SUPREME COURT NO. _____

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

GARY LEE BROWN, JR.,
A/K/A GARY LEE TAYLOR,

Defendant.

PETITION FOR REVIEW

Court of Appeals No. 34980-2-III
Appeal from the Superior Court of Grays Harbor County,
Cause No. 14-1-00390-3
The Honorable David Edwards, Presiding Judge

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I. Identity of Petitioner

Petitioner Gary Brown asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. Court of Appeals Decision

Brown seeks review of the Opinion filed by Division III of the Court of Appeals on August 1, 2017. A copy is attached as Appendix A.

III. Issues Presented for Review

1. The trial court erred by admitting a prior statement of a witness, as impeachment evidence and as a "Smith affidavit," when the witness did not provide any substantive or inconsistent testimony at trial.

2. The trial court erred by admitting a prior sworn statement as a "Smith affidavit" without making any findings that the statement was voluntary or truthful.

3. The trial court erred by instructing the State how to question its witness, in violation of due process.

4. The prosecutor committed misconduct by calling a witness for the purpose of introducing an otherwise inadmissible prior statement.

5. The denial of a fair trial by jury, because the jury heard inadmissible opinion statements regarding Brown's guilt was error.

6. Defense counsel's failure to object to Snodgrass' statement on the basis that it was not a prior inconsistent statement was error.

7. Defense counsel's failure request a mistrial after the jury heard improper opinion statements regarding Brown's guilt was error.

8. The trial court's admission of opinion testimony by a witness that the trial court found was not qualified as an expert was error.

IV. Statement of the Case

On July 7, 2016, Brown filed a brief alleging that the trial court had erred in regards to the above-indicated issues. Below are the facts in an abbreviated form pertaining to the issues upon which he seeks review. For a more comprehensive review, the opening appellate brief sets out facts and law relevant to this petition and is incorporated by reference.

1. Fire.

On April 22, 2014, a fire erupted in a single wide trailer. RP 19-20. J.J. Haskey and Sally Emery[1] bad been living in the trailer; they were not home at the time of the fire. RP 23, 141. The trailer was on a 25 acre lot, along with two other dwellings. RP 18. Clarence "Lucky" Russell lived on the property. RP 18, 24. Jose Orellana-Arita and Brandi Haley lived in the third dwelling; they did not testify. RP 25.

Several witnesses saw Brown, his girlfriend Edna Ferry, and/or Ferry's green van in the area that day. RP 20-22, 24-25, 44, 85. However, the witnesses' testimony was inconsistent about whether the van was present before or after the fire, what time it was there, and whether Ferry was in the van with Brown. RP 21, RP 34-35, RP 43-44. None of the witnesses saw anyone get out of the van or go into the trailer. RP 24, 36.

[1] For clarity, counsel will refer to witnesses as they were commonly referred to at trial, which was generally by their first name. No disrespect is intended.

No one heard any glass breaking before the fire. RP 36, 44.

Michael Anderson lived in a trailer by Lucky's gun shop. (RP 64). He didn't talk to the police the day of the fire, but contacted them later, after he was kicked off the property. RP 70. Anderson testified that Brown had been on the property with Ferry, came back and took gasoline and a towel, then left again with Ferry, Brandi, and Jose around 4:30 or 5:00. RP 66-68, 80, 83. Brown came back alone, 30 minutes to an hour and a half later; the fire started at 4:30 or 5:00. RP 81, 83.

Brown told police that he had been with his girlfriend, Ferry, they went to Brandi and Jose's to get a part for a chainsaw, but Brandi and Jose were leaving, so they left. RP 133. After that, Brown and Ferry went home and then went to the store, where they saw Deputy Gibson, on his way to the fire. RP 133. J.J. and Sally saw Brown and Ferry when they were on their way to the store, just before they learned of the fire; they testified Ferry was driving. RP 105-06, 138, 143, 148.

Ferry originally gave a statement to police consistent with Brown's statement. RP 94, 97. Later, police came to Ferry's house, told her she was going to be arrested, to call someone to get her kids, and told her she could be a witness or a suspect. RP 330-31. She then changed her story. RP 331. She was told that she would not be charged if she testified. RP 339. At trial, Ferry testified that she went to Brandi and Jose's that day

with Brown and left him there around 4:00. RP 87. She also testified that Brown told her that there had been a discussion between him, Brandi, and Jose about burning down the trailer. RP 91.

2. Confession and William Snodgrass.

Sometime after the fire, Snodgrass gave Brown a ride. RP 313. He testified that he didn't remember what Brown told him. RP 313. He reviewed a statement he had previously made to police, but stated that he still did not remember. RP 316-17.

At that point, the Judge excused the jury and instructed the prosecutor on how to proceed with the witness:

> You have passed up refreshing his recollection about fifteen minutes ago. I granted you permission to treat him as a hostile witness. Take the statement from him, and read it to him, and ask him if that's what he told detective Wallace. Do something besides continuing to just run around in circles here, and have him be evasive. We are not getting anywhere. There is a way for you to impeach him with that statement, and I want you to do so.

RP 318.

In response to the State's questions, impeaching him with his statement, Snodgrass testified that the defendant told him the police wanted to arrest him and asked him to get him out of the area. RP 319. Snodgrass was then questioned about what was in his statement, whether Brown told him he caught a house on fire, whether Brown said he did it in

exchange for a truck, if Brown said it was J.J. and Sally's trailer, if Brown said that Ferry dropped him off, if Brown said he used gasoline, and if Brown was mad at Ferry. RP 319-22. Snodgrass' responses all indicated that he didn't recall what Brown told him, but yes that's what's in his statement, "I don't recall whether he said that or not," "I don't recall them saying that he used gas," "I don't have no idea about that. I don't know. I don't know what their problem was. I don't recall." RP 319-22. Snodgrass did not write the statement; an officer wrote it for him; Snodgrass didn't recall if he read it or not. RP 323. The statement was not notarized. Exh. 57. Snodgrass' written statement was admitted into evidence, over objection. RP 334-35, Exh. 57. The court held it was not hearsay, and that it was inconsistent with his testimony. RP 335-36. During Detective Wallace's testimony, the officer summarized the statement again. RP 336.

3. Sally Emery's Opinion Testimony.

When asked what happened to her mobile home, Sally answered "Gary burned it." RP 159. Defense counsel objected and moved to strike; it was overruled. RP 159. Later, after several other witnesses testified, the court reconsidered and instructed the jury to disregard the statement. RP 242-44. In response to questions about another person who had threatened to burn the trailer, Sally said, "[H]er and Brandi Haley coaxed Gary Taylor into doing it." RP 173. Defense counsel objected and moved

to strike, which was granted. RP 173.

4. Expert Testimony.

Joe Mohr was the first firefighter to arrive. RP 47-48. Mohr had been a volunteer firefighter for twelve years and had responded to eight to ten fires. RP 45-47, 49. His training was limited to learning from more senior firefighters. RP 49. Defense counsel objected to Mohr giving an opinion about the fire, as he did not qualify as an expert. RP 48, 50. Although the court expressed concerns that Mohr was not an expert, the court overruled the objection, stating that Mohr was allowed to testify as to what he saw in this fire, how it differed from other fires he's seen, and how fires typically burn. RP 50-53. Mohr then proceeded to testify that the trailer burned mostly in one area, which indicates that someone started the fire and that when he used his hose, the fire moved, which he has seen in cases where a fire was started with diesel. RP 57.

V. Argument Why Review Should Be Accepted

It is submitted that the issues raised by this petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions and raises significant questions under the Constitution of the State of Washington and the Constitution of the United States, as well as in the public interest, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

1. Snodgrass' Statement Regarding Brown's Confession Was Improperly Admitted.

a. *Snodgrass' Statement Was Not a Prior Inconsistent Statement.*

The trial court improperly admitted Snodgrass' prior statement that Brown admitted burning the trailer, when he repeatedly testified that he did not remember what Brown told him. Originally the trial court admitted Snodgrass' statement as impeachment, and later as a "Smith affidavit." Under either rule, the trial court erred because Snodgrass' testimony at trial was not inconsistent with his prior statement; instead, he testified that he did not remember what Brown told him.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Magers,* 164 Wash.2d 174, 181, 189 P.3d 126 (2008). However, appellate courts review the interpretation of evidentiary rules de novo. *State v. DeVincentis,* 150 Wash.2d 11, 17, 74 P.3d 119 (2003). "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802. Prior inconsistent statements are admissible, and not hearsay, only if they are offered to challenge the declarant's credibility. *State v. Williams,* 79 Wash.App. 21, 26, 902 P.2d 1258 (1995). Under ER 801(d)(1)(i) a statement made under penalty of

perjury may be admitted as substantive evidence under certain circumstances, but, such statement, commonly referred to a "Smith affidavits," must be inconsistent with the witnesses' testimony. ER 801(d)(1)(i); *State v. Smith*, 97 Wash.2d 856, 651 P.2d 207 (1982). Therefore, whether admitted as a prior inconsistent statement or a "Smith affidavit," a witness' prior statement is only admissible when their credibility is at issue. ER 401, *State v. Allen S.*, 98 Wash. App. 452, 459-60, 989 P.2d 1222, 1226-32 (1999). "If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach." *Allen S.*, 98 Wash. App. at 462 (internal citations omitted).

The facts in *State v. Allen S.* are almost identical to this case. In *Allen S.*, the prosecutor anticipated that the witness may refuse to testify or claim to not remember incriminating statements that the defendant made to him. *Id.* at 456-57. The witness had previously been interviewed and told law enforcement that the defendant made incriminating statements. *Id.* The State called the witness, who repeatedly denied any memory of a conversation with the defendant. *Id.* The State impeached the witness by reciting the statements he made to law enforcement, each of which he denied any memory of. *Id.* On appeal, the court of appeals reversed the conviction, holding that the trial court erred by admitting the prior

statement. *Id.* at 468-69; *see also State v. Robbins,* 25 Wash.2d 110, 169 P.2d 246 (1946) (witness refused to testify); *State v. Washburn,* 116 Wash. 97, 99, 198 P. 980 (1921) (witness' testimony stricken); *State v. Stingley*, 163 Wash. 690, 2 P.2d 61 (1931) (witnesses only questioned about their prior statements and claimed not to remember); *State v. Delaney*, 161 Wash. 614, 619, 297 P. 208 (1931) (witness said they did not remember anything); *Kuhn v. United States*, 24 F.2d 910 (9th Cir.), *cert. denied by Lee v. U.S.*, 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928) (witness testified he could not remember). The same analysis should apply to "Smith affidavits," which also require that the prior statement was inconsistent. *See Robbins,* 25 Wash.2d 110 (exclusion of "Smith affidavit" affirmed because it was not inconsistent).

The Court of Appeals improperly relied on *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). In *Newbern*, the witness testified about the event, saying the shooting was an accident, but denied memory of making the prior statement. *Id.* at 292-94. In *Newbern*, the court held that generally, "if the witness testifies at trial about an *event* but claims to have no knowledge of a material detail, or no recollection of it, most courts permit a prior statement indicating knowledge of the detail to be used for impeachment." *Id.* at 929 (emphasis in original), citing 5A Karl B. Tegland, Washington Practice, *Evidence* § 256, at 309 (3d

ed.1989). The circumstances in this case are different. Snodgrass testified, repeatedly, that he had no memory of the *event*. Snodgrass testified that he did give Brown a ride, but that he did not remember their conversation during the ride. Nonetheless, the trial court first allowed the State to impeach Snodgrass with his prior statement to law enforcement about what Brown told him, and then later admitted the statement itself as a "Smith affidavit." This was error because Brown's testimony that he did not remember the conversation he had with Brown was not inconsistent with his statement to the police. Therefore, there was no testimony to impeach. This Court should grant review because the Court of Appeals ruling is clearly inconsistent with this Court's prior rulings.

b. *Snodgrass' Statement Was Improperly Admitted as a "Smith Affidavit."*

The Court of Appeals erred by finding that Snodgrass' statement was admissible as a "Smith affidavit." Under ER 801(d)(1)(i) a statement made under penalty of perjury may be admitted as substantive evidence under certain circumstances. A statement is not hearsay if the declarant testifies, is subject to cross-examination, the statement is inconsistent with the witness' testimony and "was given under oath subject to the penalty of perjury at a trial, hearing, or *other proceeding*, or in a deposition . . . ."

ER 801(d) (emphasis added). These statements have come to be referred to as "Smith affidavits." *See Smith*, 97 Wash.2d 856.

In *Smith*, the court declined to find that all affidavits signed under penalty of perjury are admissible as "other proceedings." *Smith*, 97 Wash.2d at 861. To determine whether an affidavit is admissible, the courts consider four factors:

> (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

State v. Thach, 126 Wash. App. 297, 308, 106 P.3d 782, 788 (2005). Snodgrass' statement was taken as part of an investigation to determine probable cause and Mr. Snodgrass was subject to cross-emanation. The issue is whether the statement was voluntary and truthful.

In *Smith*, the court found that the statement was voluntary and there were minimal guarantees of truthfulness where it was made under oath and subject to penalty of perjury, it was notarized, and it was written by the witness. *Smith*, 97 Wash. 2d 856. In *Thach*, the affidavit was admissible where the witness completed part of the affidavit herself and signed it under penalty of perjury. *Thach*, 126 Wash. App. at 308. In *Nelson*, a prior sworn statement was found reliable and admitted where,

although the witness did not write the statement herself, she testified that she made a statement, the officer wrote her statement, and she read it before signing it. *State v. Nelson*, 74 Wash. App. 380, 389, 874 P.2d 170, 175 (1994). However, in *Nieto*, the court held that a statement was not admissible because it did not contain the minimum guarantees of truthfulness where it was written on a pre-printed printed form with ambiguous boilerplate language that the statement was under the penalty of perjury, there was no notary present, there were no other formal procedures, and the witness testified that she did not read the language regarding the statement being under the penalty of perjury, it had no meaning to her, and no one read it to her. *State v. Nieto*, 119 Wash. App. 157, 163, 79 P.3d 473, 477 (2003).

In this case, the statement said it was under oath and subject to penalty of perjury, but it was not notarized and it was not written by Snodgrass. The officer wrote the statement and Snodgrass testified that he did not recall whether or not he read it before signing it. (RP 323). Throughout his testimony, Snodgrass maintained that he did not remember the conversation with Brown which was contained in the affidavit. This case is very different than *Smith* and raises concerns regarding the truthfulness of the statement. Furthermore, the trial court made no record or findings regarding the voluntariness or truthfulness of the statement.

This Court should grant review because the Court of Appeals ruling is inconsistent with the cases discussed above and because the voluntariness and truthfulness of a statement raises significant issues of public policy.

2. Brown's Due Process Rights Were Violated When the Trial Court Instructed the State on How to Impeach Its Witness.

The trial court improperly assumed the role of prosecutor when it instructed the State on how to impeach its witness, violating Brown's right to due process of law. "A fair trial in a fair tribunal is a basic requirement of due process . . . ." *State v. Moreno*, 147 Wash. 2d 500, 507, 58 P.3d 265, 268 (2002); *see also* U.S. CONST. amend. IV, XIV. A fair trial, and the appearance of fairness, requires that the judge remain a neutral party and not be involved in the prosecution of a case. *See In re Mowery, 141 Wash. App. 263, 282, 169 P.3d 835, 844 (2007), as amended (Nov. 8, 2007), citing In re Salary of the Juvenile Dir.*, 87 Wn.2d 232, 249, 552 P.2d 163 (1976); *see also State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972). In *State v. Moreno*, this Court cited *People v. Copflied* as an example of the court improperly taking on the role of prosecutor when the a victim testified differently from her statement to police, the judge called the investigating officer to the stand, and then questioned the victim. *Moreno*, 147 Wash. 2d at 511.

In this case, the court interrupted the State's questioning of its witness, Snodgrass, and instructed the State how to proceed. The Court of Appeals held that while the trial court's actions raise concerns, the court was simply exercising its courtroom management authority, and because the prior statement was properly admitted, Brown was not prejudiced. This Court should grant review because the trial court's role of instructing the State how to proceed raises significant constitutional issues and issues of public policy. And, as argued above, the prior statement was not properly admitted, and likely would not have been admitted without the trial court intervening and instructing the State how to proceed.

3. The State Committed Prosecutorial Misconduct When It Called Snodgrass for the Primary Purpose of Impeaching Him.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced his defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). "Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012); *State v. Davenport,* 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. A defendant's constitutional right to a fair trial is violated when there is a substantial

likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn.App. 895, 106 P.3d 827 (2005).

The State committed prosecutorial misconduct when it called Snodgrass as a witness for the sole purpose of admitting his prior statement. "Although the State may impeach its own witness, it may not call a witness for the primary purpose of eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible." *State v. Hancock*, 109 Wash. 2d 760, 763-64, 748 P.2d 611, 613 (1988), *citing State v. Lavaris*, 106 Wash.2d 340, 721 P.2d 515 (1986), *quoting State v. Barber*, 38 Wash.App. 758, 770–71, 689 P.2d 1099 (1984), rev. denied, 103 Wash.2d 1013 (1985). This Court noted that when a witness' "testimony simply consist[s] of flat denials . . ., without offering any affirmative testimony," it suggests that the State improperly called the witness to admit otherwise inadmissible hearsay. *Hancock*, 109 Wash. 2d at 765.

In this case, the State called Snodgrass. Snodgrass did not provide any substantive testimony regarding this case. Instead, he repeatedly testified that he did not recall what was said during his conversation with Brown. Nonetheless, the State continued to question him, using inadmissible hearsay to impeach him. Without calling Snodgrass, the State would not have been able to admit his prior statement. While there

is a possibility that a curative instruction can mitigate the taint of an improperly admitted confession, "the bell is hard to unring." *State v. Holmes*, 122 Wash. App. 438, 446, 93 P.3d 212, 217 (2004). The prosecutorial misconduct was prejudicial because no curative instruction could have cured the error or "unrung the bell" once the jury heard Snodgrass' statement, which included Brown's confession. This Court should grant review because prosecutorial misconduct raises significant constitutional issues and policy issues, especially when the misconduct results in the improper admission of a defendant's confession.

4. Brown Was Unfairly Prejudiced by Improper Opinion Statements Regarding His Guilt.

Sally Emery improperly testified, twice, that Brown burned down her trailer. Both statements were objected to, and both were ultimately sustained and the jury instructed to disregard or told the statement was stricken. However, given the extremely prejudicial nature of the statements, the trial court's rulings were insufficient to "unring the bell."

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *Glasmann*, 175 Wash. 2d at 703-04, *citing Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch,* 137 Wash.2d 792, 843,

975 P.2d 967 (1999); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. Furthermore, the right to have factual questions decided by the jury is crucial to the right to trial by jury. WASH. CONST. art I, §§ 21, 22, U.S. CONST. amend. VII. "The role of the jury is to be held 'inviolate' under Washington's constitution." *State v. Montgomery*, 163 Wash. 2d 577, 590, 183 P.3d 267, 273 (2008). Opinion testimony is inappropriate when a witness is commenting on the guilt of the accused. *Id.* at 591. Such impermissible opinion testimony about a defendant's guilt may constitute reversible error because it violates the defendant's constitutional right to a jury trial, which includes independent determination of the facts by the jury. *State v. Kirkman*, 159 Wash. 2d 918, 927, 155 P.3d 125, 130 (2007).

In this case, Sally Emery improperly testified that Brown was guilty, that he burned the trailer and that another person coaxed him into it. Both statements were objected to, and ultimately were sustained. However, the court's instruction was insufficient to remove the prejudicial effect. *See State v. Miles*, 73 Wn.2d 67, 436 P.2d 198 (1968) (court improperly allowed police to testify regarding defendant's guilt over objection, then later instructed the jury to disregard, reversed on appeal because instruction to disregard insufficient to remove prejudicial effect). Because the testimony was so "inherently prejudicial and of such a nature

as to likely impress itself upon the minds of the jurors" (*Miles*, 73 Wn.2d at 71) it cannot be assumed that the jury could disregard the testimony. This Court should grant review because the improper opinion testimony raises significant constitutional issues and the Court of Appeal's ruling is inconsistent this Court's ruling.

5. Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

In this case, defense counsel did not object to the admission of Snodgrass' statement on the basis that it was not a prior inconsistent statement. In addition, defense counsel was ineffective for failing to

request a mistrial after Sally Emery repeatedly and improperly testified that Brown set her trailer on fire. Although defense counsel properly objected, and the objections were ultimately sustained, the prejudicial effect could not be "unrung." Therefore, defense counsel should have requested a mistrial. Brown was prejudiced because Snodgrass' statement and Sally Emery's testimony that Brown burned her trailer were inadmissible, highly prejudicial, and given the circumstantial evidence, the clear bias of witnesses, and conflicting expert testimony, the prejudice likely effected the verdict in this case. This Court should accept review for all the reasons stated above, and because ineffective assistance of counsel raises constitutional issues.

6. Mohr Was Allowed to Give an Expert Opinion When He Was Not Qualified as an Expert.

The trial court improperly allowed a volunteer fire fighter, with no formal training, to testify regarding the cause of the fire by testifying that this fire was unlike an electrical fire, and was similar to a fire started with gasoline. If a witness is qualified as an expert, they are allowed to testify as to their opinion. ER 702; *see also State v. Black*, 109 Wash. 2d 336, 341, 745 P.2d 12, 15 (1987), *citing State v. Allery,* 101 Wash.2d 591, 596, 682 P.2d 312 (1984). A trial court's ruling on the admissibility of opinion or expert testimony is reviewed for abuse of discretion. *State v. Ortiz*, 119

Wash.2d 294, 308, 831 P.2d 1060 (1992); *State v. Swan*, 114 Wash.2d 613, 655, 790 P.2d 610 (1990). In this case, defense counsel objected to Mohr giving an opinion about the fire. The trial court found that Mohr was not qualified to express an opinion as an expert, but could testify as to what he has seen in other fires and whether this fire was similar or different. Mohr then gave opinion testimony, that this was not an electrical fire and that the fire behaved in a manner consistent with a fire having been started with an accelerant. This court should grant review because the trial court's ruling is contrary to appellate cases and raises significant issues of public policy.

VI. CONCLUSION

This court should accept review for the reasons indicated in Part V and reverse Brown's convictions.

DATED this 23rd day of October, 2017.

Respectfully submitted,

Jennifer Freeman, WSBA No. 35612
Attorney for Gary Brown

CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this petition for review were delivered electronically to the following:

Derek Byrne, Clerk, Division II, Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

Jason Walker
Grays Harbor County Prosecutor's Office
102 W Broadway Ave Rm 102
Montesano WA 98563
jwalker@co.grays-harbor.wa.us

The undersigned certifies that on this day correct copies of this petition for review were delivered by U.S. mail to the following:

Gary Brown, DOC# 922871
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen WA 98520

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary E. Benton

Signed October 23, 2017 at Tacoma, Washington.

APPENDIX

FILED
AUGUST 1, 2017
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. GARY LEE BROWN, JR., A/K/A GARY LEE TAYLOR, Appellant.	))))))))))	No. 34980-2-III UNPUBLISHED OPINION

KORSMO, J. — Gary Brown[1] raises numerous challenges to his conviction for first degree arson, including claims that the trial court erred in admitting a "*Smith* affidavit" prepared by a witness and by assisting the prosecutor in entering that evidence. Although the trial court's actions raise appearance of fairness concerns, we conclude that the court did not abuse its discretion in admitting the affidavit and affirm.

FACTS

This case arises from an arson fire that destroyed a mobile home, which was one of several structures, including another mobile home and a camper trailer, on the same multiple-acre parcel in Humptulips. The destroyed home was rented by J.J. Haskey and

[1] Mr. Brown was known as "Gary Taylor" to some of the witnesses and occasionally was referred to by that name in trial testimony.

Sally Emery. The other mobile home was the residence of Jose Orellana-Arita and Brandi Haley, while the camper trailer was the home of Michael Anderson.

The arson fire occurred on April 22, 2014; neither occupant was home at the time. Neighbors observed a green van belonging to Edna Ferry at the scene shortly before the fire broke out. Ms. Ferry told officers that she and her boyfriend, defendant Gary Brown, had been on the property to visit Orellana-Arita and Haley, but the pair had not left the van.

Sometime after the fire, Anthony Snodgrass gave Mr. Brown a ride in his car. Brown told Snodgrass that he had set the fire, at the request of Orellana-Arita, in exchange for a truck. Snodgrass subsequently spoke with Detective Darrin Wallace of the Grays Harbor County Sheriff's Office. Wallace wrote the statement out for Snodgrass on a two page form entitled "Victim/Witness Statement" that included a certification form stating the statement was true and correct under penalty of perjury under the laws of the State of Washington. Both pages were signed and dated by both Mr. Snodgrass and Detective Wallace.

The case against Mr. Brown eventually proceeded to jury trial. Mr. Orellana-Arita had been convicted of multiple charges, including solicitation to commit arson, and did not testify at Mr. Brown's trial. Fire investigators testified for the State, and so did several of the residents of the area. A fire investigator testified that the fire was not caused by electrical wiring, but that the burn pattern on the floor "screams" that an

ignitable liquid had been used. Report of Proceedings (RP) at 268. Mr. Anderson testified that Brown had approached his camper and took Anderson's gas can and filled a milk jug and a motor oil jug with gas. He also took one of Anderson's towels, ripped it in half, and walked off towards the Emery/Haskey residence. Anderson also told jurors about ongoing tension between Emery/Haskey on one side and Orellana-Arita/Haley on the other.

Ms. Ferry, no longer in a relationship with Mr. Brown, told jurors about conversations Brown had with Orellana-Arita and Haley. She said that Brown reported "everybody" wanted Emery and Haskey out of their home. She had dropped Brown off on the property on the day of the fire and picked him up on the road a half mile away about 15 minutes later. She did not speak to him about what he was doing on the property.

An emotional Sally Emery, glaring at the defendant when she took the stand, also testified for the State. When asked what happened to her home, Ms. Emery replied "Gary burned it." The trial court initially allowed the answer to stand, but later in the day struck the answer and told jurors to disregard it. In response to a question on cross-examination, Ms. Emery told jurors that Diane Norris "said she was going to burn my stuff, her and Brandi Haley coaxed Gary Taylor into doing it." RP at 173. The court sustained a defense objection and struck the statement.

The State called Snodgrass as its penultimate witness. He claimed a lack of memory concerning events and hinted that heart surgery and subsequent treatment had damaged his memory. Review of his written statement failed to refresh his memory and the prosecutor spent a significant amount of time questioning Snodgrass to elicit testimony of substance. The trial court interrupted the examination, excused the jury, and the following colloquy occurred:

> THE COURT: Mr. Walker, you are flopping around like a fish on a riverbank.
>
> MR. WALKER: Yes, Your Honor.
>
> THE COURT: You have passed up refreshing his recollection about 15 minutes ago. I granted you permission to treat him as a hostile witness. Take the statement from him, and read it to him, and ask him if that's what he told Detective Wallace. Do something besides continuing to just run in circles here, and have him be evasive. We are not getting anywhere. There is a way for you to impeach him with that statement, and I want you to do so.
>
> MR. WALKER: Very well, Your Honor.
>
> THE COURT: All right. Have the jury brought back in.

RP at 318. Defense counsel made no comment. The State then attempted to impeach by confronting Mr. Snodgrass with the contents of his statement in the form of leading questions. Mr. Snodgrass replied either "yeah" or "I guess" in response to the remainder of the State's leading questions. He stated that he recognized the form and his signature on it, but did not know if it contained any inaccuracies. On cross-examination he stated that he did not recall reading the statement after the detective wrote it out on his behalf.

Detective Wallace was the final witness for the State. He told jurors that Snodgrass had read the statement to ensure its accuracy before signing it. The prosecutor asked the court to excuse the jury and, after that had occurred, moved to admit the affidavit as substantive evidence under *State v. Smith*.[2] The defense objected, but the court overruled the objection and admitted the statement. Ex. 54. Before going to the jury, the affidavit was redacted to remove a statement unrelated to the arson charge. Ex. 57.

The jury found Mr. Brown guilty of first degree arson. On the basis of his high offender score, the trial court declared an exceptional sentence and ordered the arson sentence to run consecutively to the sentences in two other superior court files. Mr. Brown timely appealed. A panel of this court considered the matter without argument.

ANALYSIS

Mr. Brown raises several arguments concerning the proceedings at trial. We begin with his challenge to the admission of the Snodgrass affidavit and the trial judge's rulings relating to Snodgrass's memory failure. We then turn to the challenges to the testimony of Ms. Emery, whether trial counsel rendered ineffective assistance during the testimony of Snodgrass and Emery, whether the court erred in permitting some of Ms. Ferry's testimony, and whether a firefighter improperly expressed an opinion.[3]

---

[2] 97 Wn.2d 856, 651 P.2d 207 (1982).

[3] In light of our conclusion that there were not multiple errors, we do not address Mr. Brown's claim of cumulative error.

Admission of the Snodgrass Statement

The primary issue here is whether it was error to admit Mr. Snodgrass's witness statement into evidence both to impeach him and as substantive evidence. Since the trial court had tenable reasons for admitting the document, there was no abuse of discretion.

Trial judges have great discretion in the admission of evidence; thus, decisions to admit or exclude evidence will be overturned only for manifest abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995); *State v. Makela*, 66 Wn. App. 164, 168, 831 P.2d 1109 (1992) (ER 801(d)(1)(ii)). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court also abuses its discretion when it applies the wrong legal standard. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Prior statements of testifying[4] witnesses are considered hearsay unless they fall under an exclusion or exception to the hearsay rule. Hearsay exclusions include the nonhearsay categories of ER 801(d)(1), one of which is a prior inconsistent statement under oath. Similarly, one of the many hearsay exceptions is for past recollections

[4] As Mr. Snodgrass was present at trial and subject to cross-examination, the confrontation issues implicated by use of *Smith* affidavits are not discussed in this opinion. *But see Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

recorded. ER 803(a)(5). Prior statements that directly contradict the witness' testimony qualify as inconsistent statements, as do statements that differ in a significant way from the witness' testimony. ER 613; *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). Less clear are borderline situations when the witness claims to have forgotten certain facts at issue, or simply refuses to give any substantive testimony.

When a witness whose credibility is a fact of consequence to the action testifies at trial about an event, but claims to have no knowledge of a material detail, or no recollection of it, most courts permit a prior statement indicating knowledge of the detail to be used for impeachment. *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). To be admissible for impeachment purposes, a witness' in-court testimony need not directly contradict the witness' prior statement; "'inconsistency is to be determined, not by individual words or phrases alone, but the whole impression or effect of what has been said or done.'" *Id.* at 294 (quoting *Sterling v. Radoford*, 126 Wash. 372, 375, 218 P. 205 (1923)). If a person's credibility is a fact of consequence to the action, the jury needs to assess it, and impeaching evidence may be helpful. *State v. Allen S.*, 98 Wn. App. 452, 459-460, 989 P.2d 1222 (1999).

A prior inconsistent statement admitted solely for purposes of impeaching the credibility of a witness under ER 613, does not constitute substantive evidence, and the court should give a limiting instruction to that effect. Under ER 801(d)(1)(i), however, if the prior statement was "given under oath subject to the penalty of perjury at a trial,

hearing, or other proceeding, or in a deposition," it would be admissible substantively. Written affidavits given to police officers may meet the definition of "under oath" and "other proceedings" for purposes of ER 801(d)(1). *State v. Smith*, 97 Wn.2d at 860-862. As the phrase "other proceeding" in ER 801(d) is intentionally open-ended, the *Smith* court emphasized that the purposes of the rule, the reliability of each statement, and the facts of each case must be specifically analyzed. *State v. Otton*, 185 Wn.2d 673, 682, 374 P.3d 1108 (2016).

Smith established a four-factor test for determining whether a police interview qualifies as an "other proceeding" and whether an affidavit produced during that meeting is "under oath." *State v. Nelson*, 74 Wn. App. 380, 386-387, 874 P.2d 170 (1994). Those factors are whether: (1) the witness voluntarily made the statement, (2) there were minimal guaranties of truthfulness, (3) the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause,[5] and (4) the witness was subject to cross-examination when giving the subsequent inconsistent statement. *Smith*, 97 Wn.2d at 861-863. *Otton* reaffirmed this approach. *Otton*, 185 Wn.2d at 680. The *Smith* factors overlap, and specify, the definition of a non-hearsay prior statement under ER 801(d)(1)(i). That rule requires a showing that the

[5] The four methods are (1) filing of an information by the prosecutor in superior court, (2) grand jury indictment, (3) inquest proceedings, and (4) filing of a criminal complaint before a magistrate. *Smith*, 97 Wn.2d at 862 (citations omitted).

witness "'testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding.'" *Id.* at 679 (quoting ER 801(d)(1)).

Mr. Brown argues both that it was error to impeach Snodgrass with the statement and to admit the statement as substantive evidence. Admitted evidence may be used for all proper purposes. *Micro Enhance v. Coopers & Lybrand*, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002).[6] Since we conclude that the statement was properly admitted as substantive evidence under *Smith*, we need not separately consider whether it was properly admitted for impeachment purposes and do not further address that argument.

Here, the trial court reviewed ER 801(d)(1) and concluded it was proper to admit the statement under that rule. RP at 335-336. Mr. Snodgrass voluntarily spoke to Detective Wallace, who wrote down what Mr. Snodgrass said. Mr. Snodgrass also signed and dated the statement, which also identified the location where it was taken and indicated it was made under penalty of perjury. Ex. 54. The statement thus satisfied the certification requirements of RCW 9A.72.085(1). The record also reflects that it satisfied the specific requirements of *Smith*: it was voluntarily made in the course of a police investigation used to establish probable cause for charging the offense of arson. The

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[6] *Cf.* ER 105 (requiring jury instruction when evidence is admitted for limited purpose).

detective's testimony concerning the creation of the statement establishes the "minimal guaranties of truthfulness": Mr. Snodgrass gave the statement, the officer wrote it out, Mr. Snodgrass read the statement and signed it under penalty of perjury after having the opportunity to amend it. RP at 332-334. Indeed, the only objection defense counsel raised was that the statement was cumulative evidence and therefore did not need to be admitted. RP at 335, 336.

The statement was in the form used and approved in *Smith*. The detective provided testimony concerning the circumstances of the making of the statement. The trial court therefore had tenable grounds for admitting the exhibit as substantive evidence. The court did not err.[7]

Intervention of Trial Judge

Appellant next challenges the trial court's directive to the prosecutor to impeach Mr. Snodgrass despite not objecting to the process during trial. Mr. Brown contends this was a violation of the separation of powers doctrine. He has no standing to raise such a claim, which more properly sounds in due process or the appearance of fairness doctrine. Although we are concerned about how the court used its trial management authority, and

---

[7] This conclusion also resolves Mr. Brown's argument that the prosecutor committed misconduct in calling Snodgrass for the sole purpose of impeaching him. That was not the case. Mr. Snodgrass had relevant evidence to offer and was required to provide that information at trial. *State v. Ruiz*, 176 Wn. App. 623, 634-635, 309 P.3d 700 (2013), *review denied*, 179 Wn.2d 1015, *cert. denied*, 190 L. Ed. 2d 63 (2014). The prosecutor did not err in calling him to the stand. *Id.* at 634-640.

we caution against similar behavior in the future, the admission of the testimony under *Smith* rendered any error harmless.

The separation of powers doctrine does not involve any rights of the individual:

> Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded. The maintenance of a separation of powers protects institutional, rather than individual, interests.

Carrick v. Locke, 125 Wn.2d 129, 136, 882 P.2d 173 (1994). Accordingly, Mr. Brown lacks standing to claim that the separation of powers doctrine was violated. *See State v. Gutierrez*, 50 Wn. App. 583, 591-592, 749 P.2d 213 (1988) (no standing to assert violation of rights of another).

Mr. Brown might have been able to fashion this claim as a violation of the appearance of fairness of doctrine but for the fact that he did not challenge the judge's action at trial. The appearance of fairness doctrine is not constitutional in nature and, hence, cannot be raised initially on appeal. RAP 2.5(a); *State v. Blizzard*, 195 Wn. App. 717, 725, 381 P.3d 1241 (2016), *review denied*, 187 Wn.2d 1012 (2017).

Accordingly, it appears that this argument is better considered as a due process right to a fair trial claim. *E.g.*, *State v. Moreno*, 147 Wn.2d 500, 506-512, 58 P.3d 265 (2002) (statute permitting judges to call and question witnesses in traffic infraction proceedings). Mr. Brown also argues this challenge from this perspective.

Trial judges have broad discretion to manage their courtrooms and conduct trials fairly, expeditiously, and impartially; they must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as avoid needless consumption of time. ER 611(a)(2). A trial court is responsible to ensure the evidence is fully developed for the jury and to resolve, as far as possible, any ambiguities or conflicts in the evidence. *Moreno*, 147 Wn.2d at 509. This court, therefore, reviews a trial judge's courtroom management decisions for abuse of discretion. *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 69, 155 P.3d 978 (2007).

Due process requires, among many other things, that a tribunal be fair. *Moreno*, 147 Wn.2d at 506-507. That fairness obligation can be violated when a judge dons "executive and judicial hats at the same time." *Id.* at 507. Also, colloquies between the court and counsel hold the potential to present a fair trial challenge. *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964). On these facts, only that last concern is implicated. The trial court did not undertake the prosecution function; the court did not question Snodgrass, nor did it give the directive in the presence of the jury. Instead, the problem arose from the apparent command given the prosecutor in the colloquy outside the jury's presence.

The court was free in its exercise of its courtroom management authority to tell the prosecutor to move on, and perhaps even to give an "either/or" directive (such as "impeach him if that is what you are trying to do or else move on to another subject")

since a significant amount of time had passed without the testimony substantively progressing in any manner. However, the language used appeared to tell the prosecutor how to try his case as if the prosecutor was a functionary of the judge. That would create a fair tribunal issue if that was what the judge truly intended. For a couple of reasons, we think, however, that this was actually a diction problem.

First, the defense did not object to the court's language or proposal. In this context, we think that defense counsel simply did not see the directive as serious error, but merely viewed the statement as nothing other than the judge telling the prosecutor to move on from his flailing around. *Cf. State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (Noting that the absence of an objection or motion for mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial."). Second, the evidence ultimately was admitted for substantive purposes on the motion of the prosecutor. As discussed previously, this made the impeachment proper. The evidence was before the jury for all purposes, rendering the judge's statement nothing more than inartful phrasing. It did not lead to the admission of improper evidence.

Accordingly, although we wish the judge had stated his comment differently, it was not such a significant matter that it demonstrated that the tribunal was biased against Mr. Brown. Most certainly the use of properly admitted evidence did not deprive Mr. Brown of a fair trial.

The comment did not amount to reversible error.

Testimony of Ms. Emery

Mr. Brown next argues that the trial court erred in its handling of the two statements by Ms. Emery that the trial court ultimately struck from the record. Since the defense never asked the trial court for any additional relief, there is nothing more to be done on appeal.

As noted earlier, Ms. Emery on separate occasions stated "Gary burned it," and that others wanted the trailer burned and "coaxed Gary Taylor into doing it." The improper admission of evidence at trial is considered a "trial irregularity." *State v. Weber*, 99 Wn.2d 158, 163, 659 P.2d 1102 (1983); *accord State v. Emery*, 174 Wn.2d 741, 750, 278 P.3d 653 (2012) (one defendant interrupted the other's testimony to accuse him of perjury). When inadmissible testimony is put before the jury, the trial court should declare a mistrial if the irregularity, in light of all of the evidence in the trial, so tainted the proceedings that the defendant was deprived of a fair trial. *Weber*, 99 Wn.2d. at 164. In deciding that question, a court will consider whether a curative instruction would have been useful. *Id.* at 165. The decision whether or not to grant a new trial due to a trial irregularity is a matter left to the discretion of the trial court since the trial judge is in the best position to assess the harm, if any, caused by the irregularity. *Id.* at 166. "The question is not whether this court would have decided otherwise in the first

instance, but whether the trial judge was justified in reaching his conclusion." *State v. Taylor*, 60 Wn.2d 32, 42, 371 P.2d 617 (1962) (trial court order granting new trial).

However, this approach fails Mr. Brown because he never sought a mistrial or a new trial over the Emery testimony. It is presumed that jurors "followed the judge's instructions to disregard the remark." *Weber*, 99 Wn.2d at 166. Mr. Brown does not suggest that there is any indication that jurors disregarded the trial court's instructions. Thus, we have no reason for concluding that the trial court abused discretion it was never asked to exercise.

Instead, Mr. Brown is left to argue that Ms. Emery's remarks constituted an improper invasion of the jury's province to determine guilt or innocence by expressing a personal opinion on his guilt. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Opinion testimony that is "'based on one's belief or idea rather than on direct knowledge of the facts at issue'" is generally inadmissible to indicate the guilt or innocence of a defendant. *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting BLACK'S LAW DICTIONARY, 1486 (7th ed. 1999). Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *Id.* at 759.

Unlike *Montgomery* and many similar cases, here the opinion testimony of the victim was stricken from the record. Unlike *Weber* and its progeny, the trial court was not asked to give additional relief. Accordingly, Mr. Brown can only obtain relief in this circumstance if the stricken remarks were so egregious that no remedy other than a new trial would suffice. *Weber*, 99 Wn.2d at 164. For several reasons, we think that is not the case here. First, as noted previously, the failure to seek further relief in this circumstance strongly suggests that no additional relief was needed. *Swan*, 114 Wn.2d at 661. Second, it is unlikely that the jury was unduly swayed by the emotional victim's testimony given her obvious bias against the defendant. That the victim of an arson fire would blame the accused is not something beyond the common understanding of the jury, which would discount her baseless opinion accordingly. Finally, the prosecution did not rely on the stricken statements to tie the defendant to the crime. His own statement, as well as the eyewitness testimony putting him at the scene when the fire started, were much stronger evidence linking him to the crime. The stricken evidence pales in significance.

Accordingly, there is no reason to believe that any relief other than that sought and obtained at trial was necessary in this instance. The stricken remarks, which also were the subject of cautionary instructions, were not of such significance to require further relief.

Effective Assistance of Counsel

Mr. Brown next argues that his counsel performed ineffectively in not objecting to the Snodgrass impeachment and by failing to seek a mistrial over Ms. Emery's stricken remarks. This derivative argument is unnecessary and unavailing.

Ineffective assistance claims require proof that a defense attorney failed to perform to the standards of the profession; that failure will require a new trial when it results in prejudice to the client. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 688-692. When a claim can be resolved on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

The ineffective assistance argument is unavailing here for the reasons previously stated. The Snodgrass statement was properly admitted as substantive evidence, so it was also properly used for impeachment. Counsel did not err in failing to raise further challenges. The stricken Emery statements have not been shown to have been so prejudicial that the trial court's actions were ineffectual. Even if counsel should have

sought a mistrial, a question we do not reach, appellant has not established that he was prejudiced by the failure.

The ineffective assistance argument is without merit.

Ms. Ferry's Testimony

Mr. Brown also challenges Ms. Ferry's testimony concerning his statements to her about a telephone conversation he was having with Orellana-Arita and Haley. He argues that this was double hearsay and a violation of his confrontation right. The latter argument can be rejected summarily. A conversation between acquaintances does not constitute testimonial hearsay that raises confrontation clause questions. *State v. Wilcoxon*, 185 Wn.2d 324, 373 P.3d 224, *cert. denied*, 137 S. Ct. 580 (2016) (statement by one defendant to other acquaintance not testimonial hearsay under confrontation clause).

We have previously noted that we review a trial court's evidentiary rulings for manifest abuse of discretion. *Luvene*, 127 Wn.2d at 707. The testimony at issue was reflected in Ms. Ferry's testimony that "everybody" wanted the victims out of the trailer. RP at 92. Her testimony also noted that she had previously been warned not to repeat what Brown claimed others had said. As the trial court correctly noted, the prosecutor's question did not elicit a hearsay response because it asked for Ms. Ferry to report what Mr. Brown had said, not what he reported others as having said. His statement was not hearsay since it was offered against him. ER 801(d)(2). At the conclusion of the passage

in question, her answer reflected her summation of the conversation—"everybody" wanted them out—but did not repeat anyone's specific statement to that effect. Ferry did not report any quotation Brown may have supplied to her.

This statement was not hearsay. Moreover, the defense never challenged that statement after it was uttered, presumably because it did not violate the court's order not to relate hearsay. Ms. Ferry did not report anything that someone else stated. The trial court did not manifestly abuse its discretion in admitting the testimony.

Firefighter's Testimony

Lastly, Mr. Brown contends that firefighter Danny Mohr, a twelve-year volunteer firefighter, was erroneously allowed to voice expert opinions concerning the fire. We discern no abuse of discretion.

After Mohr, the first responder, described the characteristics of the fire when he arrived, he indicated that the burning was "unusual for mobile home fire." The court sustained defense counsel's objection that Mohr was not qualified to issue an expert opinion. The prosecutor then laid a foundation with Mohr describing his experience with mobile home fires. The court permitted Mohr to tell jurors how this fire burned differently from other mobile home fires he had fought. RP at 53. He then testified that most trailer fires he had seen spread out from the point of ignition instead of burning solely in that area. RP at 56-57. Mohr also told jurors he was not an investigator and did not express an opinion concerning the cause of the fire. RP at 57.

Mr. Brown contends on appeal that Mohr was improperly permitted to express an expert opinion. We disagree. Although an expert can express an opinion that is based on either training or experience, ER 702, Mohr did not do so here. Rather, he explained his previous experience with trailer fires and indicated how this fire differed from those fires. To the extent this was "opinion" testimony at all, it was based on his experiences rather than on technical scientific information and, therefore, was admissible as lay opinion testimony. *See* ER 701. However, the trial court expressly prohibited Mohr from expressing an opinion, and he did not do so. Instead, he told the jurors about the burning he observed in this trailer and the burning he usually observed in trailer fires. RP at 56-57. These were factual observations. It was the fire investigator, a witness whose testimony is unchallenged on appeal, who stated this fire was set with a flammable liquid. Mohr did not state any improper opinions.

The trial court properly circumscribed Mr. Mohr's testimony. There was no error, let alone abuse of discretion.

Finally, Mr. Brown requests that we waive appellate costs in the event the State substantially prevails on appeal. We decline to address the request. In the event that the State files a cost bill, our commissioner will entertain a timely objection in accordance with the provisions of RAP 14.2.

The conviction is affirmed.

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.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Siddoway, J.

Renee S. Townsley
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CASE # 349802
State of Washington, Respondent v. Gary Brown, Jr., Appellant
GRAYS HARBOR COUNTY SUPERIOR COURT No. 141003903

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
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c: Gary Brown, Jr.
DOC #922871
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Log Number: U-197
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 34980-2
Title of Case: State of Washington v. Gary Lee Brown, Jr. aka Gary Lee Taylor
File Date: 08/01/2017

SOURCE OF APPEAL

Appeal from Grays Harbor County Superior Court
Docket No: 14-1-00390-3
Judgment or order under review
Date filed: 09/16/2015
Judge signing: Honorable David L. Edwards

JUDGES

Authored by Kevin Korsmo
Concurring: Robert Lawrence-Berrey
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OPINION FACT SHEET

Case Name: *State of Washington v. Gary Lee Brown, Jr., a/k/a Gary Lee Taylor*
Case Number: 34980-2-III

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Grays Harbor; 14-1-00390-3
Judgment/Order being reviewed: Judgment & Sentence
Judge Signing: David L. Edwards
Judgment Date: 9/16/2015

2. COURT OF APPEALS INFORMATION:

Disposition: Check only 1

(X) Affirmed
( ) Affirmed as Modified
( ) Affirmed in Part/Remanded**
( ) Affirmed/Reversed-in part and Remanded**
( ) Affirmed/Vacated in part
( ) Affirmed in part/Reversed in part
( ) Denied (PRP, Motions, Petitions)
( ) Dismissed (PRP)
( ) Granted/Denied in part
( ) Granted (PRP, Motions, Petitions)
( ) OTHER
( ) Reversed and Dismissed
( ) Remanded**
( ) Reversed
( ) Reversed in part
( ) Remanded with Instructions**
( ) Reversed and Remanded**
( ) Reversed, Vacated and Remanded**
( ) Vacated and Remanded**

* These categories are established by the Supreme Court
** If remanded, is jurisdiction being retained by the Court of Appeals?
( ) YES
( ) NO

3. SUPERIOR COURT INFORMATION (IF THIS IS A CRIMINAL CASE, CHECK ONE)

Is further action required by the superior court?
( ) YES
(X) NO

Judge's Initials: KDD

PIERCE COUNTY ASSIGNED COUNSEL

October 23, 2017 - 1:48 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34980-2
Appellate Court Case Title:	State of Washington, Respondent v. Gary Brown, Jr., Appellant
Superior Court Case Number:	14-1-00390-3

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