SUPREME COURT NO. 1002572

NO. 79439-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARTY LESHAWN KIME,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Johanna Bender, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Marty Kime, the appellant below, asks this Court to review the Court of Appeals decision referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner requests review of the Court of Appeals opinion in State v. Kime, COA No. 79439-6-I, filed August 30, 2021. The opinion is attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate petitioner's constitutional right to present a defense when it prohibited reliable evidence demonstrating he was not involved in the charged crimes?

2. Is review of this constitutional claim appropriate under RAP 13.4(b)(1) where the Court of Appeals' decision conflicts with several Supreme Court decisions, including those concerning the constitutional right to present evidence of innocence?

3. Is review also warranted of other issues raised and rejected by the Court of Appeals?

D. STATEMENT OF THE CASE

1. Trial Proceedings[1]

In the late afternoon of April 16, 2015, Lisa Lynch, Martrice Grant-Walker, and their one-year-old daughter Malijha were on Reith Road in Kent heading to their nearby apartment. 15RP[2] 576-579; 16RP 631-632, 635. Lynch was

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[1] Given the large record in this case, the trial evidence is necessarily summarized broadly here. Kime's Brief of Appellant contains an extensive discussion. See BOA, at 4-40.

[2] This petition refers to the verbatim report of proceedings as follows: 1RP – 11/22/17; 2RP – 3/27/18; 3RP – 6/26/18; 4RP – 7/9/18; 5RP – 7/10/18; 6RP – 7/11/18; 7RP – 7/12/18; 8RP – 7/16/18; 9RP – 7/17/18; 10RP – 7/18/18; 11RP – 8/23/18; 12RP – 9/4/18; 13RP – 9/5/18; 14RP – 9/6/18; 15RP – 9/10/18; 16RP – 9/11/18; 17RP – 9/12/18; 18RP – 9/13/18; 19RP – 9/17/18; 20RP – 9/18/18; 21RP – 9/19/18; 22RP – 9/20/18; 23RP – 10/1/18; 24RP – 10/2/18; 25RP – 10/3/18; 26RP – 10/4/18; 27RP – 10/8/18; 28RP – 10/9/18; 29RP – 10/10/18; 30RP – 10/11/18; 31RP – 10/15/18; 32RP – 10/16/18; 33RP – 10/17/18; 34RP – 10/18/18; 35RP – 10/22/18; 36RP – 10/23/18; 37RP – 10/24/18; 38RP – 10/25/18; 39RP – 10/29/18; 40RP – 10/30/18; 41RP – 10/31/18; 42RP – 11/1/18; 43RP – 11/5/18; 44RP – 11/6/18;

driving their Chevy Impala, Grant-Walker was the front passenger, and Malijha was asleep in her car seat in the rear. 15RP 589; 16RP 624-625, 632-635; 17RP 844, 874.

As Lynch turned left onto Lake Fenwick Road, multiple shots were fired from a nearby car. 16RP 643, 650; 17RP 878. Grant-Walker grabbed Lynch and told her to duck down. 16RP 643; 17RP 878. As the second car pulled alongside, Lynch attempted to steer into it and heard additional shots. 16RP 643, 650. Grant-Walker grabbed the steering wheel and forced the Impala up a curb on Lake Fenwick Road. 16RP 643; 17RP 878. One of the gunshots struck Malijha in the head, killing her. 16RP 651. The shooter's car did not stop and continued on Lake Fenwick Road before disappearing out of sight. 17RP 878; 20RP 1338.

Eyewitness descriptions of the shooter's vehicle varied. 15RP 647-648; 16RP 727-728, 650; 17RP 782-783, 802, 809, 828, 861, 866-867; 18RP 929; 19RP 1104-1107, 1110-1114;

45RP – 11/7/18; 46RP – 11/8/18; 47RP – 12/13/18; 48RP –

22RP 1656; 32RP 2663. So did descriptions of the car's driver and front passenger. 16RP 643-644, 649, 727, 731; 17RP 803-804, 828, 863-866, 870-872.

Police focused their attention on three suspects in what they believed to be a gang-related shooting.

The first was Abdifatah Mohamed, who had no alibi and confessed to more than one person that he was the shooter. 25RP 2046-2057, 2060, 2063-2065, 2075; 31RP 887-889, 892, 908-909; 40RP 3790-3795, 3799.

The second was Jean Paul Mitchell-Jones (a.k.a "Bompton"). 19RP 1238. Mitchell-Jones told his best friend Heirus Howell that he had been the driver of the car when Malijha was shot and killed. 43RP 4101-4111.

The third suspect was Marty Kime. 27RP 2334-2335. Although Mitchell-Jones had confessed to Heirus Howell that *he* was driving during the shooting, police theorized that Kime was actually the driver. Specifically, police believed the car

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1/11/19.

used in the shooting belonged to Kime's girlfriend, Ciera Guiden. 23RP 1775. Kime frequently borrowed Guiden's car and did so on April 16, 2015. 19RP 1246-1249; 23RP 1790; 24RP 1907-1935.

Consistent with law enforcement's theory of the case, at Kime's trial, prosecutors urged jurors to find that Kime was driving Guiden's car at the time of the shooting. Prosecutors conceded they could not identify who fired the shots that day from the passenger seat, but expressed confidence they had proved that Kime was driving and therefore an accomplice to murder and assault. 43RP 4149-4152, 4163.

As discussed in detail below, prosecutors successfully prevented jurors from considering as substantive evidence Mitchell-Jones's admission to Heirus Howell that he was driving when shots were fired and not Kime. 43RP 4115, 4118-4119.

Despite Kime being prevented from using Mitchell-Jones's admission to Howell, the defense maintained its

position that the two people responsible for Malijha's death and the assaults on her parents were Abdifatah Mohamed and Mitchell-Jones. 43RP 4166-4173, 4178, 4180-4182; 44RP 4221-4228, 4268-4276.

The jury agreed with the prosecution that Kime was driving, convicting him of Murder in the Second Degree and two counts of Assault in the First Degree. 46RP 273-274; CP 720-725. Including firearm enhancements, Kime was sentenced to 582 months in prison. 48RP 384-385; CP 853.

2. Court of Appeals

Kime raised seven issues on appeal, plus a claim that the cumulative impact of multiple trial errors denied him a fair trial.

A primary argument – to which the parties' devoted almost all of oral argument – pertained to Mitchell-Jones's confession to Heirus Howell that he was the driver.

Since Kime's guilt or innocence had turned on proof beyond a reasonable doubt that he was driving at the time of the

shooting, Kime argued the trial court's refusal to allow jurors to consider Mitchell-Jones's confession to Howell that Mitchell-Jones had been driving, as substantive evidence of Kime's innocence, denied him his federal and state constitutional right to present a defense. See AOB, at 63-71; RBF, at 19-28.

The Court of Appeals rejected this and every other claim.

Kime now seeks this Court's review.

E. ARGUMENT

1. THE COURT OF APPEALS' DECISION AFFIRMING EXCLUSION OF VITAL AND RELIABLE DEFENSE EVIDENCE CONFLICTS WITH SEVERAL SUPREME COURT DECISIONS AND WARRANTS REVIEW UNDER RAP 13.4(b)(1).

In 2017, Howell twice told defense counsel that Mitchell-Jones had confessed to being the driver of the car involved in Malijha's death. 43RP 4101-4102.

Recognizing the admissibility of this evidence as a statement against Mitchell-Jones's interest under ER 804(b)(3), the Honorable Johanna Bender ruled that the defense could call

Howell as a trial witness to prove Mitchell-Jones's confession.[3] CP 594-596.

Before ruling the evidence admissible, Judge Bender addressed all 9 factors set forth in State v. Anderson, 107 Wn.2d 745, 750, 733 P.2d 517 (1987), to ensure "adequate indicia of reliability" supported admission of Mitchell-Jones's confession under the rule. Judge Bender found that Mitchell-Jones had no apparent motive to lie about being the driver; Mitchell-Jones had made other statements suggesting criminal intent and consciousness of guilt; his confessions were made during several conversations with Howell; Mitchell-Jones's

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[3] ER 804(b)(3), titled "Hearsay Exceptions: Declarant Unavailable," deems admissible:

> A statement which was at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

relationship with Howell and the timing of the statements suggested trustworthiness; the statements contained express statements of fact; there was no evidence that made Mitchell-Jones involvement as the driver impossible; and there was no reason to believe Mitchell-Jones's recollection concerning his own involvement was faulty. CP 594-596. Judge Bender also found Mitchell-Jones unavailable based on the presumption – uncontested by the parties – that "if called to give the testimony proffered by the defense, Mr. Mitchell-Jones would assert his 5th amendment right against self-incrimination." CP 594, at n. 2.

By the time of trial, Howell had second thoughts about sharing his best friend's admissions of guilt. When called by the defense, Howell initially denied that he even had a conversation with Mitchell-Jones on this subject. 43RP 4101.

Using a transcript from a 2017 defense interview with Howell, defense counsel refreshed Howell's memory concerning Mitchell-Jones's confession:

> Q: I'm handing you Defense Exhibit 613. Is that a transcript of the interview we had?
>
> A: Yes.
>
> Q: If you will turn to page 581, do you see the numbers at the bottom? About midway through that page, do you see a question from me that reads, "So when we talked" –
>
> Prosecutor: Objection.
>
> Court: Allowed for impeachment. Go ahead.
>
> Q: "So when we talked last time, you were telling me about this conversation that you had with JP [Mitchell-Jones] where he was telling you that he had been the driver in a car at the time."
>
> And your answer was: "uh-huh."
> Is that correct?
>
> A: That's what it says in the transcript.
>
> Q: And I continued my question by saying: "That baby got shot. Do you remember

where you were when you guys had the conversation?"

And your answer was: "Yeah, it was over on for – 12th and Yesler by the Urban League."

Was that your answer?

A: Yes.

Q: Do you now recall speaking with Mr. Mitchell-Jones about the shooting of Malijha Grant?

A: I remember speaking to him.

43RP 4102-4103 (emphasis added). Now that Howell's memory had been refreshed that the conversation occurred, counsel continued with the examination to elicit some additional details about the circumstances of the conversation:

Q: How long was the conversation that you had with Mr. Mitchell-Jones about the shooting?

A: I don't know.

Q: On page 582, if you could turn to that and look about midway through the page, could you read that section to yourself and see if it refreshes your recollection?

A: Yes.

Q: Do you remember how long the conversation was?

A: 15, 20 minutes.

Q: Is that how you remember it as well?

A: I don't know.

Q: And that location where you had this conversation was near the Urban League Building?

A: Yes.

Q: Were the two of you outside of the building or inside?

A: Outside.

43RP 4103.

Later, defense counsel asked questions about who was in the car with Mitchell-Jones at the time of the shooting:

Q: Did JP tell you who was in the car at the time of the shooting of Malijha Grant?

A: No.

Q: If you turn to Defense – the transcript, page 595, up at the top. Could you read through

the first half of that page and see if that helps you remember.

A: Yes.

Q: Do you now remember what JP said about the other people in the car?

A: Yeah, but he never told me nobody else. He never told me no names, so I don't know who was in the car.

Q: Up at the top of the page, isn't it true that I asked you: "When you were talking to" –

Prosecutor: Objection, hearsay.

Court: I will allow it for impeachment. Go ahead.

Q: "When you were talking about, uh – to JP about the people who were in the car, I think you said JP referred to them just as his little homies?"

. . . .

A: It says, "Little homies, uh-huh."

Q: And later on you clarified: "When he said his homies, I just – all the younger cats."

That was another answer that you gave about -

A: That's an assumption.

43RP 4108-4110.

During the entire defense examination, while Howell denied knowledge of certain things related to his conversation with Mitchell-Jones, and his memory was not sufficiently refreshed regarding others, his memory was refreshed on several important points: he now recalled the conversation in which Mitchell-Jones said he was the driver when Malijha was shot, the conversation occurred at 12th and Yesler near the Urban League, and Mitchell-Jones said others were in the car with him, but he did not identify them by name.

Additional questions addressed subjects that included Facebook exchanges between Howell and Mitchell-Jones, Mitchell-Jones' emotional and mental health challenges, and Howell's criminal history. 43RP 4104-4111.

The State did not cross-examine Howell. 43RP 4119. But it asked for a limiting instruction concerning what Mitchell-

Jones told him, arguing that the only evidence of what he said was in the form of impeachment from the transcript of the defense interview. 43RP 4111, 4113. Defense counsel argued that some of the impeachment evidence had resulted in Howell's confirmation of portions of the conversation. 43RP 4114-4115.

After reviewing Howell's testimony and reviewing her own notes, Judge Bender rejected the defense argument, finding that the entire discussion of what Mitchell-Jones told Howell was for impeachment of Howell only. 43RP 4115. Consistent with this ruling, jurors were instructed:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Mr. Howell's description of a conversation with Jean Paul Mitchell-Jones and it may be considered by you only for the impeachment of Mr. Howell's memory. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

43RP 4118-4119.

As previously discussed, during closing arguments, and with jurors not allowed to use Howell's testimony as substantive evidence that Mitchell-Jones was driving the day of the shootings, the prosecutor argued that, although the State had failed to identify the shooter, that person's identity was irrelevant. The prosecutor argued that – regardless of who fired the shots from the car – all of the evidence established that Kime was driving that day and therefore guilty of all three charges as an accomplice. See 43 RP 4149-4152, 4163.

On appeal, Kime argued that Judge Bender had erred when ruling that no substantive evidence resulted from defense counsel's use of the interview transcript to refresh Howell's memory. Kime argued that Howell's memory of the conversation had been refreshed under ER 612, Mitchell-Jones's confession was therefore still admissible as a statement against interest under ER 804(b)(3) and, given the State's theory that Kime was driving when shots were fired, the erroneous exclusion of evidence that Mitchell-Jones had

identified himself as the driver could not be deemed harmless. AOB, at 67-70; RBF, at 19-23.

Kime also argued a violation of his constitutional right to present a defense. Citing the Sixth Amendment and Const. art. 1 § 22, Kime pointed out that no state interest can be sufficiently compelling to preclude the introduction of highly probative defense evidence. And since the excluded evidence went to the heart of the defense claim that Kime was innocent because he was not driving the car from which shots were fired, reversal was required. AOB, at 70-71; RBF, at 24-28 (citing State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010); State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)).

The Court of Appeals rejected Kime's claims with little analysis. The court utterly failed to address Kime's constitutional claim concerning a violation of his right to present a defense. Instead, the Court merely found Mitchell-Jones's confession inadmissible under the hearsay rules:

> We review a trial court's evidentiary rulings for an abuse of discretion. State v. Mohamed, 186 Wn.2d 235, 241, 375 P.3d 1068 (2016). Extrinsic evidence may be used to impeach a witness with a prior out-of-court statement of material fact that is inconsistent with their trial testimony. ER 613(b). Hearsay, a statement made by someone other than the declarant that is offered for the truth of the matter asserted, is inadmissible absent a recognized exception. ER 801, 802. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." ER 805.
>
> Kime cannot demonstrate abuse of discretion because none of the substantive information from the interview should have been admitted. When Howell denied the conversation with the investigator, the defense could impeach Howell with the transcripts to confirm that Howell did speak with the investigator only. The court did not err because the transcript of the interview was hearsay and, more importantly, the substance of what Mitchell-Jones told Howell was hearsay. There is no exception to the hearsay rule which would allow the transcript to be admitted as substantive evidence. Therefore, the transcript was inadmissible for any purpose beyond confirming that Howell did speak with the investigator. For these reasons, there was no harm because nothing of substance should been presented to the jury for any purpose.

Slip op., at 24-25 (emphasis added).

This analysis does not survive scrutiny. The Court of Appeals concluded there was no substantive evidence for jurors to consider for two reasons: "the transcript of the interview was hearsay and, more importantly, the substance of what Mitchell-Jones told Howell was hearsay."

First, the transcript's hearsay status is irrelevant, since it was being used to impeach Howell and, under ER 612, refresh his memory of the conversation in which Mitchell-Jones confessed to being the driver. Contrary to the Court of Appeals' conclusion, it has long been recognized that notes or memoranda used to refresh a witness's memory need not be independently admissible, since they are not themselves placed in evidence. See State v. Little, 57 Wn.2d 516, 520, 358 P.2d 120 (1961). It was Howell's testimony, after his recollection had been refreshed, that was admissible; not the transcript itself.

Second, regarding what the Court of Appeals deemed its most important reason for rejecting Kime's arguments, the substance of what Mitchell-Jones told Howell was not hearsay.

In anticipation that Howell would take the stand and testify that Mitchell-Jones said he was the driver, Judge Bender ruled this testimony sufficiently reliable and admissible as a statement against Mitchell-Jones's interest under ER 804(b)(3). Although Howell was reluctant to repeat this information at trial, once his memory was refreshed to the extent necessary to confirm the conversation with Mitchell-Jones, that evidence remained admissible under ER 804(b)(3). Its reliability had not changed in the period since Judge Bender determined pretrial that it was admissible under the rule.

Review is appropriate in this case under RAP 13.4(b)(1). The Court of Appeals' conclusion that the hearsay status of the transcript of the defense interview with Howell, used to refresh his memory about his conversation with Mitchell-Jones, precluded admission of Mitchell-Jones's confession conflicts with State v. Little. Moreover, the Court of Appeals' silent rejection of the violation of Kime's constitutional right to present a defense conflicts with Hudlow, Jones, and a long line

of this Court's decisions. Since no state interest is sufficiently compelling to preclude defense evidence of high probative value, evidence that Mitchell-Jones (and not Kime) was driving at the time of the shooting – evidence Judge Bender had already deemed sufficiently reliable for admission under the 9-factor test applicable to ER 804(b)(3) – could not be precluded under the circumstances of this case consistent with the Sixth Amendment and Const. art. 1 § 22.

Howell's testimony did not concern some peripheral issue. This was substantive evidence that Mitchell-Jones was driving at the time of Malijha's death and, consistent with the defense theory, Mohamed's accomplice to the charged crimes. It created reasonable doubt and directly undermined the State's confident assertion that it had correctly identified Kime as the driver accomplice. This violation of Kime's right to present a defense cannot possibly be deemed harmless beyond a reasonable doubt and requires a new trial.

2. THIS COURT SHOULD ALSO REVIEW KIME'S OTHER ISSUES.

a. *Juror 19 Tainted The Panel And Denied Kime A Fair Trial.*

The federal and state constitutions guarantee every criminal defendant the right to a fair and impartial jury.[4] State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000).

During jury selection, and in the presence of the entire venire, juror 19 said he could not ensure Kime would receive a fair trial "[b]ecause I'm looking at the Defendant, and I can already see a convicted felon with no alibi." 13RP 188. Later, when questioned individually, juror 19 – formerly employed by the California Department of Corrections – admitted he did not know if Kime was a convicted felon, but said he knew Kime

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[4] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, sec. 22 guarantees "a speedy public trial by an impartial jury . . . ."

had no alibi because otherwise he would not have been charged. 13RP 201-202. He was released for cause. 13RP 202-203.

Kime argued that juror 19's remarks tainted the entire panel and denied him a fair trial. BOA, at 40-46; RBF, at 1-5. The Court of Appeals concluded that Kime could not raise this issue for the first time on appeal because it was not manifest constitutional error. See Slip op., at 13-14. Kime asks this Court to review this claim and reverse the Court of Appeals.

b. *The Admission Of Irrelevant, Emotional, And Highly Prejudicial Evidence Concerning Malijha Denied Kime A Fair Trial.*

Over defense objections, the prosecution was permitted to introduce evidence that Malijha was born with a heart defect, had endured two open heart surgeries during her first three months of life, and her family was able to take a celebratory trip to Disneyland after her first birthday. 15RP 576-577.

Moreover, although Malijha's cause of death was undisputed and x-ray images were sufficient to demonstrate the

path of the bullet in her skull, the prosecution was permitted to use gruesome overheard images of Malijha's partially empty skull cavity to show the same thing. See exhibit 509 (photos A-B, F-H); 4RP 90-95, 99-105; 5RP 173-174; 38RP 3550-3551, 3585-3586; CP 565 (ruling 3).

Kime argued all of this emotional evidence was inadmissible under ER 401-403 and denied him a fair trial. AOB, at 47-53; RBF, at 5-13. This Court should review the Court of Appeals' conclusion that admission of this evidence was within the trial court's discretion. See Slip op., at 14-19.

c. *Defense Motions For Mistrial Should Have Been Granted.*

Twice, prosecution witnesses testified improperly.

First, without a sufficient factual basis, Lisa Lynch positively identified the shooter's car in a manner that supported the State's theory that Kime was likely the driver. 16RP 684-685. Although Judge Bender instructed jurors to

disregard the testimony, she denied a defense motion for mistrial. 16RP 685-698, 711, 715-716, 721.

Second, prosecution witness Deante May provided testimony – previously undisclosed to the defense – supporting the State's theory that Kime was out driving on the day of the shooting, looking for trouble, and possibly hunting a rival gang member named "Malcolm." 20RP 1382, 1389, 1398-1399, 1407. Despite finding a discovery violation by the State, Judge Bender denied a motion for mistrial. 20RP 1400-1402; 21RP 1419-1424.

Kime argued that nothing short of a mistrial sufficed to cure the resulting prejudice from the testimony of these two witnesses. AOB, at 53-63; RBF, at 13-19. The Court of Appeals disagreed, finding no abuse of trial court discretion as to either motion. See Slip op., at 19-23. This Court should review the Court of Appeals' decision.

d. *Prosecutorial Misconduct Denied Kime A Fair Trial.*

During closing arguments, while once again focusing on its theory that Kime was looking for trouble and possibly hunting for someone named "Malcolm" the day of the shootings, the prosecutor referred to evidence that had not been presented or admitted. 43RP 4160-4161. Defense counsel did not object at the time, but later moved for a new trial. CP 727-730. Judge Bender denied the motion, finding the misconduct could have been neutralized with a defense objection and curative instruction. 47RP 284-287.

On appeal, Kime argued the misconduct warranted reversal and, to the extent defense counsel waived the issue by failing to timely object and failing to ask for a curative instruction, counsel were ineffective under the Sixth Amendment and article I, section 22 of the Washington Constitution. BOA, at 71-81; RBF, at 28-32. The Court of

Appeals rejected these claims. See Slip op., at 25-28. Kime asks this Court to review this issue.

e. *Ballistic Identification Evidence Does Not Pass The Frye Test And Should Have Been Excluded.*

Kime argued that ballistics evidence in his case – "matches" were declared using evidence from different shooting scenes in an attempt to identify the make and model of the weapon used to kill Malijha – should not have been admitted without a hearing under Frye v United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923), to assess recent scientific reports revealing significant disputes in the relevant scientific communities concerning the underlying science. BOA, at 89-95; RBF, at 33-34.

Citing State v. DeJesus, 7 Wn. App. 2d 849, 436 P.3d 834, review denied, 193 Wn.2d 1024, 448 P.3d 54 (2019), the Court of Appeals rejected the Frye challenge. See Slip op., at 31-32. This Court has never affirmatively assessed or ruled on this this claim, and should do so in Kime's case.

f. *Cumulative Error*

Lastly, Kime argued that the cumulative impact of the many trial errors denied him his constitutional right to a fair trial. BOA, at 95-96; RBF, at 34 (citing State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963)). The Court of Appeals disagreed. See Slip op., at 32-33. Kime asks this Court to review this issue.

F. CONCLUSION

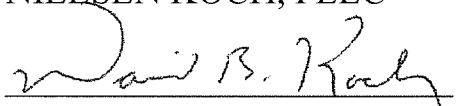
Kime respectfully asks this Court to grant his petition and reverse the Court of Appeals.

I certify that this document contains 4,249 words excluding those portions exempt under RAP 18.17.

DATED this 29th day of September, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



DAVID B. KOCH, WSBA No. 23789
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

FILED
8/30/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARTY LESHAWN KIME, Appellant.	)	No. 79439-6-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Marty Kime appeals his convictions for murder in the second degree and two counts of assault in the first degree, arising from a gang-related shooting that resulted in the death of a one-year-old child. Kime raises several arguments, including that comments made by a prospective juror tainted the jury panel. Kime also contends that the trial court erred by: admitting emotional and graphic evidence; denying two motions for mistrial; prohibiting jurors from considering evidence for purposes beyond impeachment; denying his motion for a new trial based on prosecutorial misconduct; denying his motion for a new trial based on a First Amendment challenge; and admitting ballistics evidence without conducting a Frye

hearing.[1] Kime finally asserts that he should be granted a new trial based on cumulative error.[2] We affirm.

FACTS

The Shooting:

On April 16, 2015, Lisa Lynch was driving home from work. Her partner, Martrice Grant-Walker, was seated in the front passenger seat and their one-year-old daughter, Malijha, was in the backseat of the car strapped into a car seat. As Lynch approached their apartment off Lake Fenwick Road in Kent, she heard gunshots.

Lynch saw a dark car with tinted windows. The passenger window was down, and Lynch observed two African American males, one "light-skinned" and one "dark-skinned" in the car. She saw a black handgun pointed out of the passenger seat window. Grant-Walker grabbed Lynch's head and told her to duck, then he took the steering wheel, and ran the car onto the curb. Lynch heard a second round of gunshots.

The dark car drove away quickly, heading south. Lynch rushed to check on Malijha and discovered she was bleeding from her right ear. Malijha had been shot in the head. Lynch pulled Malijha from her car seat and a bystander began CPR. Police responded and rushed Malijha to Harborview Medical Center. Her parents removed her from life support two days later.

Dr. Richard Harruff of the King County Medical Examiner's Office performed Malijha's autopsy. Dr. Harruff determined that a bullet went through the car seat, hit

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[1] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
[2] Kime also submitted a statement of additional grounds that raises no issue of merit.

Malijha's right ear, and went through her skull and brain. Dr. Harruff recovered the bullet from the left side of Malijha's scalp.

The Investigation:

Because Grant-Walker had ties to Deuce 8, a gang from Seattle's Central District, Kent police believed that the shooting was gang-related. The gangs Deuce 8 and Deuce 0 generally ran together and were considered friendly with each other. Deuce 8 and Low Profile, another Central District gang, were in ongoing conflict with one another.

Kent Police detectives collected eight .40 caliber shell casings at the scene of Malijha's shooting. A ballistics expert compared firing-pin marks, ejector marks, and tool marks on the casings. The expert concluded that all of the .40 caliber casings at the scene came from the same weapon. The expert determined that the rectangular firing-pin aperture was common to a Glock as well as to a Smith & Wesson Sigma series from the 1990s. By comparing the "class characteristics" of the casings, which included "the number of lands and grooves in a barrel, the width of those lands and grooves . . . [t]he size of the aperture of the firing-pin hole . . . [and the] general shape of that firing pin," the expert opined that the casings came from a Smith & Wesson Sigma series.

Police entered the casings in a national ballistics database to compare them to casings collected from other crimes. This resulted in two leads. The first database hit was a tentative match to .40 caliber shell casings left behind in a drive-by shooting on March 23, 2015, in South Seattle. Witnesses described a Toyota or Lexus sedan involved in the shooting, but police had no suspects. The second database hit was to a

shooting in the Central District on April 15, 2015. Police connected this shooting to two teenagers, Vyshwan Warr and Abdifatah Mohamed, both who were affiliated with Low Profile. The ballistics expert concluded that the casings from both of these shootings came from the same gun used in Malijha's murder.

Warr and Mohamed became persons of interest in Malijha's murder, prompting police to investigate their phone records.[3] Mohamed told a friend he was going to Kent the night of the shooting. Mohamed was acting "tougher" and "different" when he returned that night. At trial, the defense called a witness, Kia Dewberry, who claimed that Mohamed told her that "I think I shot a baby in the head. We got that nigger. I think I just shot a kid."

Dewberry disclosed this conversation with Mohamed to detectives. On cross-examination, Dewberry acknowledged that she had given police Mohamed's version of events, which were inconsistent with the facts. Dewberry testified that Mohamed was in a white car, three different guns were involved, and Mohamed fired backwards at the victims as they fled. Dewberry additionally testified that the baby's father was out of the car retrieving the child in the car seat, but dropped the child back into the seat when he heard a shot, after which he crawled under the car to hide.

On April 18, 2015, police learned that a Low Profile member, Jean Paul Mitchell-Jones, had been shot the day after Malijha's murder. Mitchell-Jones also became a person of interest in the case, and police obtained his phone records. Based on the three persons of interest, police investigated anyone with affiliations to Low Profile.

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[3] Detectives later concluded that Warr had an alibi on the day of Malijha's shooting.

Police explained that because of the connection with the murder weapon on April 15 and the subsequent shooting of a Low Profile member in Kent, they needed to investigate any Low Profile connections to the case. Mitchell-Jones allegedly later disclosed to a friend, Heirius Howell, that he was the driver of the car when Malijha was murdered.

Meanwhile, police attempted to identify the car used by Malijha's shooter based on varied witness descriptions of a black sedan. An eyewitness took a photo of the car fleeing south, but the image only captured an indistinct glimpse of a dark car. The photo also showed a silver Pontiac behind the fleeing car. Police looked for home surveillance cameras along Lake Fenwick Road and found one on a residence just south of the murder scene. The video captured a dark blue car with tinted windows speeding south on Lake Fenwick Road minutes after the shooting. The next car to pass was a silver Pontiac. Detectives sent the footage to Harvard Gunderson, a lifelong auto wrecker, who identified the suspect car as a 2009 to 2014 Chevrolet Cruze.

Police released still images of the dark sedan to the media on May 4, 2015. Ciara Guiden called her mother Robin Cockerhern, when she recognized the car on the news. Cockerhern purchased the car for Guiden and Guiden had the windows tinted. Cockerhern called the police, and identified the car as a dark blue 2014 Chevrolet Cruze. Detectives seized the Cruze.

Police drove the Cruze past the surveillance camera that captured the fleeing vehicle after the murder and observed that the vehicles looked very similar on camera. Police later discovered surveillance video picturing the Cruze nearby while Lynch ran

errands, and Lynch's car passing by heading west, followed by the Cruze, less than a minute before Malijha was shot. Guiden identified the Cruze at trial.

Guiden told police that she had loaned the Cruze to her boyfriend, Marty Kime, on April 16, 2015, the day of the shooting. She noted that the car was clean and vacuumed out when Kime returned it to her. Guiden told police that she dropped Kime off at his cousin's house on 9015 Canyon Drive in Kent after he borrowed the Cruze on April 16, 2015. Police focused on Kime after discovering that he was a member of Low Profile.

In March 2015, John Williams, a Low Profile leader, was shot. Williams was hospitalized for weeks until he died on March 22, 2015. Kime and Williams were close friends. Williams was presumed to have been shot by Deuce 8. The police believed that the primary motive for the murder of Malijha was retribution for Williams's murder.

On May 15, 2015, police searched 9015 Canyon Drive.[4] Detectives recovered 19 cellphones belonging to various people at the residence, which investigators used to piece together Kime's whereabouts at the time of the shooting. Detectives also recovered a box of .40 caliber ammunition in a bedroom and a single round on the kitchen counter. Firearms experts determined that five of the casings from the murder scene had the same bunter marks[5] as the bullet recovered from the kitchen. Three of the casings from Malijha's murder had the same bunter marks as the casings in the box. The rounds recovered from the April 15, 2015, shooting linked to Warr and Mohammed had the same bunter marks as the ammunition in the box.

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[4] The road is named Canyon Drive, but was often referred to as Canyon Road in testimony. Gwendolyn Mayo, a relation of Williams, lived in the house. Williams sometimes stayed there. Mitchell-Jones also stayed in the house.

[5] Bunter marks are unique marks stamped by the manufacturer.

On one of the phones seized, officers discovered a photo of Kime in a car, pointing a handgun with a visible bullet in the chamber into the camera. A firearm examiner determined the gun most closely resembled a Smith & Wesson Sigma series handgun, after comparing it to an extensive reference collection. Police ultimately never recovered the murder weapon.

Phone records showed Kime in the general vicinity of the murder scene during the day of Malijha's murder. The police believed that after borrowing Guiden's car, Kime retrieved the gun used by Mohamed and Warr. Police based this theory on messages Kime sent to his brother Isiah Woods.

In September 2015, police arrested a Low Profile member, Lugene Slade, for a federal gun charge. He agreed to cooperate with police in exchange for leniency. Slade testified that he met up with Kime to smoke after Malijha's murder. Although things seemed normal at first, Slade said "I asked him did he kill the baby. And that's when everything changed. He got quiet. He didn't say anything. More standoffish. And it was just—it was an awkward silence for a while." Slade testified that Kime neither confirmed nor denied his involvement in the shooting.

In December 2015, the lead detective visited Kime at the federal detention center in SeaTac, where Kime was serving time on a gun charge. The detective informed Kime that the police were charging him with Malijha's murder.

David Harrison, an avowed white supremacist skinhead, was serving a six-year sentence for felony possession of a firearm in that same detention center as Kime in December 2015. Harrison reached out to his lawyer with information about Kime, hoping to reduce his sentence and because "it was the right thing to do." Harrison

spoke with police in early 2016, soon after Kime was charged. Harrison testified that after Kime spoke with detectives, he was worried about the shooting, and Kime asked Harrison about firearms and forensics. Kime asked Harrison if he could be charged if the police did not have a gun. After Harrison read an article about Malijha's murder, he asked Kime about it. Kime said it was an accident. Kime also told Harrison that he was worried his "little homies" would give him up and that he was nervous because he signed for a hotel card in the area. Kime said police would not find the gun.

Police questioned Eric Little, a son of Mayo who lived at 9015 Canyon Drive in 2015. In 2015, Little said he did not know anything about Malijha's murder, only that there were rumors that Low Profile was involved. However, after Little was charged with two counts of first degree assault for a drive-by shooting, he decided to testify against Kime in exchange for a plea deal and spoke with police in May 2018. Little said that he had gone out looking for Deuce 8 members on March 22, 2015, the day Williams died. On March 23, 2018, Little was in a friend's Lexus when someone shot at him, knocking out the Lexus's window. Little testified that when he returned home to 9015 Canyon Road, Kime and his friend Vicky Rogers were there, and they said that they had fired upon Little after mistaking him for someone else. Little's testimony was consistent with the facts of the shooting in South Seattle where police first found .40 casings matching the database results of those found at Malijha's shooting.

Little said that Kime, Woods, Mohamed, and Warr went to the 9015 Canyon Drive house on April 15, 2015. Kime showed Little a .40-caliber Smith & Wesson. Little provided Kime with some .40-caliber rounds. On the day of Malijha's shooting, Little testified that he was with Rogers, and that Kime called Rogers. Kime told them that he

saw an older guy, "Fast"[6] from Deuce 8 at Safeway with his family. Kime tried to get Little to come meet him, but Little said he did not condone attacking someone with their family present. Little testified that when he returned to 9015 Canyon Drive, Kime was there and "acting weird."

In 2018, police found videos shot on Woods's phone that showed Kime and Woods driving in Guiden's car near the Renton CVS where Grant-Walker and Lynch stopped. In one video, Kime sees someone and asks, "Is that Malcom?" Kime reached down to the floor beneath the driver's seat, and Woods replies "no." Kime said "Oh, I thought we had him." In other videos, Kime and Woods rapped along to a song about "trying to catch a body."

The Trial:

The State charged Kime with second degree felony murder, and two counts of first degree assault, all with firearm enhancements. Slade, Harrison, and Little testified against Kime. The State theorized that Kime drove the car, provided the weapon used to kill Malijha, and followed Grant-Walker. The State charged Kime through accomplice liability, and was ultimately unable to identify whether Mohamed, Woods, or someone else fired the gun and killed Malijha. Kime's defense focused on blaming Mitchell-Jones and Mohamed for the murder, and challenging Slade, Harrison, and Little's credibility. Defense moved for a new trial on two different grounds, both of which the court denied.

The jury convicted Kime of murder in the second degree and two counts of assault in the first degree, all with firearm enhancements. The trial court imposed a sentence of 582 months.

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[6] Fast is Grant-Walker's nickname.

Kime appeals.

ANALYSIS

A. Tainted Jury Panel

Kime argues first that during jury selection a potential juror tainted the jury pool with negative remarks aimed at Kime and his potential trial defense, thus denying him of a fair trial. We disagree.

Prospective jurors were given questionnaires concerning their abilities to serve. One question read: "Is there any other reason you can think of that would make it difficult for you to be objective in a case involving loss of life?" Juror 19 answered "yes," explaining: "I worked in a state prison. All or vertuly [sic] all inmates say 'I did not do it.'" Defense counsel requested individual questioning of juror 19 based on this answer, calling the response "extreme bias." The trial court denied the request. In general voir dire, the State discussed the purpose of a jury, and asked "Anybody in this group . . . have a different opinion about juries; think juries are not the best way to do it?" The following exchange occurred:

> JUROR 19: I think more than likely what it is, is two opposing teams making an argument to a jury of people that they don't have no idea what they are interested in. They could just take it to the judge. The judge knows everything about what's going on here and could make a decision that is fair. Basically, whoever argues the best wins.
>
> MS. MCCOY: And if you are selected to be a juror, how would you make sure that your jury gives the Defendant a fair trial?
>
> JUROR 19: I can't make sure of that.
>
> MS. MCCOY: Why not?
>
> JUROR 19: Because I'm looking at the Defendant, and I can already see a convicted felon with no alibi.

The State did not follow up.

The trial court allowed juror 19 to be questioned individually without the remaining jury panel. Juror 19 opined that Kime would not be in court if he had an alibi. When the State asked if he could listen to the court's instructions about not making assumptions as a juror, juror 19 said "I don't think I can. I worked too many years in the State of California for the Department of Corrections, and I've seen it so many [sic] that I don't think I can make that kind of decision." The State asked "so do you think that you can be a fair and impartial jury in this case?" Juror 19 said "I do not." The court granted the defense's subsequent motion to remove juror 19 for cause. Defense counsel did not voice any concern about juror 19's statement tainting the panel and did not request a new venire.

As voir dire continued, juror 43, an African American woman, stressed the importance of giving Kime a fair trial, "with the intent knowing that he comes to court innocent until he's proven guilty." Juror 43 served on Kime's jury. The next day, the State asked if, based on the previous discussions about biases, if jurors could think of a reason why some communities may not cooperate with police. Juror 53, an African American man, said "I applaud Juror 43 with her courage yesterday," while he discussed growing up in a community with a widespread distrust of police. Juror 53 added:

> Yesterday a person said something along the lines of they can't see anything but a convicted felon. And in my head or in my opinion, that goes down a road that I don't think the Court really wants to go. When I came in here on Tuesday, there was a video about implicit bias. And that was not only a demonstration of implicit bias, but explicit bias to me.

Juror 53 criticized the court for not speaking up about juror 19's comment. The State explained that the court could not comment on remarks made during jury selection, but

the purpose of such discussions was to make sure Kime got a fair trial. Juror 53 did not serve on the jury.

During defense's discussion of burden of proof with the panelist, juror 63 agreed that it was better to have 100 guilty people go free than convict an innocent person. Juror 63 served on Kime's jury. Juror 64 agreed that it should not be easier to convict people. Juror 64 also served on Kime's jury. Juror 125, a Puerto Rican individual, said that the "system is already tainted," and they did not want to be part of the system "because I see it's already stacked against him." Juror 125 did not serve on Kime's jury.

We review a trial court's decision on voir dire for an abuse of discretion. State v. Davis, 141 Wn.2d 798, 826, 10 P.3d 977 (2000). "Therefore, absent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, a trial court's ruling on the scope and content of voir dire will not be disturbed on appeal." Davis, 141 Wn.2d at 826.

A defendant is guaranteed the right to a trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. Davis, 141 Wn.2d at 824. In Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury. Davis, 141 Wn.2d at 824. Seating an actually biased juror is a manifest constitutional error requiring reversal. State v. Irby, 187 Wn. App. 183, 197, 347 P.3d 1103 (2015). A party may raise a manifest constitutional error affecting a constitutional right for the first time on appeal. Irby, 187 Wn. App. at 192. A defendant establishes a manifest error by demonstrating practical and identifiable consequences in the trial as a result of the error. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

In State v. Guevara Diaz, 11 Wn. App. 2d 843, 861, 456 P.3d 869 (2020), this court reversed based on actual bias when the defendant was charged with rape, and one of the jurors said she could not be fair to both sides in a case involving sexual assault or abuse. Although neither the State nor the defense questioned the juror individually if she could be fair, the juror sat on the jury and deliberated. Guevara Diaz, 11 Wn. App. 2d at 858. This court opined that "the trial court should have addressed this actual bias by questioning juror 23 or allowing defense counsel to question her outside the hearing of other jurors." Guevara Diaz, 11 Wn. App. 2d at 858. The court held that the record clearly demonstrated that a seated juror exhibited actual bias and "nothing occurred during voir dire to provide any assurance of her impartiality." Guevara Diaz, 11 Wn. App. 2d at 861.

Guevara Diaz is distinguishable from this case because juror 19 did not serve on Kime's jury. Had juror 19 participated in convicting Kime, this comment could have served as an example of actual bias. However, Kime's argument centers on these comments tainting the entire panel of potential jurors.

Because Kime raises the issue of juror 19's comments tainting the jury for the first time on appeal, he must demonstrate that these comments resulted in a manifest constitutional error. Kime is unable to meet this burden. Indeed, the record demonstrates the opposite. The other potential jurors used Juror 19's comments as a tool to discuss the importance of setting aside biases and ensuring that Kime received a fair trial. The record demonstrates that the other jury panelists did not accept juror 19's statement as truthful, or as proof of Kime's guilt, but rather used this dialogue as a way to ensure that biased jurors did not convict Kime. Kime is unable to demonstrate that a

biased juror actually deliberated in his case, or that juror 19's comments tainted the panel.

Kime's argues that the trial judge should have conducted the rest of juror 19's questioning individually after reading juror 19's initial survey. However, the trial court has considerable discretion in conducting voir dire. State v. Munzanreder, 199 Wn. App. 162, 175, 398 P.3d 1160 (2017). Kime has not demonstrated that the trial court abused its discretion by questioning juror 19 in general voir dire after the response to the survey.

B. Admission of Evidence

Kime next contends that admission of irrelevant, inflammatory, and improperly prejudicial evidence denied him a fair trial. We disagree.

We review evidentiary decisions for an abuse of discretion. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Improperly admitted evidence is only reversible if it results in prejudice. State v. Hatch, 165 Wn. App. 212, 219, 267 P.3d 473 (2011). Prejudice occurs when a reasonable probability exists that the evidence materially affected the outcome of the trial. Hatch, 165 Wn. App. at 219. The trial court conducts a balancing test to determine whether the probative value of proffered evidence is outweighed by its prejudicial effect under ER 403. Erickson v. Robert F. Kerr, M.D., P.S., Inc., 125 Wn.2d 183, 191, 883 P.2d 313 (1994). "The trial judge has wide discretion in balancing the probative value of evidence against its potential prejudicial impact." Cole v. Harveyland, LLC, 163 Wn. App. 199, 213, 258 P.3d 70 (2011).

1. Heart Surgeries/Disneyland

During Lynch's testimony, she testified that Malijha was born with a small heart, and that she had two open heart surgeries as a baby. Lynch testified that the family took a trip to Disneyland around Malijha's first birthday. Defense counsel's objections to this line of questioning were overruled.

Kime argues that Malijha's struggles at birth and celebratory trip were irrelevant and highly prejudicial, merely serving to arouse an emotional response in the jury. Kime fails, however, to demonstrate that the trial court abused its discretion in allowing the testimony. The State had the burden to demonstrate that Malijha's heart condition played no role in her death. Lynch's testimony demonstrated that although Malijha was born with a heart condition, she was well enough to travel before her death.[7] The State later elicited testimony from the medical examiner stating that Malijha's prior surgeries and heart condition played no role in her death. If the defense had stipulated to Malijha's cause of death, Lynch's testimony might have proven irrelevant. There was no such stipulation.

Kime cannot demonstrate that any prejudice outweighed the probative value of this testimony. Further, Kime cannot demonstrate that this brief line of questioning materially affected the outcome of the trial.

2. Autopsy Photos

The State offered 18 photographs from Malijha's autopsy. The trial court carefully considered each offered photograph and asked the State to articulate the

[7] The State bears the burden to prove all the essential elements of the crime charged, including the cause of the victim's death. See State v. Imokawa, 194 Wn.2d 391, 402, 450 P.3d 159 (2019). Because the State presents its case first and was required to prove Malijha's cause of death, this evidence was potentially relevant.

relevance of each. The court ultimately admitted 12 photographs. Photos A and B[8] are x-ray images of the bullet in Malijha's skull. The State explained that these images are relevant because

> the State has to prove manner of death. The State also has to prove where that bullet came from because that bullet is relevant to the forensic evidence in the case as far as the type of firearm that the State argues was used as the murder weapon, having never been recovered.

The court also confirmed that these photographs illustrated the direction of which way the bullet came from. The court declined to admit pretrial photo C, which was a full body photograph of Malijha.[9]

Admitted photo C (pretrial photo F) shows where the medical examiner recovered the bullet on the left side of Malijha's forehead. The court declined to admit pretrial photo E, which pictured Malijha's face, because pretrial photo F was a closer view of the same picture and pretrial photo E was "more emotionally disturbing." While the State offered four photographs to show the entry wound by Malijha's right ear, the court admitted only two, admitted photos D and E.[10] Similarly, while the State offered four photos of Malijha's opened skull cavity and brain during autopsy, the court limited them to admitted photos F, G, and H.[11] Admitted photo I[12] shows the fibrous material and Styrofoam that was carried into Malijha's brain by the bullet, corresponding with the bullet hole on the right ride of her rear-facing car seat. Admitted photos J, K, and L[13]

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[8] Pretrial photos A and B.

[9] Although the court initially admitted a full body, naked photo of Malijha on the autopsy table, it later reversed its ruling, concluding that pretrial photo "D is duplicative and cumulative of the other evidence that I had ordered admissible and has a very significant prejudicial quality to it."

[10] The State offered pretrial photos G through J; the court admitted pretrial photos H and J.

[11] The State offered pretrial photos K through N; the court admitted pretrial photos L through N.

[12] Pretrial photo O.

[13] Pretrial photos P through R.

depict the bullet recovered from Malijha's head. The court carefully explained its ruling in detail:

> I am going to allow some but not all of these photographs to be admitted into evidence. The ones that I am allowing to be admitted I find have probative value that outweighs their potential prejudicial effect.
>
> In making this decision, I am aware that the State is entitled to enter probative evidence and that there's certainly no per se bar of the use of autopsy or other gruesome photographs, but that the Court needs to be particularly mindful that the probative value of each one of those photographs does, in fact, outweigh its prejudicial effect, and that there is a significant prejudicial effect associated with photographs of the deceased in this case. In this case the deceased was a one-year-old baby, and the prejudicial effect is significant.
>
> The first two photographs, A and B, of State's proposed Exhibit 20 I will admit. They are both X-rays. They show from two separate angles the entrance point into the skull of the baby. Neither of them is terribly gruesome in nature. The prejudicial effect is fairly limited. They are highly probative in that they show the entrance wound.
>
> And it is the Court's understanding based on the pretrial argument of both parties that there will be significant dispute and argument at this trial over the angle and trajectory of the shootings and what inferences the trier of fact should draw from those forensics in terms of who would or would not have had a believable or likely vantage point to have committed the shootings.
>
> Exhibit C or subsection C to Exhibit 20 is a photograph of Malijha that the Court is excluding. It is almost duplicative to D. The only difference is that in C the baby is clothed and in D the baby is not clothed. Her wounds are covered in C, they are uncovered in D. The Court finds that the cumulative nature of the photos renders one of them unnecessary and ultimately prejudicial, but the one where she is not clothed the Court finds is admissible in order to show the two separate injuries that she sustained to two separate places on her head, which, again, is relevant to the State's proof—or not proof, but the State's theory as to both the different volleys of bullets and the different vantage points of shooter or shooters.
>
> The Court is similarly excluding E, which is a close-up photo of the baby's face, but is allowing F. In making those—in that decision, the Court is excluding E, but admitting F, because they both show the same graze wound to Malijha's forehead. E shows her entire face, and it is a more prejudicial photograph. As a result, F is a more clinical photograph showing her face only from the bridge of her nose to the crown of her head and focuses more exclusively on the nature of her injury.

> Photograph number 4 is a close-up of the baby's ear, and it is almost entirely duplicative of photograph H. H is a slightly more close-up shot of the same injury. The Court is allowing H and J because they show both the initial entrance point of the penetrating—of the bullet, the penetrating bullet, I should say, there's two bullet injuries, as well as the place where the bullet actually penetrated the skull. The Court is excluding G and I because they are largely duplicative of H and J.
>
> . . . .
>
> Exhibits O, P, Q, and R, have very limited prejudicial effect. They're the cotton stuffing from the car seat and the bullet. The Court finds that they are probative and have very little prejudicial value.

The photos were admitted during the testimony of medical examiner Dr. Harruff.

Kime contends that photos F, G, and H (the overhead shots of Malijha's skull cavity) were particularly gruesome. But Kime does not demonstrate that photos F, G, and H were unduly prejudicial. "Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial. We note, for example, that accurate but graphic photographs are admissible even when repulsive or gruesome if their probative value outweighs their prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).

The State offered photos F, G, and H to show the bullet's trajectory, the brain injury which resulted, and where the bullet came to rest, all of which were relevant to proving the manner of death. The court limited the number of photos of the skull cavity to only those necessary to prove trajectory. This evidence was necessary to prove that the bullet struck Malijha from her right side, which was the driver's side of the car, as she was in a rear-facing car seat, after passing through the car seat. The photographs match the testimony from eyewitness accounts that the shooter fired from alongside Lynch's car.

The trajectory of the bullet was important because Kime's defense was to blame Mohamed for the murder. The photos were necessary to prove that the bullet struck Malijha from her right side, which was inconsistent with Mohamed's account of the shooting because he claimed to fire backwards at the car, and that Grant-Walker had Malijha out of the car when he shot her. Ultimately, this was a highly emotional trial involving the death of a baby, and the admission of these photographs did not change the jury's outcome. The court conducted an extensive ER 403 balancing test and carefully weighed each photograph for prejudice. For these reasons, Kime cannot demonstrate that the court abused its discretion in admitting the photos.

C. Motions for Mistrial

Kime moved for mistrial twice. The first instance was after Lynch positively identified the shooter's car, and the second was after Deante May offered surprise testimony. Kime argues that the court erred by denying both motions for mistrial. We disagree.

We review the trial court's denial of a mistrial for abuse of discretion, and we find abuse only "when no reasonable judge would have reached the same conclusion." State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "In determining the effect of an irregularity, we examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." Emery, 174 Wn.2d at 765.

1. Lynch Identification

Prior to trial, defense counsel obtained an order limiting Guiden and her mother, Cockerhern, as the only witnesses who could identify the car in the surveillance video as the Cruze. During trial, however, Lynch testified that the image of the car released by police from the surveillance footage was the car that shot at her. The exchange occurred as follows:

> Q: And in that news conference, did the police put out a description of the car?
> A. Yes.
> Q. I'm sorry. That was—did they put out an image of a car?
> A. Yes.
> Q. And did you see the image that went out on the media?
> A. Yes.
> Q. What did you think?
> A. That was the car.

The defense moved for a mistrial. The court denied the motion for mistrial, but instead gave a limiting instructing telling the jury to disregard Lynch's testimony identifying the car as the shooter's car. The court instructed the jury: "You are to disregard the testimony of Ms. Lynch that Exhibit 17 is an image of the car from which shots were fired on April 16, 2015. You should not consider that testimony for any purpose."

The State then elicited testimony from Lynch that the car looked like the car she saw on April 16. On cross-examination, Lynch testified that it was her impression that detectives believed the car belonged to the shooter.

The trial court did not abuse its discretion in denying the requested mistrial. Lynch's testimony was properly cured through the curative instruction. "A jury is presumed to follow the court's instructions and that presumption will prevail until it is

overcome by a showing otherwise." Carnation Co. v. Hill, 115 Wn.2d 184, 187, 796 P.2d 416 (1990). Kime cannot overcome the presumption that the curative instruction was sufficient.

2. Deante May Testimony

The State theorized that Kime and Woods were out "hunting" rival gang members before Malijha's murder. To support this theory, the State pointed to the video where Kime thought that he spotted someone named Malcom. The State was unable to identify the Malcom in the video. There was evidence of two different Malcoms presented pretrial.[14] There was a Deuce 8 Malcom and a Deuce 0 Malcolm, both described with different attributes and different connections to Kime. The defense believed that the individual was someone named Malcolm Simon, and that Kime did not hold any animosity toward him. The defense found and contacted Malcolm Simon. The defense planned to call Malcolm Simon to testify to dismiss any theories that Kime was "hunting" Malcolm Simon.

At trial, May, a former member of Low Profile, testified about relations between the gangs in the area, and said that after Williams's shooting, Kime asked May to take him to downtown Seattle to enact revenge. May testified that individuals posted disrespectful comments about John Williams after he was shot. May specifically

[14] During pretrial, the State explained:
We have in our investigation turned up two different Malcolms who are Central District folks. There's a Malcolm Beaver that Rhyheem Bellvie talks about, and then there's a Malcolm Simon that Detective Wade Jones told us about. We still have some more work to do to try and figure out if we can pin down a particular identity for somebody who would be in this area, but there are two Malcolms that we're aware of who are Central District-affiliated people.

identified someone, Malcom, a Deuce 0 member, who said "Fuck John. Fuck LP. Pull the plug on that bitch-ass nigger."

Defense did not object to this testimony, but moved for mistrial after the State completed direct examination, arguing that this testimony about the comment from Malcolm was a surprise. The court denied the motion, instead allowing defense counsel to interview May. After interviewing May and learning that there was no evidence that Kime saw the post, defense counsel again moved for mistrial, which the court again denied. During cross-examination, May testified that he never saw Malcom or Kime together, he did not know if Kime knew Malcom, and he did not know if Kime ever saw or learned about the post.

Malcolm Simon later testified for the defense that he was a friend of Kime and Williams, and that he did not have a conflict with either of them. He said that he had only posted good things about Williams on Facebook.

Any issue with May's testimony was sufficiently cured through cross-examination, and through Malcolm Simon's later testimony. The issue of Malcolm, although contested by the parties, was not a central issue of the case. The significance of the video where Kime thought he saw someone he called Malcom evidenced that Kime and Woods were out looking for rival gang members in the area. Although the defense claimed that the issue of Malcom was significant to the State's argument about Kime's state of mind, the video simply added evidence of Kime's intent to target rival gang members. Therefore, the identity of Malcom is ultimately insignificant to the case. The State demonstrated Kime's motive through sufficient evidence outside of the Malcolm video.

The court properly cured any surprise from May's testimony by allowing the defense to interview May and fully cross-examine him after the interview. The defense acknowledged that this would cure the record. Further, the defense had Malcolm Simon testify as a witness, resolving any concerns with the Malcom issue. For these reasons, the trial court properly denied both motions for mistrial.

D. Evidence for Impeachment Purposes Only

Defense witness Heirius Howell was best friends with Mitchell-Jones. Kime argues that the court erred by limiting Howell's testimony at trial to be considered for impeachment purposes only. We disagree.

Based on pretrial interviews, the defense expected Howell to testify that several months after Malijha's murder, Mitchell-Jones told Howell that he was the driver in the shooting. However, Howell initially refused to testify at trial. The defense then attempted to introduce evidence of interviews between Howell and a defense investigator in which Howell said that Mitchell-Jones told him that he was the driver. Only one interview was recorded and the other two interviews were memorialized only by defense notes; none were sworn depositions and the State was not present for any of the interviews.

Defense counsel wanted to present these interviews to the jury to show that Mitchell-Jones, not Kime, was driving the car. To make this argument, defense also pointed to the cellphone records showing Mitchell-Jones in the area of the shooting, with his phone off during the murder. Defense also highlighted that Mitchell-Jones called Kime 15 minutes after Malijha's shooting to potentially demonstrate that they were not together. Defense argued that because Mitchell-Jones confessed to being the

driver, and that Kime was not with Mitchell-Jones 15 minutes after the murder, the jury should conclude that Kime was not involved in Malijha's murder.

The trial court noted that the defense witness refused to testify, stating "I cannot conceive of a way that I would provide to the jury the information you're asking me to provide to them without commenting on the evidence, nor did you cite any authority." The court denied the motion to admit the hearsay statements, stating that "those statements are not corroborated and the Defense has made no record to suggest that they are reliably corroborated."

Howell eventually agreed to testify. At trial, Howell initially denied speaking to the investigator, and defense counsel used a 2017 interview transcript to impeach him. Defense counsel then continued to ask Howell about information from the transcript. This questioning included eliciting substantive information about Mitchell-Jones telling Howell he was the driver and that the other people in the car were his "little homies." After the State's motion for a limiting instruction, the court instructed the jury that Howell's testimony was admitted for impeachment purposes only. Defense did not object to the instruction.

We review a trial court's evidentiary rulings for an abuse of discretion. State v. Mohamed, 186 Wn.2d 235, 241, 375 P.3d 1068 (2016). Extrinsic evidence may be used to impeach a witness with a prior out-of-court statement of material fact that is inconsistent with their trial testimony. ER 613(b). Hearsay, a statement made by someone other than the declarant that is offered for the truth of the matter asserted, is inadmissible absent a recognized exception. ER 801, 802. "Hearsay included within

hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." ER 805.

Kime cannot demonstrate abuse of discretion because none of the substantive information from the interview should have been admitted. When Howell denied the conversation with the investigator, the defense could impeach Howell with the transcript to confirm that Howell did speak with the investigator only. The court did not err because the transcript of the interview was hearsay and, more importantly, the substance of what Mitchell-Jones told Howell was hearsay. There is no exception to the hearsay rule which would allow the transcript to be admitted as substantive evidence. Therefore, the transcript was inadmissible for any purposes beyond confirming that Howell did speak with the investigator. For these reasons, there was no harm because nothing of substance should have been presented to the jury for any purpose.

E. Prosecutorial Misconduct

Kime next contends that the trial court erred when denying his motion for a new trial based on prosecutorial misconduct. We disagree.

As discussed above, there was evidence of two different individuals named Malcom presented at trial. The subject of Malcom also arose during Lugene Slade's testimony, where Slade testified that he had seen Kime and Malcolm together. During closing, the prosecutor argued:

> Slade also told you another important thing, and that is there's two Malcolms. There's Malcolm Simon. I'll talk about him in a second. There's also Malcolm Beaver who's a Deuce 8, not a Deuce 0. And Malcolm Beaver hangs out at Third and Pine. So there's another Malcolm.
>
> But, again, Slade's testimony is just one piece of evidence. You should not convict the Defendant based on

> Lugene Slade's testimony alone. You should convict the Defendant based on all the evidence including Lugene Slade's testimony. [15]

This was the first time the jury heard the name of the second Malcolm as Malcolm Beaver.

The defense did not object during closing argument. Later, defense counsel moved for a mistrial based on a misstatement of the evidence. The court denied the motion, finding that any misconduct could have been neutralized with a defense objection and curative instruction.

A trial judge has broad discretion in granting motions for new trial, and we will not upset that ruling absent an abuse of discretion. Mohamed, 186 Wn.2d at 240-41. To demonstrate prosecutorial misconduct, the defendant must prove that the prosecutor's conduct was both improper and prejudicial. Emery, 174 Wn.2d at 756. "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Emery, 174 Wn.2d at 760. If the defendant did not object, any error is waived unless the prosecutor's conduct was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760. The defendant must show that (1) no curative instruction would have alleviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Emery, 174 Wn.2d at 760-61. "The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to

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[15] During pretrial, the State identified Malcolm Beaver as someone the State witness Ryheem Bellvie would discuss. But the State elected not to call Bellvie as a witness so the name Malcolm Beaver was never before the jury.

express such inferences to the jury." In re Pers. Restraint of Davis, 152 Wn.2d 647, 716, 101 P.3d 1 (2004).

The trial court did not abuse its discretion in denying the motion. Although the judge agreed that this statement was in error, this statement did not rise to the level of flagrant and ill-intentioned conduct required when the defendant failed to object at trial. The court explained:

> I was deeply impressed by the work of both the State and the defense was the incredible—the incredibly nuanced and rich understanding that both parties had of the record. And considering how factually detailed this case was, it's actually a little bit amazing to me that we really had very few of these moments where something that we talked about in pretrial sort of got leaked over into trial by accident.
>
> I agree, though, it was error. It should not have happened. It was not permissible. I don't have any reason to find that it was malevolent in any way. The fact that there was not an objection at the time is really the starting point for the Court's analysis. I don't find that the error was flagrant or ill-intentioned, and I do find that it could easily have been neutralized by a curative instruction, had I been given the opportunity to do so in real time.

As discussed above, the issue of Malcolm is not dispositive of the outcome of the case because the State presented sufficient evidence of Kime's motivation for the shooting. The mention of the name Malcolm Beaver actually lends credibility to the defense's argument that there are two individuals named Malcolm, and that Malcolm Simon did not have an issue with Kime or Williams.

Kime also contends that his counsel was ineffective for failing to object to this statement made during closing argument. Washington follows the Strickland[16] test to determine if defense counsel was deficient. To demonstrate ineffective assistance of counsel, a defendant is required to show that: (1) defense counsel's representation was

[16] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

We have a strong presumption that counsel's performance was reasonable. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The defendant must show the absence of a legitimate strategic or tactical reason supporting the challenged conduct by counsel. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003).
Kime cannot meet the first prong of the Strickland test. Although defense counsel did not object, this statement was made during the State's closing argument. It is rare for counsel to object during closing argument, therefore choosing not to object is a legitimate strategy. Further, counsel's objection could have highlighted the Malcolm issue and confused jurors. Because defense counsel had a legitimate strategy by not objecting during closing argument, Kime cannot demonstrate his counsel was ineffective.

F. First Amendment Challenge

Kime next argues that the trial court erred by denying his motion for a new trial based on his First Amendment challenge to the accomplice liability statute and corresponding pattern jury instruction. We disagree.

The trial court used the State's proposed jury instruction on accomplice liability:

> A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing the crime.

> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.[17]

(Emphasis added).

Under RCW 9A.08.020(3)(a)(ii), a person is an accomplice to commit a crime if they act "with knowledge that it will promote or facilitate the commission of the crime," and "aids or agrees to aid such other person in planning or committing it." The trial court also instructed the jury on knowledge:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

After the verdict, defense moved for a new trial, arguing that accomplice liability law and the corresponding jury instruction violated the First Amendment because of the use of the words "encourage" and "support" in the definition of aid. Defense counsel argued that using these terms in the definition created the possibility that Kime could be convicted based on his words alone, specifically, the words from his Facebook posts.[18]

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[17] This instruction is identical to WPIC 10.51, except it excluded the language: "A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not."

[18] Kime made Facebook posts in which he expressed sorrow for Williams's death and a desire for revenge.

We review a trial court's denial for a mistrial for an abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A law criminalizing speech is unconstitutionally overbroad under the First Amendment 'if it sweeps within its prohibitions constitutionally protected free speech activities.'" State v. Johnston, 156 Wn.2d 355, 363, 127 P.3d 707 (2006) (quoting City of Bellevue v. Lorang, 140 Wn.2d 19, 26, 992 P.2d 496 (2000)).

This court has previously rejected the argument that the accomplice liability instruction violates the First Amendment. In State v. Coleman, 155 Wn. App. 951, 962, 231 P.3d 212 (2010), we held that the knowledge aspect of accomplice liability requires the defendant to act knowingly, with specific criminal mens rea. "Therefore, by the statute's text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." Coleman, 155 Wn. App. at 961. The other divisions of this court have also rejected this First Amendment over-breadth challenge. See State v. Ferguson, 164 Wn. App. 370, 375, 264 P.3d 575 (2011); State v. Holcomb, 180 Wn. App. 583, 590, 321 P.3d 1288 (2014); State v. McPherson, 186 Wn. App. 114, 121, 344 P.3d 1283 (2015). While Kime contends that the Washington Supreme Court has not addressed this argument, the court has declined to review the opinions affirming the constitutionality of the accomplice liability statute. See State v. Coleman, 170 Wn.2d 1016, 245 P.3d 772 (2011); State v. Ferguson, 173 Wn.2d 1035, 277 P.3d 669 (2012); State v. Holcomb, 180 Wn.2d 1029, 331 P.3d 1172 (2014); State v. McPherson, 183 Wn.2d 1012, 352 P.3d 188 (2015).

Because the accomplice liability statute applies only when the accomplice acts with the knowledge of the specific crime charged, and does not criminalize words alone,

Kime's argument fails. We follow our previous decisions and reject Kime's First Amendment challenge. The trial court thus properly denied the motion for a new trial.

G. Ballistics Identification Analysis and Frye

Kime contends that the expert testimony on ballistic identification evidence was inadmissible and the trial court should have excluded it. We disagree.

Kime sought a hearing under Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923), to examine the State's forensic evidence. The defense opposed the ballistics evidence, arguing that there was no statistical reality to the State's claim that bullets and shell casings could be a match. The trial court ruled that no Frye hearing was necessary because ballistic evidence has been generally accepted for a significant period of time. The court did not allow the experts to testify to a hundred percent degree of certainty, and said that defense could address any questions of methods and certainty under cross examination.

We review the trial court's decision to hold a Frye hearing de novo. State v. Pigott, 181 Wn. App. 247, 249, 325 P.3d 247 (2014). Washington courts employ the "general acceptance" standard set forth in Frye. Pigott, 181 Wn. App. at 249. "Under Frye, novel scientific evidence is admissible if it is based on a theory or principle that is generally accepted in the relevant scientific community, but not admissible if qualified experts have significant disputes as to its validity." Pigott, 181 Wn. App. at 249. "Evidence not involving new methods of proof or new scientific principles, is not subject to examination under Frye." Pigott, 181 Wn. App. at 249.

In State v. DeJesus, 7 Wn. App. 2d 849, 858, 436 P.3d 834 (2019), this court reviewed a case where a crime analyst examined cartridge casings from the scene of a

shooting with another cartridge case recovered from the suspect's home. The analyst concluded that based on consistent markings from the casings, they were fired from the same gun. DeJesus, 7 Wn. App. 2d at 858. The appellant argued that there was a significant dispute among scientists about the validity of toolmark analysis of ballistic evidence for firearm identification. DeJesus, 7 Wn. App. 2d at 860. The court rejected this argument, noting that all of DeJesus's challenges concerned the weight of the testimony, not its admissibility. DeJesus, 7 Wn. App. 2d at 865. The court held that "courts from around the country have universally held that toolmark analysis is generally accepted," and held that the court did not err in admitting the ballistics evidence. DeJesus, 7 Wn. App. 2d at 865.

While Kime contends that DeJesus was wrongly decided, the Washington Supreme Court denied review.[19] Because the scientific technique at issue in DeJesus is identical to the ballistics evidence challenge Kime raises here, we follow the reasoning in DeJesus, and hold that the court did not err by not holding a Frye hearing because ballistic evidence is generally accepted. Kime cannot demonstrate the court abused its discretion by admitting the ballistic evidence.

H. Cumulative Error

Finally, Kime argues that the cumulative impact of multiple errors denied his right to a fair trial. We disagree.

Under the cumulative error doctrine, the defendant must show that while multiple errors, when standing alone, are insufficient grounds for reversal, the combined effect of

[19] State v. DeJesus, 193 Wn.2d 1024, 448 P.3d 54 (2019).

these errors requires a new trial. State v. Clark, 187 Wn.2d 641, 649, 389 P.3d 462 (2017).

As discussed in-depth above, none of the issues that Kime raised constituted an error. Because the trial court did not err, the cumulative error doctrine does not apply.

Affirmed.

Mann, C.J.

WE CONCUR:

Bowman, J.

Appelwick, J.

NIELSEN KOCH P.L.L.C.

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