Supreme Court No. 93035-0
(Court of Appeals No. 71912-2-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TRAVIS LILE, Appellant.

ANSWER/CROSS PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT/CROSS-PETITIONER

Respondent/Cross-Petitioner, State of Washington, by Hilary A. Thomas, appellate deputy prosecutor for Whatcom County, seeks the relief designated in Part B.

B. COURT OF APPEALS DECISION

Petitioner Lile has asked this Court to review all of the issues decided by the Court of Appeals, Division I, in State v. Lile, __ Wn. App. __, 2016 WL 1562075/785526 (Feb. 29, 2016). The decision initially was issued unpublished on Feb. 29, 2016 and then on April 12, 2016 the Court of Appeals granted Lile's motion to publish. The decision is attached as Appendix A to Lile's petition. As Cross-Petitioner, the State requests if this Court accepts review of Lile's affidavit of prejudice issue that it also accept review of the issue of whether the judge's decision to grant a continuance was discretionary for purposes of RCW 4.12.050, affidavits of prejudice. Otherwise, the State requests this Court deny review.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a judge's granting of a continuance was a discretionary decision for purposes RCW 4.12.050 where the parties agreed to continue the trial date, but where the judge has discretion and an independent obligation to decide whether to grant a continuance and where the judge had denied agreed continuances in the past.

2. Whether a defendant waives the issue of severance by failing to renew his motion to sever at or before the end of trial as CrR 4.4 provides.

3. Whether the trial court abused its discretion in denying defendant's attempt to impeach one assault victim with evidence of domestic harassment that didn't involve punching where the victim was a complete stranger to the defendant and where the victim testified he wasn't a fighter on cross-examination.

4. Whether testimony defense witnesses met with defense counsel, failed to meet with the police investigator and used similar phrasing after they had met together with defense counsel impugned defense counsel under the Sixth Amendment where the jury was instructed not to draw any adverse inferences regarding counsel from the testimony.

5. Whether Petitioner's remaining issues warrant further review where the Court of Appeals found them inadequately briefed and/or Petitioner has failed to brief them herein.

D. STATEMENT OF THE CASE

Lile was charged with Assault in the Second Degree, Assault in the Third Degree, Assault in the Fourth Degree and Resisting Arrest. The statement of facts is taken verbatim from the Court of Appeals opinion:

> On February 16, 2013, Taylor and Alyssa Powell went out to drinks with Christopher Rowles and his girlfriend, Amanda Millman, in downtown Bellingham. Over the course of the evening, Millman had about a beer and a half and part of a mixed drink. Rowles had two drinks. Taylor was drinking more than Rowles. Alyssa became very intoxicated over the course of the evening. As the group decided to leave a nightclub at the end of the night, Millman was helping Alyssa walk, because she was so intoxicated that she was stumbling and swaying back and forth. The group walked down a hill on a sidewalk. The group encountered another group on the sidewalk—Travis Lile's group.
>
> Lile and his friends also went out in downtown Bellingham that night. They had been drinking at a party earlier in the evening and had walked downtown to go to a bar. Lile was with Sean Duff,

Cameron Moore, and Allen Owens. Lile, Owens, and Duff are in the Navy. Lile's group was walking up the hill on the same sidewalk as the other group walked down the hill.

As the groups walked toward each other, Taylor and Rowles were about 10 to 15 feet behind Millman and Alyssa. As Millman and Alyssa passed Lile's group, it appeared to Rowles that Millman bumped Lile accidentally with her purse or elbow. Lile's group yelled things at the women as they passed, and Lile called the women a profane name. Alyssa said, "F–U." Millman turned around and saw Lile walking backward up the hill. At that point, Lile turned around and bumped shoulders with Rowles as Rowles walked down the hill. According to Rowles, the two passed each other, Lile then yelled, "hey" at Rowles, and when Rowles turned around, Lile punched him. According to Lile, he threw the punch, because Rowles and Powell were in his face and he felt threatened. A scuffle between the men ensued. Millman approached the fight yelling at the men to stop. Lile hit her. Lile's punch knocked Millman out, knocked some of her teeth out, and fractured one of her facial bones.

Officer Jeremy Woodward was on patrol in downtown Bellingham that night. Officer Woodward heard yelling and saw a commotion on a sidewalk near a bar. From his police car, he saw Lile punch Rowles in the face. Around the time Officer Woodward was exiting his police car, Lile had turned and punched Millman.

Officer Woodward ran toward Lile's location. At that point, Lile was already walking away. As Officer Woodward approached Lile, he yelled, "[S]top, police. You're under arrest." Officer Woodward attempted to grab Lile by his shirt. But, Lile knocked Officer Woodward's hand away and took off running. Officer Woodward chased Lile who eventually tripped and fell. Officer Woodward struggled with Lile. Lile struck Officer Woodward on the right side of his face hard enough that it knocked Officer Woodward off balance and knocked his glasses off. The struggle continued. Officer Woodward tried to apply a lateral visceral neck restraint to get Lile to comply, but Lile tucked his chin and Officer Woodward was not able to apply it. Eventually, after another officer arrived, the officers were able to handcuff Lile.

Slip Opinion at 1-2; State v. Lile, 2016 WL 1562075, at ¶2-6.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b), this court will grant review only:

(1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
(3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner's basis for the Court's acceptance of his petition for review is predicated upon the affidavit of prejudice issue. He asserts that this Court should accept review pursuant to RAP 13.4(b)(1) and (4). He, however, does not analyze how the other issues he presents fall within the parameters of those decisions subject to further review. Those issues do not warrant review by this Court.

The State is cross-petitioning on the Court of Appeals decision that the judge's granting of an agreed continuance in this case was not a discretionary decision under the statutory provisions regarding affidavits of prejudice. There is a conflict amongst caselaw as to what constitutes a discretionary decision for the purposes of RCW 4.12.050 that merits review by this Court so that those parameters can be clarified. The State asks this Court to accept review of that issue should this Court accept

review of Petitioner's issue regarding the Court of Appeals finding that the erroneous denial didn't warrant reversal under the facts of this case.

1. This Court should address whether an agreed continuance is a discretionary decision under RCW 4.12.050 where a judge has discretion and an independent obligation to decide whether to grant a motion to continue a trial date.

The Court of Appeals found that Judge Uhrig's decision to grant the trial continuance was not a discretionary act under RCW 4.12.050, but found reversal wasn't warranted since the trial was not heard by Judge Uhrig. The State had argued the agreed continuance motion in this case was a discretionary decision based on CrR 3.3, In re Recall of Lindquist, 172 Wn.2d 120, 129, 258 P.3d 9 (2011) and State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990). Likening the agreed continuance in this case to a stipulation pursuant to State v. Parra, 122 Wn.2d 590, 859 P.2d 1231 (1993), the Court of Appeals found that under State v. ex rel. Floe v. Studebaker, 17 Wn.2d 8, 134 P.2d 718 (1943) the judge's decision to grant the continuance was not discretionary. The Court of Appeals noted that State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990) and another case State v. Espinoza, 112 Wn.2d 819, 774 P.2d 1177 (1989), *rev'd in part on other grounds*, 112 Wn.2d 819 (1989), were in conflict with the Floe case but had failed to cite to Floe when they were decided. The Court therefore adopted the reasoning in Parra because it reaffirmed the rationale in Floe.

See, Slip Opinion at 13 n.5. The State submits that under RAP 13.4(b)(1), (2), this Court should accept review in order to address this conflict amongst cases regarding what constitutes a discretionary decision under RCW 4.12.050 and because the Court of Appeals decision conflicts with Dennison and In re Lindquist.

The statutory provision regarding affidavits of prejudice provides:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, *That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case*, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, *and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso*; ...

RCW 4.12.050(1) (emphasis added).

A judge exercises discretion in deciding whether to grant or deny motion for continuance of a trial date. CrR 3.3(f). Even if the parties enter into a *written* agreement to continue a trial date, which did not occur here, the judge may, but is not required to, continue the trial date. CrR 3.3(f)(1).

"Grant or denial of a continuance is a discretionary ruling because the court must consider various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial." In re Lindquist, 172 Wn.2d at 130 (quoting State v. Guajardo, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987)). The Court of Appeals acknowledged this is the general rule regarding continuances, but concluded it did not apply to cases like this one in which there was a joint motion for a continuance. See Slip Opinion at 7.

The Court of Appeals held that, based on Floe, the general rule does not apply when both parties act in concert via stipulation or by making a joint motion. Slip Opinion at 9. Floe was a civil case in a one judge county involving a stipulation that two causes could be consolidated for trial on the pleadings and the trial date in the one matter could be set over so that consolidation could occur. Floe, 17 Wn.2d at 15. The trial court granted the continuance and eventually granted consolidation as well. Id at 15-16. The court found the affidavit of prejudice that had been filed was effective because the court had not been called upon to exercise any discretion in its ruling: "We do not believe it can be said that the court is required to exercise discretion when asked to make an order involving preliminary matters such as continuing a case, or for consolidation, where all the parties have stipulated that such order be made." Id. at 17.

Subsequent to Floe this Court decided Espinoza and Dennison. In Espinoza, a juvenile moved for continuance of the trial date, which was granted by the commissioner, and then filed a second, joint, motion for a continuance, which was also granted by the commissioner. Espinoza, 112 Wn.2d at 821-22. When the juvenile filed an affidavit of prejudice, the commissioner declined to recuse himself. Id. at 822. The State challenged the timeliness of the affidavits at the Supreme Court arguing the commissioner had twice exercised discretion in ruling on the continuance motions. Id. at 823. After noting that the grant or denial of a continuance is a discretionary ruling, the court declined to address the argument because the State had failed to raise the issue at the Court of Appeals. Id.

The court in Dennison, another criminal case, relied upon Espinoza in listing the grant or denial of a continuance as an example of a discretionary ruling. Dennison, 115 Wn.2d at 620. The court included continuances of a trial date as discretionary rulings under RCW 4.12.050, noting that *although both parties stipulated to the continuance*, the trial court had still exercised discretion in ruling on the motion, citing former CrR 3.3(h)(1). Id. n.10 (emphasis added).

The Court of Appeals ultimately relied upon Parra's citation to Floe in holding the judge's ruling in this case was not discretionary because the joint motion was "akin to a stipulation." The Parra case

involved an omnibus order the judge signed granting motions requested by both parties within the omnibus application. Parra, 122 Wn.2d at 597-98. An affidavit of prejudice was filed against the judge. While neither side objected to the requests of the other, some of the requests fell within the discretionary provisions of the discovery rules. Id. at 598-99. The defendant argued since neither side had objected, it was akin to a stipulation under Floe and therefore did not implicate a discretionary ruling. Id. at 599. The court held otherwise, finding the lack of objections did not create a stipulation since there were matters the court had to rule on. Id. at 602. The court later noted that generally "matters relating merely to the conduct of a pending proceeding, or to the designation of the issues involved, *affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court*, may be the subject of a stipulation." Id. at 603 (emphasis added).

The decisions in Dennison and Espinoza, both criminal cases, are in conflict with Floe, a non-criminal case, relied upon by the Court of Appeals. Under the criminal time for trial rules the court has an independent obligation to rule on continuance requests. CrR 3.3(f). They are not the proper subject of a binding stipulation on the court as trial date continuances do affect the administration of the courts and the court has to rule on the motion. In addition to considering length of time a case has

been pending, the court may need to consider the impact on any victims, other witnesses, its own calendar, constitutional speedy trial considerations, etc. *See*, e.g., RCW 10.46.085 (court may continue child sex abuse cases only for substantial and compelling reasons and only if benefit of postponement outweighs detriment to victim).

There had been a number of continuances in this case, some of which the prosecutor had objected to, and the case had been pending over 8 months when on January 22nd the parties orally agreed to continue the trial date one week from Feb. 3rd to Feb. 10th, due to the Superbowl. CP 6-8, 557-58, 563-68; 1RP 3. When Judge Uhrig found the affidavit of prejudice untimely, he noted he had in fact denied agreed continuances in the past, although he did so infrequently. 1RP13-14. The Court of Appeals erred in finding the agreed motion for continuance of the trial date to be the equivalent of a stipulation and in not applying the general rule set forth in Lindquist and Dennison to this case.

The Court of Appeals, however, did not order a new trial because it found that under the unique facts of this case reversal wasn't warranted because Judge Uhrig did not preside over the trial. Noting that a properly filed affidavit of prejudice divests a judge of authority to act within the case, the Court relied on State ex rel. LaMon v. Town of Westport, 73 Wn.2d 255, 438 P.2d 200 (1968), *overruled on other grounds by* Cole v.

Webster, 103 Wn.2d 280, (1984), in determining that "not every ruling made after timely filing of an affidavit of prejudice constitutes reversible error." Slip Opinion at 17. Lile asserted he had been prejudiced by the fact that Judge Uhrig heard and denied his motion to sever. However, as the Court of Appeals found, Lile had waived any error with respect to the substance of that ruling by failing to renew his severance motion at trial as required by CrR 4.4. The Court of Appeals was correct in finding reversal wasn't warranted under the exceptional circumstances of this case.

2. Lile waived his right to raise the severance issue because he failed to renew his motion at or before the close of evidence as required by CrR 4.4(a)(2).

Lile appears to contend that he was not required to comply with CrR 4.4(a)(2) because Judge Uhrig ruled on his motion and should have been precluded from doing so because of the affidavit of prejudice. This, however, was not the argument he made at the Court of Appeals, rather he addressed the substance of Judge Uhrig's ruling and argued that he had been prejudiced thereby. *See*, Appellant's Opening Brief at 11-14. He did add a sentence at the very end of this argument, asserting that a different judge should have heard his motion because of the affidavit of prejudice. The Court of Appeals applied settled law in determining that Lile waived the ability to contest the issue of severance by failing to renew his motion.

Lile's waiver of the severance issue does not "legitimize" Judge Uhrig's ruling as he contends. CrR 4.4(a) requires that a defendant move for severance pretrial and renew that pretrial motion. CrR 4.4(a). Waiver is the consequence for failure to do so. CrR 4.4(a)(1), (2) ("Severance is waived by failure to renew the motion."); State v. McDaniel, 155 Wn. App. 829, 859, 230 P.3d 245, *rev. den.*, 169 Wn.2d 1027 (2010). Even if it was error for Judge Uhrig to hear the motion to sever, Lile still had an obligation to re-raise the motion at trial, no matter who the judge was, or the issue would be waived pursuant to CrR 4.4(2).

3. The trial court did not abuse its discretion in determining the domestic violence allegations in an ex-girlfriend's anti-harassment protection order application were not sufficiently similar to a fight between strangers for impeachment.

Lile asserts the Court of Appeals erred in finding the trial court did not abuse its discretion in precluding impeachment of the victim Rowles based on actions that were the subject of a protection order regarding an ex-girlfriend. Lile does not argue how this issue falls within the parameters of RAP 13.4(b). He also has failed to argue how the Court of Appeals' analysis of State v. Gefeller, 76 Wn.2d 449, 458 P.2d 17 (1969), and State v. York, 28 Wn.App. 33, 621 P.2d 784 (1980), was wrong. The Court of Appeals did not err in determining the trial court did not abuse its discretion in finding that the proffered domestic harassment evidence was

not sufficiently similar to be probative of either his truthfulness or whether Rowles was a "fighter."

Specific instances of conduct of a witness cannot be proved through extrinsic evidence in order to attack the witness's credibility. ER 608(b). A witness cannot be impeached on matters that are collateral to the issues at trial. State v. Oswalt, 62 Wn.2d 118, 120-21, 381 P. 2d 617 (1963). As noted by the Court of Appeals, a trial court may consider whether the witness's alleged misconduct is "relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial," in exercising its discretion. Slip Opinion at 21-22, citing State v. O'Connor, 155 Wn.2d 335, 349, 119 P.3d 806 (2005).

Ex. 21, which was the *only* evidence defense counsel proffered for impeachment, relates solely to a petition for an order of protection[1]. The trial judge reviewed those documents and determined that the accusation pertained mainly to Rowles' interfering with his ex-girlfriend's text messages and email account and therefore wasn't similar enough to impeach Rowles with it. 2RP 548-49, Ex. 21. The documents also included a statement from the ex-girlfriend that Rowles had grabbed for her wrist, held her on the bed, and had told her he would "beat the asses" of two men who had talked with her at work. In her ruling, the judge

[1] Lile had sought to have other alleged incidents admitted under ER 404(b) but the trial court denied that motion and Lile did not pursue that on appeal.

specifically noted that she did not interpret the protection order allegations as accusing Rowles of fighting. 2RP 549.

The Court of Appeals agreed with the judge the proffered evidence was not sufficiently similar to the facts here which involved strangers.

> The evidence shows these instances transpired because of jealousy or because the women had ended the relationship with Rowles. While the evidence suggests that Rowles may be abusive and possessive in romantic relationships, nothing in the evidence indicates that Rowles punched his girlfriends or that he ever fought with a third party stranger.

Slip Opinion at 20. Lile contends that the Court of Appeals decision is sexist because it does equate an assault on a woman with an assault on a man. The Court found that the acts of harassment that formed the basis of the protection order did not include punching. The Court did not find the harassment insufficiently similar because it involved a female rather than a male, but because Rowles' harassing behavior towards an ex-girlfriend was factually different than punching a male stranger. *See* Slip Opinion at 24. Moreover, Lile admitted he threw the first punch. 2RP 868-70.

Lile also asserts this situation was similar because the "impulse of possession" and romantic jealousy that led to Rowles' acts of domestic violence is the same motive Rowles had to start the fight with Lile. Lile, however, never requested the trial court to permit the impeachment evidence under this theory. At trial, defense counsel asserted he wanted to

impeach with the harassment evidence because Rowles had twice stated he wasn't a fighter, thereby implying that he was a peaceful person, and that he wanted to introduce evidence that Rowles had a harassment order for pushing someone down on a bed and getting control over them. 2RP 543-46. Lile cannot now argue the trial court abused its discretion in denying his request on a theory he never presented to the trial court.

4. Testimony defense witnesses met with defense counsel, failed to meet with the police investigator and used similar phrasing after they had met *together* with defense counsel did not impugn defense counsel particularly where the judge instructed the jury not to draw any adverse inferences from the testimony.

Lile asserts that the Court of Appeals erred in not reversing because it stated: "Moreover, the State never made the direct assertion explicitly impugning Johnston. And that Johnston coached the defense witnesses is not a necessary inference, but a possible inference." Lile does not argue how the Court of Appeals misinterpreted or misapplied the caselaw or that this issue otherwise falls within the parameters of RCW 13.4(b). He essentially argues that the prejudice from the potential inference was so overwhelming to preclude the probative nature of the questioning regarding the defense witnesses' lack of cooperation with the police and the fact that their stories became similar after they met *together* with defense counsel. Lile fails to mention that the trial court cautioned the jury regarding the testimony, limiting their consideration of the

testimony for the legitimate purposes of the assessing the witness's credibility, and fails to mention that Lile attacked the adequacy of the investigation.

The Court of Appeals found United States v. MacDonald, 620 F.2d 559 (5th Cir. 1980), the main case relied upon by Lile, distinguishable. The Court found that instead of implicating his Sixth Amendment right to counsel, i.e., implying that Lile was guilty because he exercised his right to counsel, the elicited testimony was "used to imply that the main witnesses' credibility was questionable, because they had met with each other in Johnston's presence and discussed the events of the night before giving their statements to [the detective]." Slip Opinion at 39. Lile fails to address how this analysis was incorrect. He also does not argue that the Court of Appeals was wrong in concluding that the State never made a "direct assertion explicitly impugning" counsel. As the State's elicitation of testimony and argument did not imply that Lile was guilty because he hired an attorney, Lile's Sixth Amendment right was not implicated.

Lile does not address how the judge's instructions did not cure the potential prejudice he was concerned about. In order to establish prosecutorial misconduct based on impugning defense counsel, a defendant must establish both that the prosecutor's conduct was improper and that there is a substantial likelihood that it affected the jury's verdict.

State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). On review, the court determines whether the conduct was improper and prejudicial in the context of "the entire record and circumstances at trial." Id. at 442. Reversal is not warranted if the improper argument could have been obviated by a curative instruction State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

The prosecutor here was attempting to elicit information defense witnesses met to discuss the case and did discuss the case with one another, proper cross examination regarding their credibility and bias. The prosecutor was also attempting to explain why the detective had not met with witnesses yet. The court limited the questions the prosecutor could ask regarding involvement of defense counsel. See, e.g., 2RP 748-49. The judge cautioned the jury twice that the purpose of the testimony regarding the witnesses' meeting with defense counsel was merely to establish a chronology, and should not be interpreted in any other manner. Upon defense objection to the prosecutor's question of one defense witness if he had changed his mind "[a]fter the visit, after that time interval that elapsed when you were talking with" defense counsel, the judge ruled:

> I am going to permit the question because as I understand it this is the chronology in time in which the events occurred, but I'm also going to instruct the jury that's simply what this is, a discussion of the chronology in time when the events occurred and you're not to

> infer anything beyond the testimony, you're not to infer any causal connection that you don't hear testimony or other evidence about.

2RP 752-53. The judge also cautioned the jury again in closing when defense counsel objected to the prosecutor's argument the defense witnesses started using same terminology regarding the contact between Rowles and Lile after they had gone together to sec defense counsel. Although the prosecutor revised his argument to state "after the interview," the judge also instructed the jury:

> ... witnesses and parties meet with lawyers frequently in the development of a case so the fact that a witness or lawyer met with another lawyer is not to be taken by you to make an adverse inference against anybody.

2RP 1095-97.

The actual testimony heard by the jury in this case did not impugn defense counsel. Whatever prejudice regarding disparagement defense counsel perceived was cured by the judge's instructions to the jury. Lile has failed to demonstrate how the Court of Appeals analysis was erroneous or how this issue warrants further review.

5. The issue regarding the State's cross-examination of the defendant does not merit further review because it was inadequately briefed below.

Lile provides no argument as to why the Court of Appeals erred in its analysis regarding the discretionary evidentiary issue regarding the "warrior" cross-examination and has thus failed to demonstrate how this

issue warrants review under RAP 13.4(b). The Court of Appeals failed to address this issue on review because Lile argued on appeal a different evidentiary theory, ER 404(b), than that which had been raised at the trial court, which had been relevance. It also refused to address Lile's argument on this issue further because he failed to set forth argument containing citations to legal authority. Lile still has failed to provide any sufficient legal argument with citations to legal authority.[2]

6. The issue regarding improper closing argument does not merit further review because it was inadequately briefed below.

Lile states that he is relying on his briefing at the Court of Appeals in seeking further review on the issue of improper closing argument in case the case is remanded for a new trial. The Court of Appeals refused to address this issue because Lile had inadequately briefed it. The State conceded on appeal that the testimony referred to in closing had not actually been admitted (there had been a redacted video-taped deposition of one defense witness that had been admitted into evidence since he was unavailable for trial). There shouldn't be any reason the court would need to address this issue solely because of the potential that a new trial may be ordered. Lile still has failed to provide sufficient legal authority to merit review of this issue.

[2] The Court of Appeals set forth the full context in which the prosecutor sought to elicit testimony regarding Lile's consideration of himself as a "warrior." It also sets forth the prosecutor's rationale for this line of questioning. See Slip Opinion at 24-27.

7. Petitioner has failed to demonstrate the Court of Appeals erred in its analysis, or that further review is warranted, regarding the court's denial of the request for self-defense instructions.

Lile seeks to incorporate the argument from his Court of Appeals briefing into his petition for review on the issues of whether the trial court erred in denying his requested self defense instruction and cumulative error. The Supreme Court does not address issues based solely on incorporated arguments in petitions for review. State v. Sublett, 176 Wn.2d 58, 68 n.2, 292 P.3d 715 (2012). Lile has failed to demonstrate how the Court of Appeals analysis on these issues is erroneous and failed to demonstrate they warrant further review.

F. CONCLUSION

For the reasons set forth above, Cross-Petitioner, State of Washington, respectfully requests that this Court accept discretionary review of the Court of Appeals finding that the judge's granting of the agreed motion to continue the trial date was not a discretionary decision under RCW 4.12.050 should this Court accept review of Lile's affidavit of prejudice issue. The State otherwise requests this Court deny review.

Respectfully submitted this 29th day of April, 2016.

HILARY A. THOMAS, WSBA No. 22007
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and appellant's counsel, William Johnston, addressed as follows:

William Johnston
Attorney at Law
401 Central Avenue
Bellingham, WA 98225

Sherrie E. Farmer
LEGAL ASSISTANT

April 29, 2016
DATE

OFFICE RECEPTIONIST, CLERK

To: Therese Zemel
Subject: RE: State of WA vs. Travis Lile # 93035-0

Rec'd 4/29/16

Supreme Court Clerk's Office

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Subject: State of WA vs. Travis Lile # 93035-0

Attached please find the Answer/Cross Petition for Review in the above-referenced case.