Supreme Court No. 102621-8
Division III, No. 38844-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHAN OLIVER BEAL,

Petitioner

PETITION FOR REVIEW FOLLOWING APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Nathan Beal, asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for first-degree murder.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on November 7, 2023. A copy of this opinion is attached as "Appendix A."

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether Mr. Beal's conviction should be reversed and remanded for a new trial when evidence of his invocation of the Fifth Amendment right to remain silent was presented at trial and the error was not harmless beyond a reasonable doubt. This issue involves a significant question of constitutional law. RAP 13.4(b)(3).

Issue 2: Whether this Court should accept review because the forensic ballistics match was incorrect and inadmissible. The Court of Appeals decision conflicts with a

published decision of the Court of Appeals and involves an issue of substantial public interest. RAP 13.4(b)(2) & (4).

Issue 3: Whether the extensive media coverage of the case violated the defendant's constitutional right to a fair trial. This issue presents a significant question of constitutional law and involves an issue of substantial public interest. RAP 13.4(b)(3) & (4).

D. STATEMENT OF THE CASE

On August 8, 2020, around 2:40 pm, law enforcement received a call about a woman who was found slumped over in a vehicle in the Browne's Addition neighborhood in Spokane. (RP[1] 306-307, 309, 310, 317-318; State's Exs. 11, 12, 16). When law enforcement arrived, it was determined the woman, Mary Schaffer, was deceased. (RP 314). It appeared she had been there for several hours. (RP 320).

A nearby neighbor heard what sounded like a gunshot between 12:00 p.m. and 12:40 p.m. earlier that afternoon. (RP

[1] "RP" refers to Volumes I and II transcribed by T. Cochran.

352). She went around the corner to check out the source of the sound, and did not notice anything out of the ordinary, except for a taller gentleman with curly hair walking very quickly. (RP 353). Though the neighbor later claimed she saw Nathan Beal standing behind a white car, she did not tell any investigating officers at the scene about him and only mentioned the curly-headed man. (RP 359-360, 365-368, 373).

Mr. Beal was Ms. Schaffer's ex-husband, and Ms. Schaffer planned to pick up their children earlier that afternoon on August 8, 2020, from Mr. Beal's apartment in Spokane. (RP 325, 333, 754-755). As part of a parenting arrangement, H.B. and N.B. were to spend five weeks in the summer with Mr. Beal, while spending the remainder of the year with Ms. Schaffer. (RP 646, 706). Ms. Schaffer never picked up her children that day. (RP 652).

The State charged Mr. Beal with the murder of Ms. Schaffer in the first degree with a firearm enhancement, and alleged Ms. Schaffer was an intimate partner. (CP 11).

Mr. Beal was interviewed by law enforcement and prior to trial, a CrR 3.5 hearing was held to determine which statements of Mr. Beal's were admissible. (RP 15-59). The trial court found all statements were admissible, with the exception that any statements Mr. Beal made after he invoked his right to silence would not come into evidence. (CP 491; RP 33, 59). Specifically, the court noted the line of questioning about whether Mr. Beal had a firearm in his apartment would not be admissible after the point where Mr. Beal invoked his right to remain silent by stating he did not want to answer any more questions about it. (CP 491; RP 53, 59).

A jury trial was held in February of 2022, and witnesses testified consistent with the facts above. (RP 305-786).

Justin Sharp testified he and Ms. Schaffer were in a relationship at the time she passed away. (RP 324-325).

He stated Ms. Schaffer had two children from a prior relationship with Mr. Beal, H.B. and N.B. (RP 325). Mr.

Sharp noted the children spent most of their time with Ms. Schaffer and she had primary custody. (RP 326-328).

Mr. Sharp testified Ms. Schaffer was supposed to pick up the children from a visit with Mr. Beal on August 8, 2020. (RP 333). Ms. Schaffer was to fly from their home in Oregon to Spokane, rent a car, and drive back with the children. (RP 334).

Sandra Young testified she lived next door to Mr. Beal at the time Ms. Schaffer was killed. (RP 350-351). She stated she returned home from work on the day of the incident around 12:00 p.m. and 12:40 p.m. (RP 352). She was unloading her car when she heard a gunshot. (RP 352). The sound prompted her to come out of the apartment's parking area and look around. (RP 353). She looked down the street and "saw one gentleman with curly hair walking very quickly" towards her. (RP 353). Ms. Young also saw Mr. Beal in between two cars, standing behind a white car. (RP 353-355). Ms. Young said Mr. Beal walked down two streets and back to the apartment

complex. (RP 357). It was a warm day and Mr. Beal was wearing a jacket with his hands in his pockets. (RP 358). Ms. Young, seeing nothing of note or evidence that anyone had been hurt, went out for a few hours. (RP 356, 358-359). When she later returned, she saw law enforcement and the area was taped off. (RP 359).

Ms. Young spoke to several officers—at least four—about what she had seen earlier that day, and while the information was still fresh in her mind. (RP 359, 363-364). She went into detail describing the tall thin man with curly hair she had seen leaving the area in a suspicious manner—walking very quickly and wearing dark clothing or a gray sweatshirt. (RP 359-360, 367, 369-370). She noted the curly hair looked like a wig to her. (RP 359). Ms. Young never mentioned Mr. Beal being near the white car during any of those interviews in the hours immediately following the incident. (RP 359-360, 365-368, 373). Rather, Ms. Young repeatedly told the officers about the curly-headed man. (RP 360).

Detective Downing was called to the location where Ms. Schaffer's car was found around 3:00 p.m. that day. (RP 398-399). He testified the car Ms. Schaffer was found in was a rental car, and it was located about 20 yards from Mr. Beal's apartment. (RP 402-404). A single, Winchester 9-millimeter Luger shell casing was found on the ground outside of the white car on the driver's side. (RP 404-405). Detective Downing described that Ms. Schaffer's body was in a position that made it appear she was about to pull herself out of the car. (RP 406-409, 412). There was a hole in her skull with stippling, indicating a gun was shot within 30 inches of her head. (RP 410-411, 416, 455). The detective collected a bullet from inside the car. (RP 444).

A search warrant was executed on Mr. Beal's apartment, Detective Downing testified. (RP 428, 441). A backpack found inside the apartment's bedroom closet contained a loaded firearm, a Ruger 9-millimeter. (RP 434-436, 438). The magazine contained bullets with a headstamp of Winchester 9-

millimeter Luger. (RP 440-441). Additional matching bullets were found in the backpack, as well as a gray short-sleeved t-shirt. (RP 441-443, 457).

Detective Downing stated he learned Mr. Beal purchased coffee at a local shop about one block away earlier that day at 12:30 p.m. (RP 449-452).

Detective Downing interviewed Mr. Beal the day of the incident, and Mr. Beal agreed to speak with him after being read his *Miranda* rights. (RP 452). The detective testified as follows:

> [The State]: . . . And did you read the defendant his rights?
> [Witness]: Yes, I did.
> [The State]: Okay. Did he agree to speak with you?
> [Witness]: Yes, he did.
> [The State]: Okay. Now, did you ask the defendant if he in fact owned a firearm?
> [Witness]: Yes, I did.
> [The State]: And what was his initial response to that question?
> . . .
> [Witness]: He told me he doesn't own a firearm but he knows—he knows how to use them.

[The State]: Okay. Did you ask the defendant if there was a firearm in his apartment, in his—in his house?
[Witness]: Yes, I did.
[The State]: And what was his initial response to that?
[Witness]: He shrugged his shoulders and didn't answer.
[The State]: Okay. And did you ask him a clarifying question, "Is there a firearm in your apartment?"
[Witness]: Yes, I did.
[The State]: And what was his response to that?
[Witness]: He said, "I don't want to answer that."
[The State]: Okay. Did he—what was his demeanor like when he initially responded to that?
[Witness]: He was calm.
...
[The State]: At some point in this interview with the defendant, did you ask him, "Is the gun still in your backpack?"
[Witness]: Yes, I did.
[The State]: What was his reaction and what was his response to that question?
[Witness]: His reaction was his body language totally changed. He slumped down in his chair, looked down at the ground, and his lower lip began to quiver.
[The State]: And what was his response?
[Witness]: *His response is done—is he's done talking.*

(RP 452-454) (emphasis added).

Detective Cestnik testified. (RP 474-492). A gray, long-sleeved sweatshirt was found in a dumpster nearby. (RP 483-484).

Midway through trial, defense counsel moved for a mistrial based on Detective Downing's testimony. (RP 499-500, 512-521). Defense counsel pointed out that Detective Downing testified directly about Mr. Beal's right to remain silent. (RP 499-500). Specifically, Detective Downing testified in front of the jury that when he asked Mr. Beal about the firearm in his backpack, Mr. Beal stated he did not want to answer that question. (RP 499-500, 453). The State noted it would not argue the comment on the defendant's silence in closing arguments. (RP 513). The State also argued it did not comment on Mr. Beal's assertion of his rights. (RP 513-514).

The trial court shared with the parties that it was also concerned about Detective Downing's testimony. (RP 515). The court intended to bring up the issue, as well, and spent time researching it the night prior. (RP 515). The trial court

reiterated its prior ruling as to which of Mr. Beal's statements were to come in from his interview with the detective:

> … I can't recall which video was which here, but there was a discussion about "Do you own a firearm?" "No, I don't." And eventually when the detective got to the point where he mentioned the firearm in the backpack, what Mr. Beal actually said was "Next question, please." After that, I believe there was a questions about "Do you want to answer any other questions?" and he said, "No, I don't want to answer that."
>
> So in my ruling, I said that everything could come in, including the "Next question please"' and I was very clear to say that anything after that does not come in, because in my mind that is Mr. Beal invoking his right to remain silent. And I was very clear on that…
>
> So that, to me, was a red flag of an area that I did not believe the detective should have gone into. It's basically Criminal Law 101; you don't comment on a defendant's invocation of their right to remain silent.

(RP 516-518). The trial court denied the motion for mistrial. (RP 516-518).

Since the court would not grant a mistrial, defense counsel suggested Detective Downing be called to testify again,

giving the opportunity to correct his prior improper statements and also offer the possibility of impeachment. (RP 519-520).

The lead detective assigned to the case was Detective Green. (RP 558). Detective Green stated a phone was found in Ms. Schaffer's purse. (RP 569). He also noted H.B.'s cell phone was seized. (RP 569). According to Ms. Schaffer's phone, the last text message she sent was at 12:36 p.m. to H.B. (RP 572-573, 747).

Detective Green obtained surveillance footage from near the scene. (RP 572-581; State's Exs. 104 & 105). A male in these videos is seen in the distance with dark shoes, a gray sweatshirt, a mask, and dark hair. (RP 581; State's Exs. 104 & 105). Detective Green thought the video showed Mr. Beal walking through the neighborhood around midday. (RP 582). No mask was recovered from Mr. Beal's apartment. (RP 731-732).

A forensic scientist testified. (RP 599-611). The scientist did not note any blood present on the gun at the time of his examination. (RP 609-610).

Another forensic scientist testified, and she noted Mr. Beal's DNA was found on the gun but was not found on the gray sweatshirt found in the dumpster nor the driver's door to Ms. Schaffer's car. (RP 627-629, 631, 634-635, 637).

H.B. testified at trial. (RP 643-656). She stated on the day her mother was to pick her up at her father's apartment, she got a text message from her mother that she was 20 minutes away. (RP 651). Mr. Beal was not home at that time—he had said he was going to get mochas for them. (RP 651). When H.B.'s mother finally texted that she had arrived, Mr. Beal was not home. (RP 652).

Brett Bromberg-Martin testified as a supervising forensic scientist for the firearm and toolmark section. (RP 664). Mr. Bromberg-Martin stated random imperfections inside a firearm lead to markings on cartridge cases and bullets, like ballistic

fingerprints. (RP 667). He testified that in his opinion the bullet fragment from the crime matched the Ruger firearm. (RP 675). The witness admitted he had a full narrative from law enforcement as to what the detective thought happened prior to testing the bullet fragment and coming to his own conclusion. (RP 678-680). Mr. Bromberg-Martin testified he could not be 100 percent certain that the bullets matched the gun, and that he relied on his analytical opinion for the outcome. (RP 683-684). He stated: "there's not a qualitative sureness percentage or confidence interval or something like that on any crime laboratory report, because that's not typically something we associate with this type of conclusion." (RP 683-684). Mr. Bromberg-Martin also agreed that the type of testing involved was subjective, and there was no machine to run any processes on for identification at this time. (RP 686-687).

Detective Downing was recalled to the stand. (RP 699-701). The parties agreed to allow Detective Downing to read from a script during his testimony. (RP 691-692, 699-701).

There he testified to interview questions and answers he had in a prior exchange with Mr. Beal. (RP 699-701). He once again testified to questions he asked Mr. Beal about whether he owned a firearm. (RP 700-701).

Mr. Beal testified after the State rested. (RP 752-786). Mr. Beal told the jury he did not shoot Ms. Schaffer on August 8, 2022. (RP 762).

Mr. Beal stated he and Ms. Schaffer were together in 2006 and separated in 2015. (RP 754). He only text messaged Ms. Schaffer and never called her so he could keep a record of what was being said. (RP 768-769, 782). Mr. Beal was unable to purchase a handgun on his own, so he asked a former girlfriend to purchase it for him. (RP 755-756). Mr. Beal stated he never said anything to Emily Goodwin, also a former girlfriend, about custodial interference. (RP 757). Mr. Beal agreed he did tell Detective Downing he did not own a gun, because he did not own one. (RP 757-758, 780). Mr. Beal noted he was not wearing a shirt on August 8 because it was

very hot that day. (RP 751). He put on bright blue pants and shirt with a purple hat when he later went to get coffee. (RP 762). Mr. Beal did not own a gray sweatshirt. (RP 762).

Mr. Beal stated he was somewhat concerned when Ms. Schaffer did not show up. (RP 768, 777). When Ms. Schaffer appeared to be late, he went to the coffee shop. (RP 775).

The jury found Mr. Beal guilty of murder in the first degree. (CP 405-407; RP 849). The jury also found Mr. Beal was armed with a firearm at the time of the commission of the crime and that he and Ms. Schaffer were intimate partners. (CP 405-407; RP 849).

Mr. Beal appealed. (CP 527-543).

In an unpublished opinion, the Court of Appeals affirmed Mr. Beal's conviction, holding Detective Downing's remark during trial was a comment on Mr. Beal's right to remain silent, but the error was harmless beyond a reasonable doubt. *State v. Beal*, No. 38844-1-III, 2023 WL 7321393 (Wash. Ct. App. Nov. 7, 2023); *See* Appendix A. The Court of

Appeals also rejected Mr. Beal's arguments in his Statement of Additional Grounds regarding: (1) the admissibility of the toolmark analyst's testimony, (2) his argument that excessive media presence violated his constitutional right to an impartial jury, and (3) that the trial transcript was inaccurate. Appendix A, pgs. 23-27.

The facts are further set forth in the Appellant's Opening Brief and in the Statement of Additional Grounds for Review. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT

Issue 1: Whether Mr. Beal's conviction should be reversed and remanded for a new trial when evidence of his invocation of the Fifth Amendment right to remain silent was presented at trial and the error was not harmless beyond a reasonable doubt. This issue involves a significant question of constitutional law. RAP 13.4(b)(3).

During trial, the State elicited testimony from an officer witness about Mr. Beal's refusal to answer any further questions during an interview. The Court of Appeals held the

comment was a violation of his constitutional right to remain silent and should not have been presented at trial. But the error was not harmless beyond a reasonable doubt.

Review is merited because the comment on silence was not harmless beyond a reasonable doubt, and as such is a significant question of constitutional law on whether the defendant was given a fair trial due to violation of his Fifth Amendment rights. U.S. Const. amend. VI, V & XIV; Const. art. I, sec. 9; RAP 13.4(b)(3).

Both the United States Constitution and Article I, section 9, of the Washington State Constitution state that a person shall not be compelled in any criminal case to give evidence against himself. U.S. Const. amend. V; Const. art. I, sec. 9; *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996)). Both constitutions protect the right to remain silent. *Easter*, 130 Wn. 2d at 235. A comment on the right to remain silent is a constitutional issue, and as such may be raised for the first time

on appeal. *State v. Romero*, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002).

It is a violation of due process for the State to comment on or exploit a defendant's exercise of the right to remain silent. *State v. Romero*, 113 Wn. App. 779, 786-787, 54 P.3d 1255 (2002). "[T]he State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence." *Easter*, 130 Wn.2d at 236. This is because a defendant's "Fifth Amendment right to silence can be circumvented by the State just as effectively by questioning the arresting officer or commenting in closing argument as by questioning the defendant himself." *Id.* at 236 (citation omitted).

As recognized by the Court of Appeals' opinion, Detective Downing commented on Mr. Beal's right to remain silent. Appendix A, pg. 15. The Court of Appeals determined that the comment warranted the constitutional harmless error

standard because the comment had the "unintended effect of likely prejudicing Beal." Appendix A, pg. 15.

The State bears the burden of proving a constitutional error was harmless. *Romero*, 113 Wn. App. at 794; *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002). Constitutional error is harmless if the appellate court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Romero*, 113 Wn. App. at 794-795. The State must persuade the appellate court the untainted evidence overwhelmingly supports a guilty verdict. *Curtis*, 110 Wn. App. at 15. If the error was not harmless, the remedy is a new trial. 113 Wn. App. at 795. RAP 13.4(b)(3).

Here, the Court of Appeals erred when it determined the evidence against Mr. Beal was overwhelming and that Detective Downing's comment was harmless beyond a reasonable doubt. Appendix A, pg. 18-19.

First, the Court of Appeals failed to fully consider the inconsistencies in the story from Ms. Young, Mr. Beal's neighbor. She heard the gunshot and saw a man—who was not Mr. Beal—leaving the area quickly. (RP 353, 359-360, 367, 369-370). The Court of Appeals completely omits this fact from its opinion. Appendix A, pg. 17. Ms. Young did not mention Mr. Beal's presence once during her interviews with several officers the day of the shooting. (RP 360). At the time of questioning, Ms. Young also did not know Mr. Beal was suspect, nor did she know what had happened. (RP 360). Her testimony is suspect as there was no reason not to mention Mr. Beal's presence. This is particularly true since had Ms. Young thought to mention his presence to the police, Mr. Beal would have been another potential witness at the scene for police to question. (RP 360). One would think Ms. Young would have suggested the police speak with Mr. Beal if she had in fact seen him by the white car after hearing the gunshot and seeing a suspicious man walk past.

The evidence showed Mr. Beal was purchasing coffee at a shop at 12:30 p.m., a few minutes before Ms. Schaffer sent her last text message at 12:36 p.m. (RP 449-452; 572-573, 747). Coffee cups were found in Mr. Beal's apartment, supporting the evidence he purchased them. (RP 546; State's Ex. 122). If Mr. Beal had been intending to kill someone, it seems strange he would also be able to carry three mochas back to his apartment in time to meet up with Ms. Schaffer and shoot her before she exited her vehicle. (RP 449-452, 480).

Moreover, a gray long-sleeved sweatshirt was found in a dumpster nearby, perhaps matching the video of a man walking through the neighborhood. (State's Ex. 104 & 105). But Mr. Beal's DNA was not found on the sweatshirt—in fact, the DNA of four other individuals was found instead. (RP 627-628). The forensic scientist who conducted ballistics analysis admitted the testing he does is subjective, and he read a narrative of law enforcement's theory of the case prior to conducting his analysis on the bullet. (RP 678-680, 686-687).

The admissibility of his analysis and conclusion is also in question. *See Issue 2.* Finally, Mr. Beal denied shooting Ms. Schaffer. (RP 762). All of these factors show the evidence against Mr. Beal was not overwhelming.

The case should be reversed and remanded for a new trial. The evidence was not overwhelming and the Court of Appeals erred in finding it was. This case involves a significant question of constitutional law due to the promise of the constitutional right to a fair trial. Review is warranted. RAP 13.4(b)(3).

Issue 2: Whether this Court should accept review because the forensic ballistics match was incorrect and inadmissible. The Court of Appeals decision conflicts with a published decision of the Court of Appeals and involves an issue of substantial public interest. RAP 13.4(b)(2) & (4).

Review by this Court is merited because the Court of Appeals decision conflicts with a published decision of the Court of Appeals. RAP 13.4(b)(2); *State v. DeJesus*, 7 Wn. App. 2d 849, 436 P.3d 834 (2019). Review is also merited due to the improper admission of expert witness testimony on

toolmark analysis, which involves an issue of substantial public interest. RAP 13.4(b)(4).

Scientific methods and evidence are admissible at trial under the *Frye* standard if the evidence is based on a method that has been generally accepted in the scientific community. *State v. Copeland*, 130 Wn.2d 244, 297-298, 922 P.2d 1304 (1996).

As Mr. Beal recognized in his Statement of Additional Grounds, *State v. DeJesus* states that ballistics identification methodology (toolmark analysis) is generally admissible evidence and meets the *Frye* standard without a hearing. *DeJesus*, 7 Wn. App. 2d 849; *See Statement of Additional Grounds*, pg. 4.

But Mr. Beal argues Mr. Bromberg-Martin's particular testimony is inadmissible because it does not meet the *Frye* standard, which requires known error rates. As *DeJesus* states, the courts look to: (1) whether the underlying theory is generally accepted in the scientific community and (2) "whether

there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community." 7 Wn. App. 2d at 860; *See Statement of Additional Grounds*, pg. 4. Mr. Bromberg-Martin's testimony was admittedly subjective, which does not meet the second part of the *DeJesus* inquiry. (RP 686-687); 7 Wn. App. 2d at 860. Mr. Bromberg-Martin testified there are no "qualitative sureness" percentages or confidence intervals for the types of testing he conducts. (RP 683-684). Review is merited pursuant to RAP 13.4 (b)(2).

As *Copeland* recognized, science is constantly evolving, and for that reason this Court did not limit consideration of materials that are not available until after a *Frye* hearing has been conducted. *Id*. at 256. Review of admissibility is de novo, involving mixed questions of law and fact. *Id*. at 255. *Copeland* requires examination of sources outside the record: "The reviewing court will undertake a searching review which may extend beyond the record and involve consideration of

scientific literature as well as secondary legal authority." *Copeland*, 130 Wn.2d at 355-356. Moreover, whether evidence is generally accepted in the scientific community may be challenged later, "[if] a party presents new evidence *seriously* questioning continued general acceptance of use . . . a *Frye* hearing will be required." *Id.* at 298.

A new ruling in Maryland seriously calls into question the admissibility of the type of ballistics toolmark analysis used in this case. As recognized in *Abruquah v. State of Maryland*, a firearms examiner may no longer conclusively testify that a bullet was fired from a specific gun. *Abruquah v. State of Maryland*, 296 A.3d 961, 968 (Md. 2023). The *Abruquah* court concluded the toolmark analyst should not have been allowed to testify to an unqualified opinion that the bullets fired came from a specific gun. *Id.* at 648. The court noted while reports, studies and testimony support the method of toolmark analysis as a means for presenting evidence as to whether bullets are consistent or inconsistent with being fired from a particular

firearm, those same sources do not demonstrate the method can be the basis for an unqualified conclusion. *Id.* at 648.

Mr. Bromberg-Martin testified that in his opinion the bullet from the scene was fired from the gun found in Mr. Beal's apartment. (RP 675). This kind of unqualified testimony would not be allowed in Maryland courts. *Abruquah*, 483 Md. at 648. It should not have been allowed in the present case, either. The expert in this case based his opinion on subjective analysis, without presenting any pictures at trial to demonstrate comparisons between samples. (RP 686-687). A *Frye* hearing, at a minimum, should have occurred. *Statement of Additional Grounds,* pgs. 2-9. Moreover, the *Abruquah* opinion demonstrates the unqualified opinion of a toolmark analyst may no longer be generally accepted in the scientific community. *DeJesus*, 7 Wn. App. 2d at 860.

Finally, as Mr. Beal explains in his Statement of Additional Grounds, the *Daubert* standard and FRE 702 should apply to determine admissibility of expert testimony, not the

Frye standard. *See Statement of Additional Grounds*, pgs. 5-9. *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); FRE 702; *Frye v. United States*, 293 P. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923).

The toolmark analysis testimony of Mr. Bromberg-Martin was improperly admitted and should have been subjected to a *Frye* hearing, at a minimum. The case should be reversed.

Issue 3: Whether the extensive media coverage of the case violated the defendant's constitutional right to a fair trial. This issue presents a significant question of constitutional law and involves an issue of substantial public interest. RAP 13.4(b)(3) & (4)

Review by this Court is merited because the right to a fair and public trial raises a significant question of law under the United States Constitution. U.S. Const. amend. VI & XIV; RAP 13.4(b)(3). Review is also merited because both the federal and state constitution provide the right to a trial by an

impartial jury. U.S. Const. amend. VI; Const. art. I, sec. 21; RAP 13.4(b)(4).

As Mr. Beal explained in his Statement of Additional Grounds, he was denied his constitutional right to a fair trial because despite there being a free and open courtroom, he has been unable to access media recordings of the trial to show the inaccuracy of the trial transcripts. U.S. Const. amend. VI; *see Statement of Additional Grounds*, pgs. 10-16. Mr. Beal also explained in his Statement of Additional Grounds that his constitutional right to trial by an impartial jury was violated due to the media creating bias in the jury pool. *See* Statement of Additional Grounds, pgs. 10-16; U.S. Const. amend. VI & XIV; Const. art. I, sec. 21. The case should be reversed.

E. CONCLUSION

For the reasons stated herein, Mr. Beal requests this Court grant review.

I certify this document contains 4,949 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 7th day of December, 2023.

_____

Laura M. Chuang, WSBA #36707

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Petitioner vs. NATHAN OLIVER BEAL Appellant/Respondent	) Supreme Court No.) _____)) COA No. 38844-1-III)) PROOF OF SERVICE)

I, Laura M. Chuang, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 7, 2023, having obtained prior permission, I served a copy of the Petition for Review on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 7th day of December, 2023.

/s/ Laura M. Chuang____
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APPENDIX A

FILED
NOVEMBER 7, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. NATHAN O. BEAL, Appellant.	)))))))))	No. 38844-1-III UNPUBLISHED OPINION

STAAB, J. — Nathan Beal was convicted of murdering his ex-wife, Mary Schaffer. On appeal, he argues that one of the State's witnesses impermissibly commented on his right to remain silent during trial and that this constitutional error is not harmless beyond a reasonable doubt. Beal also appeals the imposition of the $200 criminal filing fee and the lifetime no-contact orders prohibiting any contact with his children. In his statement of additional grounds (SAG), Beal raises several other issues.

We hold that the detective's remark was a comment on Beal's right to remain silent. However, the State has met its burden to show that the error was harmless beyond a reasonable doubt. Accordingly, we affirm Beal's conviction. However, we remand for the court to reconsider the lifetime no-contact orders, keeping in mind Beal's constitutional rights as a parent, the children's wishes, and the need to protect the children from harm. We deny or decline to address the remaining issues.

BACKGROUND

1. ALLEGATIONS

Beal and Schaffer were married and had two children together, H.B. and N.B. Schaffer and Beal separated in 2015 and officially divorced in 2019. After the divorce, Schaffer moved to Oregon with H.B. and N.B. Schaffer began dating Justin Sharp in 2015.

In August 2019, Schaffer and Sharp travelled to Spokane to pick up the children who had been staying with Beal. Beal asked Schaffer to meet him in a park without the children present before the custody exchange. Beal told Schaffer and Sharp "there would be no exchange of the children unless he was able to have a one-on-one conversation alone with Ms. Schaffer." Rep. of Proc. (RP) at 330. Sharp joined Schaffer for the conversation because she was afraid, which angered Beal.

Following the meeting, Schaffer and Sharp drove to Beal's apartment, but Beal refused to exchange custody of the children. After the police were called, Beal released the children to Schaffer.

Two months after this incident, Beal purchased a handgun and convinced his then girlfriend to register it in her name.

The following year, on August 8, 2020, Schaffer was murdered in Spokane. On that day, Schaffer had again travelled to Spokane to retrieve H.B. and N.B., who had

been staying with Beal for approximately five weeks. Schaffer flew to Spokane, rented a car, and planned to drive H.B. and N.B. back to Oregon.

Schaffer was concerned for her safety. Sharp, who could not travel with Schaffer to Spokane, agreed to keep in constant contact with her. Schaffer sent her last text to Sharp at 11:44 a.m. It said: "I'm parked over here across from [Beal]'s place at the grocery store . . . there's so many sketchy looking people i'm afraid to leave the car!" Ex. 116.

A receipt found in Schaffer's car indicated that she purchased snacks from Rosauers, a supermarket near Sharp's apartment at noon.

At 12:14 p.m., Schaffer texted H.B. and Beal indicating that she was twenty minutes away from Beal's apartment. At 12:36 p.m., Schaffer texted H.B. to let her know that she had arrived. H.B. responded that Beal was not in the apartment but had gone to the store.

H.B. later testified that Beal had left the apartment before Schaffer arrived to get mochas for himself, H.B., and N.B. The coffee shop was located a block away from Beal's apartment complex. H.B. testified that when Beal had purchased mochas in the past, the trip usually took between 20 and 30 minutes and H.B. and N.B. usually went with him. H.B. testified that on the day of Schaffer's murder, the trip to get mochas took Beal 40 minutes to an hour. Beal's receipt from the coffee shop was timestamped 12:30

p.m. Surveillance footage captured Beal walking on the street outside of his apartment complex beginning at 12:37:42 p.m.

Sharp continued texting Schaffer. When she did not respond, he tried to contact H.B. H.B. responded to Sharp's texts but Beal would not allow H.B. to answer his calls. Sharp called the police to request a welfare check on Schaffer and provided them with a picture of Schaffer's rental car.

At 2:40 p.m., officers found Schaffer dead in her rental car from a gunshot wound to her head. Schaffer's vehicle was parked 20 yards from Beal's apartment complex and was visible from Beal's apartment. The driver's side door was ajar and Schaffer was positioned in such a way that it appeared she was getting ready to step out of the vehicle when she was shot. A single Winchester 9-mm Luger shell casing was found outside of the vehicle.

When Schaffer was found, it appeared that she had been dead for several hours. She was holding her purse, which still contained her wallet and all of her credit cards. Her luggage was also found undisturbed in the backseat.

Officers executed a search warrant on Beal's apartment where they found a backpack containing a loaded Ruger EC9s with a magazine inserted and a round in the chamber, as well as additional Winchester 9-mm Luger bullets. H.B. testified that she was aware Beal had a gun because she had seen it in a backpack in Beal's closet.

Beal was arrested and charged with first degree murder.

2. TRIAL

Prior to trial, Beal was interviewed by the police. The State requested a CrR 3.5 hearing to determine the admissibility of some of Beal's statements to the police. The court found that Beal waived his constitutional right to remain silent and began answering questions. However, Beal stated at one point during the interview that, "I'm not answering any more questions," at which time Detective Wayne Downing, who was interviewing Beal, terminated the interview. The court ruled that Beal's statements, up until he expressly stated he did not want to answer more questions, were admissible.

At trial, multiple police witnesses testified for the State. Detective Downing testified regarding statements Beal made during a police interview:

> [Detective Downing:] May I refer to my report?
>
> [The State:] Yes.
>
> [Detective Downing:] (Looking at a document.) He told me he doesn't own a firearm but he knows—he knows how to use them.
>
> [The State:] Okay. Did you ask the defendant if there was a firearm in his apartment, in his—in his house?
>
> [Detective Downing:] Yes, I did.
>
> [The State:] And what was his initial response to that?
>
> [Detective Downing:] He shrugged his shoulders and didn't answer.
>
> [The State:] Okay. And did you ask him a clarifying question, "Is there a firearm in your apartment?"
>
> [Detective Downing:] Yes, I did.

> [The State:] And what was his response to that?
>
> [Detective Downing:] He said, "I don't want to answer that."
>
> [The State:] Okay. Did he—what was his demeanor like when he initially responded to that?
>
> [Detective Downing:] He was calm.
>
> [The State:] Okay. Did he ever smile?
>
> [Detective Downing:] He smiled off and on throughout the interview –
>
> [The State:] Okay.
>
> [Detective Downing:] —yes.
>
> [The State:] At some point in this interview with the defendant, did you ask him, "Is the gun still in your backpack?"
>
> [Detective Downing:] Yes, I did.
>
> [The State:] What was his reaction and what was his response to that question?
>
> [Detective Downing:] His reaction was his body language totally changed. He slumped down in his chair, looked down at the ground, and his lower lip began to quiver.
>
> [The State:] And what was his response?
>
> [Detective Downing:] His response is done—is he's done talking.

RP at 452-53.

Following Downing's testimony, Beal moved for a mistrial alleging that the Detective had impermissibly commented on Beal's right to remain silent. The State responded that it had instructed Detective Downing on what he could and could not say

pursuant to the CrR 3.5 ruling but during the testimony the Detective got lost in his report and mistakenly testified about Beal's request to end questioning.

The court indicated that Beal's statements were admissible up to the point that he stated he did not want to answer further questions. The court concluded that Detective Downing's reference was an indirect comment on Beal's silence but that no prejudice had ensued because the State did not ask the jury to infer guilt from Beal's invocation of his right to remain silent. Thus, the court denied the motion for a mistrial.

Through his attorney, Beal indicated he did not want a limiting instruction that would draw the jury's attention to the remark. Instead, at Beal's suggestion, the State recalled Detective Downing to the stand to correct his response to the question.

Upon being recalled to testify, Detective Downing read directly from the interview transcript:

> [The State:] Did you ask the defendant if he owned a firearm?
>
> [Detective Downing:] Yes, I did.
>
> [The State:] And what was his answer?
>
> [Detective Downing:] "No, I don't."
>
> [The State:] And did you ask him a second time if he owned a firearm?
>
> [Detective Downing:] Yes, I did.
>
> [The State:] And what was his answer?
>
> [Detective Downing:] "I do not own a firearm."

> [The State:] And did you ask the defendant, "Is there a firearm in your house or apartment?"
>
> [Detective Downing:] Yes, I did.
>
> [The State:] And what was his answer?
>
> [Detective Downing:] "Next question, please."
>
> [The State:] And did you ask the defendant if the gun was still in his backpack?
>
> [Detective Downing:] Yes.
>
> [The State:] And what was his answer?
>
> [Detective Downing:] He asked, "What?"
>
> [The State:] Okay. Did you re-ask, "Is the gun still in your backpack?"
>
> [Detective Downing:] Yes, I did.
>
> [The State:] What was his answer?
>
> [Detective Downing:] "I don't understand."
>
> [The State:] And again, did you re-ask him again, "Is the gun still in your backpack?"
>
> [Detective Downing:] Yes, I did.
>
> [The State:] And what was his answer.
>
> [Detective Downing:] "I don't know why you're asking me that."

RP at 700-01.

The State called twenty-one witnesses in total. Officer Michael Baugh testified that Schaffer's murder did not appear to be a robbery and that there were no signs of a

struggle. He testified that nothing was taken from Schaffer's vehicle, including her purse and luggage.

The State called Sandra Young, whose boyfriend lived next door to Beal. She testified that on the day of Schaffer's murder, she arrived at her boyfriend's apartment around 12:30 p.m. While she was getting items out of her car, she heard a gunshot. Young stated that she looked toward the street and saw Beal directly behind Schaffer's rental car. On cross-examination, the defense pointed out that Young had spoken to several officers on the day of Schaffer's murder and neglected to mention Beal's presence. Young testified that she did not mention Beal's presence to the police at first because it was not unusual for her to see him in the neighborhood and it "didn't occur to [her]" to mention it. RP at 360.

Michael Williamson testified that he lived in the same area as Beal. Williamson testified that on the date of Schaffer's murder he walked to a nearby grocery store and noticed Schaffer's vehicle parked on the street with the door ajar. On the return trip, he again walked past Schaffer's vehicle and noticed the door still ajar. He instructed people nearby to call the police and upon looking in the windshield, saw blood running down Schaffer's face.

Emily Goodwin testified that she dated Beal in 2020. Goodwin testified that Beal did not like Schaffer and recalled him saying that H.B. and N.B. "were going to be coming to see him for the summer and that they would not be going back." RP at 540.

Christina Brewer, another ex-girlfriend of Beal, testified that she purchased Beal's Ruger EC9s at his direction. She stated she purchased the gun using money given to her by Beal and registered it under her name at his request. Brewer testified one of the reasons Beal wanted the gun was because of the custody battle.

Joseph Schaffer, Schaffer's older brother, testified that Beal had called him in the past and stated that "[Schaffer] needed to be taken out." RP at 660.

H.B., Beal and Schaffer's fourteen-year-old daughter, testified regarding Beal's actions on the day of Schaffer's murder. H.B. testified that Beal was "energetic but anxious" when he returned to the apartment on the day of Schaffer's murder with the mochas. RP at 654. She stated that Beal was "more alert than usual, checking his surroundings often" and kept checking the "curtains and the door." *Id.* Additionally, H.B. testified that Beal was "upset or disappointed" with the custody arrangement between him and Schaffer. RP at 647. She also testified about her contact with Schaffer and Sharp on the day of Schaffer's murder.

Sharp testified about his contact with Schaffer, the police, and H.B. on the day of Schaffer's murder. He also recounted Beal's anger and actions toward Schaffer during the 2019 custody exchange.

Jeremy Phillips and Brittany Wright, forensic scientists, testified that Beal's fingerprints and DNA[1] were found on the grip, trigger, textured area, and barrel of his Ruger EC9s. Further, Brett Bromberg-Martin, a forensic scientist, testified that a microscopic examination revealed that the bullet used to kill Schaffer matched bullets test-fired from Beal's Ruger EC9s.

Beal was the only witness that testified for the defense. He maintained that he did not shoot Schaffer.

The jury found Beal guilty of first degree murder.

3. SENTENCING

The court sentenced Beal to 380 months of confinement. At sentencing, the State asked the court to impose the $500 victim assessment, a $200 criminal filing fee, a $100 DNA collection fee, and restitution in the amount of $4,377.42. There was no discussion regarding Beal's finances or indigency status. Beal objected to the imposition of restitution:

> [BEAL'S ATTORNEY:] In addition, your Honor, we don't have objections to most—to the 36 months of community custody, the LFOs.[2] Mr. Beal is objecting to the victim compensation restitution. So I've just noted that on the order for restitution.

RP at 860. The court imposed all of the fees requested by the State including restitution.

---

[1] Deoxyribonucleic acid.
[2] Legal financial obligations.

The State also requested a lifetime no contact order between Beal and Schaffer's family, including H.B. and N.B. Beal objected to the imposition of a lifetime no contact order between him and H.B. and N.B. H.B. stated through her attorney that she did not wish to have contact with Beal, but there was no information regarding whether N.B., Beal's eleven-year-old son, wanted to have contact with Beal. The court requested that counsel follow up with N.B. about his wishes regarding contact. The court imposed a lifetime no contact order with Schaffer's family, including Beal's children. The court stated it would reconsider the no contact order upon receiving more information regarding N.B.'s wishes.

Beal timely appealed.

ANALYSIS

1. COMMENT ON BEAL'S SILENCE

Beal's primary argument on appeal is that Detective Downing violated Beal's constitutional right to remain silent by testifying that Beal ended the interrogation, and this constitutional error was not harmless beyond a reasonable doubt. The State maintains that the remark was not a direct comment on Beal's right but alternatively argues that even if it was constitutional error, the State has demonstrated that the error was harmless beyond a reasonable doubt. We hold that there was error but that the error was harmless.

A defendant's right to silence is derived from the Fifth Amendment to the United States Constitution applicable to the State through the Fourteenth Amendment and article I, section 9 of the Washington Constitution. State v. *Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). In the context of post-arrest silence, when the State provides *Miranda*[3] warnings that implicitly promise that a defendant's silence will not be used as evidence, the defendant's invocation of this right is protected by due process under the Fourteenth Amendment. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *see also Romero*, 113 Wn. App. at 786-87 (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979)). Pursuant to this protection, a prosecutor may not use a defendant's exercise of his constitutional right to silence as substantive evidence of guilt, and "[a] police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996).

In considering whether a remark rises to the level of a constitutional error, our Supreme Court has distinguished between a "comment" and a "reference" to a defendant's silence. *Burke*, 163 Wn.2d at 225 (Madsen, J., dissenting). The primary distinction between a reference and a comment is the intended purpose of the remark. *Id.* at 216. A comment on a defendant's silence occurs when the State uses the silence to show or imply guilt. *Lewis*, 130 Wn.2d at 707. On the other hand, a reference to silence,

[3] *Miranda v Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

is not considered a comment on the "constitutional right to remain silent if 'standing alone, [it] was so subtle and so brief that [it] did not naturally and necessarily emphasize defendant's testimonial silence.'" *Burke*, 163 Wn.2d at 216 (second alteration in original) (internal quotation marks omitted) (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Some courts have characterized the distinction between a comment and a reference to the right to remain silent as a direct or an indirect comment on silence. *See, e.g.*, *Romero*, 113 Wn. App. at 787.

Whether a remark is considered a comment or a reference will dictate the standard of reviewing the error. "Both are improper, but only the former rise[s] to the level of constitutional error." *Burke*, 163 Wn.2d at 255 (Madsen, J., dissenting). When the State makes a direct comment on the right to remain silent, the court applies the constitutional harmless error standard. *Romero*, 113 Wn. App. at 791. On the other hand, a reference or indirect comment does not generally rise to the level of a constitutional error, and the defendant bears the burden of showing prejudice. *Lewis*, 130 Wn.2d at 706-07; *Burke*, 163 Wn.2d at 216-17. However, in *Romero*, this court took the distinction one step further and held that even an indirect comment requires application of the constitutional harmless error standard when the remark was intended to prejudice the defendant or resulted in the unintended effect of likely prejudicing the defendant. *Id.* at 790-91.

Here, the trial court concluded that the remark by Detective Downing was an indirect comment on Beal's right to remain silent. This conclusion finds some support in

the record. The offending comment by Detective Downing was: "His response is done—is he's done talking." RP at 454. The comment was not responsive to the prosecutor's question. Instead, as the prosecutor later explained, the detective had been told what he could say in his testimony, the police report suggested a different answer to the question, and the detective indicated he had lost his place in the report during his testimony. There were no other comments suggesting that the detective intended to infer guilt from Beal's comment. Nor did the State refer to the detective's comment during the remainder of trial. Detective Downing's remark was unresponsive, subtle, and fleeting.

On the other hand, as Beal points out, in *Romero* we held that "*any* direct police testimony as to the defendant's refusal to answer questions is a violation of the defendant's right to silence." *Romero*, 113 Wn. App. at 792.

Ultimately, it is unnecessary for us to decide whether Detective Downing's remark was a direct or indirect comment on Beal's right to remain silent. Even if it was an indirect comment, it had the unintended effect of likely prejudicing Beal and would therefore be subject to a constitutional harmless error standard. *Id.* at 790-91.

Under the harmless error standard, the State has the burden of proving that the constitutional error was harmless beyond a reasonable doubt. *Id.* at 795. The State must convince this court that a reasonable jury would have reached the same result absent the error because the untainted evidence was overwhelming. *Id.* at 794-95.

The evidence against Beal was overwhelming. First, it should be noted that neither the State nor Detective Downing made further comments on Beal's termination of the interview, nor is there any allegation that the State inferred that Beal's comment was substantive evidence of guilt. Beal declined an instruction to the jury but at his request, Detective Downing was recalled to the stand and provided correct answers to the same questions without reference to Beal's termination of the interview.

Turning to the evidence at trial, the State produced evidence that Beal harbored anger and resentment toward Schaffer due to their child custody arrangement. In August 2019, during a custody exchange, Beal demanded Schaffer meet him in a park alone and told her that there would be no custody exchange unless he was able to have a one-on-one conversation with Schaffer. Sharp joined Schaffer for the meeting, which angered Beal. During this exchange, police ultimately had to get involved before Beal would release the children to Schaffer.

On the day of the murder, Schaffer was scheduled to pick up her children from Beal and had expressed concern for her safety. After Schaffer texted H.B. and Beal that she was 20 minutes away, Beal left the apartment. A receipt from the coffee shop indicated Beal purchased mochas at 12:30 p.m. Schaffer sent her last text to her daughter at 12:36 p.m., telling her she had arrived. Surveillance video showed Beal in the area of his apartment complex, near Schaffer's car at 12:37 p.m. H.B. testified that it took her father longer than usual to get mochas. Sandra Young indicated that she heard a gunshot

while she was getting items out of her vehicle and then saw Beal between Schaffer's vehicle and another vehicle parked on the street.

Police found the firearm and the same type of ammunition used in the murder in Beal's closet. Beal purchased the firearm using a straw purchaser and registered the gun in her name, telling her that the gun was being purchased in part because of the custody dispute. Beal's DNA was on the grip, trigger, textured areas and barrel.

There was no evidence that Schaffer was murdered as part of a robbery. None of her belongings were taken, including her purse and luggage.

Given the State's untainted evidence at trial, Detective Downing's comment on Beal's silence was harmless beyond a reasonable doubt. The evidence against Beal was overwhelming and a reasonable jury would have convicted Beal of the murder of Schaffer absent Detective Downing's comment.

Beal argues that Young's testimony, regarding seeing Beal behind Schaffer's parked vehicle, was not as strong as the State makes it out to be. Beal argues that the testimony is suspect because she did not mention Beal's presence to police at first. Young testified that she did not mention Beal's presence to the police at first because it was not unusual for her to see him in the neighborhood and it "didn't occur to [her]" to mention it. But even without Young's testimony, the State's case against Beal was strong. Further, Young's testimony about why she did not mention Beal at first is plausible and explains her initial omission.

Beal also points to the fact that his neighborhood, where Schaffer was killed, was unsafe. Schaffer herself told Sharp in a text message that there were a lot of "sketchy-looking people." RP at 341. This may be true, but it does not explain why none of Schaffer's belongings were taken following her murder, as is the case with a typical robbery. Instead, the fact that nothing of value was taken from Schaffer after her murder supports the conclusion that this was a targeted attack.

Beal next argues that the ballistics analysis is not reliable because Bromberg-Martin, the forensic scientist who conducted the analysis, read a narrative report of law enforcement's theory of the case prior to conducting the analysis, and because his analysis was subjective. However, Bromberg-Martin also testified that "it's generally considered best practice to read through all the administrative documentation as part of a case before you work it." RP at 679. Further, Bromberg-Martin was qualified to give his expert opinion regarding whether Beal's firearm was the one used in Schaffer's murder. Bromberg-Martin had almost ten years of experience, a master's degree, had offered expert testimony at least fifteen times in the past, and had performed well over 1,000 microscopic firearm ammunition comparisons. Thus, though his analysis was subjective, Bromberg-Martin was qualified to give that opinion and his testimony was reliable.

Finally, Beal argues that the evidence against him was not overwhelming because he testified that he did not shoot Schaffer. However, the jury's finding of guilt necessarily meant that they did not find his testimony to be credible. Even considering

Beal's challenges to certain aspects of the State's case against him, this court should still conclude that the evidence against him was overwhelming and that Detective Downing's comment was harmless beyond a reasonable doubt.

2. DENIAL OF MOTION FOR A MISTRIAL

Alternatively, Beal argues that the court abused its discretion in denying Beal's motion for a mistrial because the court recited the incorrect legal standard and because Beal was so prejudiced by Detective Downing's statement that only a new trial could remedy the issue. We find no abuse of discretion.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *Lewis*, 130 Wn.2d at 707. The court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Id.* The trial court is in the best position to assess the prejudice of a statement. *Id.*

Here, the trial court researched the law pertaining to comments on a defendant's silence after hearing Detective Downing's testimony. The court, in analyzing the issue, recited from *Burke*, 163 Wn.2d at 217:

> And I'm quoting from—I think it's page 217: "In circumstances where silence is protected, a mere reference to the defendant's silence by the government is not necessarily a violation of this principle. However, when the state invites the jury to infer guilt from the invocation of the right to remain silent, the Fifth Amendment and Article I, Section 9, of the Washington Constitution are violated."

RP at 517-18. The court ultimately decided that Detective Downing's comment was a reference to Beal's desire not to answer further questions and instructed the State to not instruct the jury to infer guilt from it. The court also allowed Detective Downing to be recalled in order to responsively answer the State's questions and to correct the record.

Contrary to Beal's argument, the court did not cite an incorrect legal standard. *Burke* is the most recent Supreme Court decision on this issue and is good law. While the trial court did not analyze the issue using the entire *Romero* framework, its reliance on *Burke* was not untenable. Other than Detective Downing's improper comment, Beal does not point to any other prejudice from the remark. Just as we find that the error was harmless beyond a reasonable doubt, we conclude that the trial court did not abuse its discretion by relying on *Burke* in denying Beal's motion for a mistrial.

3. LIFETIME NO CONTACT ORDER

Beal argues that the trial court erred when it imposed a lifetime no contact order between him and his children.

Pursuant to RCW 9.94A.505(9), a trial court may impose "crime-related prohibitions" as a sentencing condition. *State v. Torres*, 198 Wn. App. 685, 689, 393 P.3d 894 (2017). A trial court's imposition of a sentencing condition is reviewed for an abuse of discretion. *Id.* A causal connection between the condition imposed and the crime committed is not necessary so long as the condition relates to the crime's circumstances. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). "A

no contact order is a crime-related prohibition." *State v. Howard*, 182 Wn. App. 91, 101, 328 P.3d 969 (2014).

"Sentencing conditions that interfere with a fundamental right must be sensitively imposed so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *Id.* (quoting *State v. Warren,* 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). "Parents have a fundamental [ ] interest in the care, custody, and control of their children." *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). A court can impose a condition on a criminal defendant that restricts the fundamental right to parent as long as "the condition is reasonably necessary to prevent harm" to the child. *Id.*

The State contends that Beal cannot raise this sentencing issue for the first time on appeal. However, the record suggests that Beal *did* object to the no-contact order below. "THE COURT: All right. And then he—there's an objection to the no contact with the children. [H.B.] is apparently an upcoming witness in a case?" RP at 861.

At sentencing, H.B. stated that she did not wish to have contact with Beal, but there was no information regarding whether N.B. wanted to have contact with his father. The court requested that counsel follow up with N.B. about his wishes regarding contact. After imposing the no-contact order between Beal and the children, the court stated that it would reconsider the order with regard to N.B. depending on what he wishes.

The court did not acknowledge Beal's fundamental right to parent or analyze whether the no-contact order was reasonably necessary to prevent harm to the children.

Torres, 198 Wn. App. at 690; *State v. Peters*, 10 Wn. App. 2d 574, 584, 455 P.3d 141 (2019). Given the rights at stake, we remand for the trial court to consider whether the no-contact order is necessary to protect the children from harm, the impact on Beal's fundamental right to parent, and to consider N.B.'s wishes regarding contact with his father.

4. CRIMINAL FILING FEE

Beal contends that the court erred when it imposed the $200 criminal filing fee, a discretionary LFO, on Beal. RCW 36.18.020(2)(h). Because Beal failed to object, we decline to address the issue.

A trial court may not impose discretionary costs on indigent defendants. RCW 10.01.160(3). Pursuant to RCW 36.18.020(2)(h), a criminal filing fee may not be imposed on a defendant who is indigent as defined in RCW 10.01.160(3). Under RCW 10.01.160(3), a defendant is indigent if they meet the criteria specified in RCW 10.101.010(3)(a) through (c) (among other definitions).

Here, Beal did not object to the imposition of LFOs at sentencing. In fact, he affirmatively disclaimed any objection to the LFOs, including the criminal filing fee:

> [BEAL'S ATTORNEY:] In addition, your Honor, *we don't have objections to most—to the 36 months of community custody, the LFOs.* Mr. Beal is objecting to the victim compensation restitution. So I've just noted that on the order for restitution.

RP at 860 (emphasis added). The record does not indicate Beal's finances at the time of sentencing.

Under RAP 2.5, this court may refuse to review any claim of error not raised at the trial court level. The only exceptions are for claimed errors of lack of jurisdiction, failure to establish facts upon which relief can be granted, and manifest error affecting a constitutional right. RAP 2.5(a). Beal does not argue that any exception to RAP 2.5 applies on appeal.

5. STATEMENT OF ADDITIONAL GROUNDS

SAG No. 1

Beal first challenges the admissibility of the ballistics evidence matching his firearm to the bullet used to kill Schaffer. Beal concedes that ballistics analysis is admissible but argues that Bromberg-Martin's testimony was inadmissible in this case. Beal's argument does not have merit.

Beal contends that Bromberg-Martin's testimony "was a clear violation of the first point in the *Daubert*[4] checklist" because his opinion was subjective. He also argues that the testimony was inadmissible because Bromberg-Martin did not provide a margin of error because he only used a microscope for visual comparison between the test-fired bullets and the actual bullet used to kill Schaffer and because he read the police narrative report before examining the bullets. Beal also argues that the testimony was inadmissible under ER 702.

[4] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Beal raises the admissibility of Bromberg-Martin's testimony for the first time on appeal. Thus, we may decline to address the issue. *See* RAP 2.5(a). The record reflects that Beal did request a *Frye*[5] hearing "to at least recognize that this is a subjective way of testing." RP at 98. The court denied the request for a *Frye* hearing but told Beal's counsel that she could challenge the expert's opinion during cross-examination. Beal did just that on cross-examination but lodged no objections to any portion of Bromberg-Martin's testimony. Despite the lack of objection, we consider the issue.

First, it should be noted that Washington adheres to the *Frye* standard for admissibility, not *Daubert*. *State v. Copeland*, 130 Wn.2d 244, 251, 922 P.2d 1304 (1996). Next, Bromberg-Martin's testimony in the form of an opinion was in line with the requirements of ER 702. The rule states:

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

ER 702. Thus, Beal's argument that the subjective nature of Bromberg-Martin's testimony rendered it inadmissible fails.

Beal next argues that Bromberg-Martin's inability to provide a margin of error rendered his testimony inadmissible. He contends that his attorney was unable to refute Bromberg-Martin's testimony without an applicable margin of error. Beal does not cite

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

any rule of law that stands for the proposition that an expert opinion needs to provide a margin of error in order for testimony to be admissible.

Notwithstanding, Bromberg-Martin *was* cross-examined regarding the certainty of his analysis. Bromberg-Martin conceded that there is "a small amount of variance even shot to shot with the same gun. If 100 percent of one item agreed with another one, that would be really unusual or atypical." RP at 683. The defense was able to highlight the fact that Bromberg-Martin could not be 100 percent certain that the bullets matched.

Beal's arguments regarding Bromberg-Martin using only a microscope for visual comparison and his reading of the police narrative report before conducting his analysis are unsupported. He does not explain how these things render Bromberg-Martin's testimony inadmissible and he does not cite any rule of law to support his position.

SAG No. 2

Beal next challenges the "excessive media" presence during his criminal proceedings and argues that it violated his constitutional right to an impartial jury because he was not given an opportunity to "contribute" to the media's "narrative." He also argues that the trial transcript is inaccurate because it does not include off-the-record conversations. We reject this argument as well.

Under article I, section 22, a criminal defendant is entitled to a "public trial" and "the right to an impartial jury." These are related but distinct rights. *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). "The 'impartial jury' aspect of article I,

section 22, focuses on the defendant's right to have unbiased jurors, whose prior knowledge of the case or prejudice does not taint the entire venire and render the defendant's trial unfair." *Id.* "Thus, voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror questioning." *Id.*

Beal does not provide any evidence demonstrating that his right to an impartial jury was violated. Instead, he makes general statements like: "it can be reasonably assumed" that the media would not affect the jury pool. Beal does not point to any specific juror in arguing that the jury pool was tainted nor does he contend that voir dire was insufficient to test the jury for bias. Consequently, Beal is unable to demonstrate how the media's coverage of his case violated his constitutional rights.

Beal also argues that the trial transcript is inaccurate. He states that his appellate attorney advised him that there were no audio or video recordings of his trial but that there was instead a verbatim report of the proceedings. Beal states that his attorney's statement was "absolutely false." SAG at 14. He also contends that off-the-record arguments were not contained in the trial transcript and that these arguments had merit.

The connection between Beal's argument related to the trial transcript and his contention that his constitutional right to an impartial jury was violated is unclear. To the extent that Beal is arguing that the verbatim report of proceedings is inaccurate or

incomplete, we decline to consider the argument because it relies on evidence outside the record.

In sum, we affirm Beal's conviction for first degree murder, but remand for the sole purpose of instructing the sentencing court to consider whether the lifetime no-contact orders protecting his children are necessary to protect them from harm in light of the children's wishes and Beal's fundamental right to parent his children.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Birk, J.*

* The Honorable Ian S. Birk is a Court of Appeals, Division One, judge sitting in Division Three pursuant to CAR 21(a).

NORTHWEST APPELLATE LAW PLLC

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