncontested today. Most importantly, recording makes it easier for judges to identify false confessions by allowing them to bypass the interpretation of the agent taking notes and writing the report, providing judges with a more objective means of assessing the veracity of a defendant's confession.[31] In a study on exonerations in the United States between 1989 and 2003, researchers found that 15% of exonerated defendants had confessed to crimes they had not committed.[32] Electronic recording cannot entirely

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remedy the problem, but recorded interviews have already led some judges to suppress confessions that, while questionable on tape, would likely have been admitted without a recording.[33] Recording custodial interviews may also lead to greater efficiency and reduced costs.[34] When recording, interviewers no longer have to worry about taking notes and can focus instead on conducting the interview.[35] Moreover, recording statements results in fewer suppression motions and quicker resolutions of those suppression motions that are litigated.[36]

However, a policy that strongly encourages recording interrogations may not be enough; state and local recording policies without enforcement mechanisms have often been inconsistently applied. For example, in 2006, the Iowa Supreme Court strongly encouraged law enforcement officers to record custodial interviews.[37] Shortly afterward, the Iowa Attorney General announced that he considered the decision to require recording, and the Iowa Department of Public Safety (DPS) adopted a general policy that required electronic recording of all custodial interviews.[38] But a 2011 survey found that, while most Iowa agencies recorded at least occasionally, only about half followed the DPS policy and recorded in all situations.[39] Additionally, due to budgetary constraints, policies without enforcement mechanisms can be stalled while police resources are focused on higher priorities. For example, in 2012, New York City implemented a policy to videotape interrogations for murder, sex crimes, and felony assaults.[40] But a year later, only 28 out of more than 76 detective squads even had an interview room set up with recording equipment, and only two of those were recording homicide interrogations.[41]

Although the federal context is distinct,[42] the DOJ should still guard against uneven application of its new policy by ensuring strong internal accountability mechanisms. Already, agents are required to document "[any] decision not to record any interview that would otherwise presumptively be recorded under" the new policy,[43] but it is unclear exactly what is required in this documentation. Simple notification is a good first step, but interpreting the requirement to involve a detailed explanation of why the presumption was violated would increase compliance. Empirical research suggests that law enforcement officers who know they

must explain their actions to a third party make fewer mistakes.[44] Moreover, the more detailed the justification required, the less likely officers will act without good reason.[45] The policy also indicates that supervisors should periodically review documentations of noncompliance.[46] That is a good start, but expanding this requirement to include releasing noncompliance information to the public would increase transparency.[47] This information could then be used to determine whether the DOJ's self-policing is adequate.

If internal accountability measures prove insufficient to compel compliance with the recording presumption, external accountability measures may become necessary. The policy makes extremely clear that it does not confer on defendants any right to have one's interview recorded.[48] And because there is no constitutional right to have one's interrogation electronically recorded, to compel recording would require a federal statute.[49] Fortunately, several state statutes mandating the recording of custodial interviews have been passed in the last decade and can provide guidance. State policies generally have one of three enforcement methods: exclusion, presumed involuntariness, or jury instructions. In exclusion states, if an interview was not recorded and no statutory exceptions apply, the statement will not be admissible.[50] In presumed involuntariness states, an unrecorded statement will be subject to the rebuttable presumption that it was involuntary, and therefore not admissible, unless the government overcomes the presumption by proving the statement was voluntarily given.[51] In jury-instruction states, the prosecution may present evidence from custodial interviews that, in violation of the statute, have not been recorded, but the court will instruct the jury about the legal requirement to record statements.[52] Any of these three options would provide federal agents with greater incentives to record their interviews than the current policy.

If federal law enforcement officers are not held to account for their decisions not to record, the DOJ's step in the right direction might not go as far as it could or should go to promote reliability and efficiency in criminal proceedings. To give the policy its best chance of effective implementation without outside interference, the DOJ should ensure strong enforcement of its policy's internal accountability and

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make information on noncompliance public. If internal measures prove inadequate, Congress should be prepared to enact formal, external accountability mechanisms to incentivize compliance and limit the harm of violations.

HARVARD LAW REVIEW ©2021

MARIE TROMBLEY

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