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Supreme Court No. 95920-0
(COA No. 75277-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMAS BERHE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Tomas Berhe, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated February 5, 2018, for which reconsideration was denied on April 30, 2018, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies are attached as Appendix A and B, respectively.

B. ISSUES PRESENTED FOR REVIEW

1. Because our courts never tolerate jurors exhibiting racial bias during deliberations, a prima facie showing of such bias triggers a mandatory duty to fully inquire into the potentially tainted verdict. After Tomas Berhe's trial, the sole black juror sitting in a murder trial involving a black defendant told the court that her guilty vote resulted from racially hostile behavior by other jurors. The court refused to let Berhe contact other jurors to investigate this claim and concluded the black juror was being overly emotional.

Procedurally, the trial court's limited inquiry into a juror's claim that racial animus tainted the verdict is contrary to the evidentiary hearing mandated by *State v. Jackson.*[1] Substantively, the Court of Appeals' decision that a black juror's perception of racial hostility from

other jurors does not cast doubt on the integrity of the verdict conflicts with recent United States Supreme Court cases[2] and is contrary to the Sixth and Fourteenth Amendments and the fair trial rights protected by article I, sections 3, 21, and 22. Should review be granted under RAP 13.4(b)?

2. Nationally, many courts are re-examining the admissibility of testimony from firearms examiners who claim that a certain gun matches a certain bullet because there are no reliable and validated studies proving the accuracy of this opinion testimony. The court rejected Berhe's request to prohibit the State's ballistics examiner from claiming she could scientifically determine a gun matched the bullets from the scene. Should this Court take review to address the court's gatekeeping role in limiting misleading scientific opinion testimony based on changes in scientific knowledge, as a matter of substantial public interest?

3. When an arrested person tells police he does not want to talk to them, they must stop questioning and cannot use any elicited

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[1] *State v. Jackson*, 75 Wn. App. 537, 542-43, 879 P.2d 307 (1994).

[2] *Pena-Rodriguez v. Colorado*, _ U.S. _, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017); *Tharpe v. Sellers*, _ U.S. __, 138 S. Ct. 545, 199 L. Ed. 2d 424 (2018).

statements against him under the Fifth Amendment and Article I, section 9. Here, the court admitted into evidence a videotape of police interrogation even though Berhe's words and conduct showed he did not want to answer their questions. Should this court grant view to address whether it is presumptively prejudicial for the court to admit an accused person's custodial statements to police where he explicitly says, "I don't want to talk to you"? Is a suspect's further refusal to cooperatively answer persistent police questions inadmissible when it indicates the suspect is invoking the right to remain silent and lacks probative value, as the Court of Appeals has held?[3]

4. The right to a fair trial includes the right to a trial free from prosecutorial misconduct. Here the prosecution employed an array of improper tactics, including shifting the burden of proof in closing argument, denigrating the defense, and commenting on Berhe's right to remain silent. Should this Court take review due to the cumulative harm resulting from improper trial tactics?

5. In several recent cases, this Court has recognized sentencing judges' discretion to impose exceptional sentences below the standard range that including running sentences concurrently despite statutory

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[3] *State v. Fuller*, 169 Wn. App. 797, 832, 282 P.3d 126 (2012).

language favoring consecutive prison terms. This discretion arises because the exceptional sentence statutes do not preclude the court from imposing any terms concurrently. Should this Court reexamine the court's authority to impose firearm enhancements concurrently in the context of imposing an exceptional sentence below the standard range, as a matter of substantial public importance and based on the conflict with other recent decisions?

C. STATEMENT OF THE CASE

Shortly after midnight on July 22, 2013, someone fired several shots through the closed passenger window of Mike Stukenberg's parked car, where Everett Williams sat. 2/2RP 1425-26.[4] Williams died immediately; Stukenberg received a superficial wound to his arm. *Id.* at 1441-42; 2/17RP 2821.

Stukenberg gave many different versions who was the shooter, saying he saw three unknown perpetrators, including a white male wearing a mask; he only saw a shadow; he could not see what happened; he did not believe Berhe was the shooter; Berhe was there but he did not see him pull the trigger; Berhe was the shooter but he only said this because he was worn down by police after Berhe was

arrested. 2/2RP 1448-49, 1454; 2/3RP 1552, 1560, 1583. Stukenberg erased his phone after the shooting. 2/3 RP 1555; 2/11RP 2302-3, 2333.

People in nearby apartments heard shots, and called 911, but did not see the shooting occur. 1/27RP 731; 1/28 885, 911, 951, 976-79; 2/20RP 3063; 3/22RP 3152-53. The alley was dark and witnesses gave different descriptions of a person who could have been involved. 2/28RP 839-40 (person in white t-shirt), 979-80 (average height male in long-sleeved shirt and dark colored clothing); 2/22RP 3022-23 (6' tall white male in red coat); 2/22RP 3070 (person in light clothes). [5] Several neighbors saw two cars leaving the scene, a dark sedan and a green Volkswagen. 2/1RP 1165, 1196, 1216.

Williams had a large group of friends who regularly gathered to "drink and do drugs," as they had that day. 2/2RP 1313, 1368; 2/3RP 1853; 2/4RP 1759, 1811; 2/10RP 1980, 1991, 1993. Looking for a friend's party, Elijah Washington drove Berhe, Lucci Cascioppo, and Claire Villiot to a parking lot. 2/4RP 1825; 2/10RP 1999-2001. They followed Kevin Simmons, who drove Dominic Oliveri in his green Volkswagen. 2/10RP 2005, 2090.

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[4] All proceedings occurred in 2016.

Oliveri was mad at Williams, who he accused of stealing a bag of pills. 2/2RP 1345; 2/3RP 1530-31; 2/10RP 2102. Williams asked his friend Emily Schlackman if she thought Oliveri would kill him. 2/22RP 3052, 3054.

Oliveri "disappeared" shortly after the shooting. 2/2RP 1331; 2/3RP 1563; 2/4RP 1796, 1883; 2/10/RP 2095. He hired a lawyer and said he would assert his right to remain silent if called to testify; the jury was not told this was why he did not testify. 2/11RP 2379.

Cascioppo was in the parking lot during the shooting with his girlfriend Villiot. Villiot recalled nothing, and said she was "totally gone" from mixing Xanax with alcohol. 2/4RP 1766-67, 1780-81. Cascioppo also mixed Xanax, cocaine and beer before the incident and had serious memory loss, but said Berhe shot Williams. *Id.* at 1859, 1878. Cascioppo, Villiot, and Oliveri fled afterwards and did not call for aid. 2/4RP 1815, 1856 1880. Stukenberg and Cascioppo considered Oliveri their closest or oldest friend. 2/2RP 1562-63; 2/4RP 1854.

Several miles from the shooting, police stopped Berhe in a dark sedan. 1/28RP 1096. Washington was driving. 2/1RP 1251. Under

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[5] Berhe is 5'7" tall. 2/16RP 2473. He wore a dark t-shirt and denim shorts on the night of the incident. Ex. 58, p. 10.

Washington's seat, the police found a gun. 2/4RP 1931. Forensic scientist Kathy Geil test-fired this gun, compared bullets and shell casings, and concluded this firearm fired the bullets used in the shooting. 2/17RP 2698, 2704.

Berhe was charged with first degree murder with a firearm enhancement and first degree assault with a firearm enhancement for the ricochet bullet that hit Stukenberg. CP 1-2. Washington testified for the State and received immunity. Ex. 50; 2/10RP 2075. He did not see the shooting but claimed Berhe said he shot Williams and accidentally shot Stukenberg. 2/10RP 2013, 2035. Washington admitted he lied to police multiple times and gave various stories of events. 2/10RP 2059, 2061, 2063, 2073, 2075, 2079, 2090.

Berhe objected to the State's claim the firearm in the car was the same gun that fired the fatal bullets based on evidence, citing cases criticizing the science of toolmark comparisons, but the court overruled his objection. 1/19RP 57-60; CP 37-38.

After the jury convicted Berhe of the charged offenses, one juror complained of racial harassment in the jury room. CP 474-78; 4/6RP 90, 105, 110. Citing juror privacy, the court forbid the lawyers from contacting other jurors, and instead sent all jurors a letter saying they

could contact the attorneys if they wished. 3/10RP 11; CP 292. Five jurors told the prosecution they had not acted with racial hostility. CP 322-28. The court did not inquire further. 4/26RP 110-11.

At sentencing, the judge agreed to impose a mitigated sentence of concurrent time for the first degree assault conviction because Stukenberg was shot by accident and he was suspected of playing a role in arranging this shooting. 5/26RP 172. The court believed it lacked discretion to impose the firearm enhancement concurrently and therefore imposed two consecutive firearm enhancements. *Id.* The Court of Appeals affirmed.

D. ARGUMENT

1. Racial bias among deliberating jurors must be meaningfully investigated by the trial court when a juror swears that race-based animus that affected the verdict.

a. Our judicial system does not tolerate racial bias during jury deliberations.

It is an "unmistakable principle" that "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Pena-Rodriguez v. Colorado*, _ U.S. _, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017), quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979); U.S. Const.

amends. 6, 14; Const. art. I, §§ 21, 22. In *Pena-Rodriguez*, the Supreme Court held that evidence a deliberating juror "relied on racial stereotypes or animus" to convict a person violates the jury trial guarantee of the Sixth Amendment. *Id.* at 869.

Prejudice among jurors "prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require." *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986). In *Heller*, the judge questioned each juror during deliberations when he learned some made comments about the defendant or witnesses being Jewish. *Id.* at 1526. Each juror assured the court such comments would not affect their verdict. But on appeal, the Eleventh Circuit ruled it was "inconceivable" that the jurors were untainted by discriminatory comments and ordered a new trial. *Id.* at 1527.

Shortly after issuing *Pena-Rodriguez*, the Supreme Court applied it to remand a case for further consideration where one juror described viewing the defendant negatively because he was black. *Tharpe*, 138 S. Ct. at 546. Although the juror disavowed this statement shortly after he made it, the Supreme Court mandated further proceedings due to the importance of ensuring verdicts are not based on racial prejudice. *Id.* at 546; *Id.* at 548, 550 (Thomas, J., dissenting).

Here, the Court of Appeals dismissed a juror's sworn statement that other jurors treated her with racial hostility because she was the sole juror who shared the same race as Mr. Berhe. It ruled that without blatant racial epithets uttered during deliberations, it would not require any further investigation into the juror's claims. This truncated analysis is unacceptable, because it permits a verdict to stand despite a juror's first hand claim of racial bias affecting the outcome of the case. Review should be granted.

b. The Court of Appeals decision is contrary to Jackson, which requires at least a meaningful evidentiary hearing when a juror presents a first-hand claim of racial bias affecting the verdict.

When there is prima facie evidence of bias during jury deliberations, an evidentiary hearing "is the preferred course of action." *Jackson*, 75 Wn. App. at 543-44. A juror's firsthand observations of discriminatory treatment based on her race and the race of the accused constitutes prima facie evidence of racial bias. Juror 6 submitted a sworn declaration saying she felt racial bias and race-based derision from other jurors, and her opinions were treated hostilely because she was accused of favoring Berhe because they shared the same race. CP 475-76. She said she was mistreated, "mocked," and marginalized

while other non-black jurors who also questioned the State's case were not. *Id.* She said she only voted to convict because of this undue pressure.

Here, the trial court refused to hold an evidentiary hearing. The court prohibited the defense from contacting any jurors. Instead, the court wrote a letter to the jurors and told them they could contact any of the attorneys voluntarily. Five jurors spoke to the prosecutor. CP 322-28. Each denied acting with racial animus.

This limited inquiry was inadequate. A juror's "denials of misconduct are an insufficient basis on which to reject a claim of misconduct." *Heller*, 785 F.2d at 1528. A "juror will rarely" admit his own bias, because "the juror may have an interest in concealing his own bias, and . . . the juror may be unaware of it." *Id.*, quoting in part *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 104 S. Ct. 845, 558, 78 L. Ed. 2d 663 (1983) (Brennan, J., concurring). Appeals to racial prejudice are often not blatant. *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011). Subtle appeals to racial prejudice are "[p]erhaps more effective . . . . Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." *Id.*

Relying only on a voluntary poll of some jurors to inquire into another juror's claims of race-based hostility is not a meaningful inquiry into a fundamentally intolerable prospect that a conviction for murder was obtained by way of at least some jurors who use race-based tactics to obtain the agreement of 12 jurors.

This Court should grant review and reverse the Court of Appeals decision, because a juror's claim that her verdict was the product of a racially hostile environment requires close scrutiny and meaningful review.

2. The unreliability of identifying a gun based on fired bullets requires the court to prohibit the State from misleading the jury about the value of scientific evidence.

A forensic analyst's opinion that the markings on a bullet scientifically establish the firearm that shot it is fundamentally flawed, because this opinion does not rest on valid principles and methods and is not foundationally valid. President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016) ("Council Report") at 4-5, 105; National Research Council of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward,* 154 (2009).

Opinions of certainty in ballistics matching are "not scientifically defensible." Council Report at 29. "[U]sing markings on a bullet to attribute it to a specific weapon 'to the exclusion of every other firearm in the world' [is] an assertion that is not supportable by the relevant science." *Id.* at 30.

Many courts have limited firearm identification testimony due to these recent and unimpeachable reports on the lack of validity of accuracy underlying ballistic toolmark comparisons. *See Gardner v. United States*, 140 A.3d 1172, 1183-84 (D.C. 2016) (explaining recent criticism of ballistics-match opinion evidence); *Com. v. Pytou Heang*, 942 N.E.2d 927, 938 (Mass. 2011) (collecting cases where courts expressed "concerns" about scientific reliability and subjective nature of forensic ballistics comparisons); *United States v. Ashburn*, 88 F. Supp. 3d 239, 249 (E.D.N.Y. 2015) (barring expert from claiming certainty in match of firearms and bullets and cautioning against referring to comparison as "science"); *see also Willie v. State*, 204 So. 3d 1268, 1288 (Miss. 2016) (Kitchens, J., concurring) (defense attorney's failure to object to firearms matching testimony was ineffective assistance because "an expert cannot reliably testify in absolute terms that a bullet was fired from a specific firearm").

In *United States v. Glynn*, 578 F.Supp.2d 567, 570 (S.D.N.Y. 2008), the court similarly ruled that recent evidence casts doubt on the scientific "rigor" of ballistics identification testimony. It concluded that it would "seriously mislead the jury as to the nature of the expertise involved," if the examiner testified he matched ammunition to a particular gun. *Id.* at 571. The court limited the expert to saying a firearms match was "more likely than not;" without claiming any degree of certainty. *Id.* at 575.

Berhe asked the court to limit the State analyst's opinion of ballistics matches between the gun found under Washington's seat and the bullets from the scene. CP 37-38. But the court refused. CP 37. The prosecution offered testimony and argued the firearm found in the car matched the bullets and casings, based on science that is generally accepted, widely used and never debunked. 2/1RP 2695, 2472 ; *see also* 2658, 2694, 2969, 2698, 2702, 2730; 2/24RP 3261, 3342. The court thereby allowed jurors to rely on misleading scientific evidence, undermining the reliability of the proceedings.

This Court should grant review based on the substantial public importance of limiting jurors from relying on unsound or misleading

evidence cloaked in science and giving guidance to courts based on recent studies debunking the value of ballistic comparison testimony.

3. An accused person's refusal to answer questions during custodial interrogation is a presumptively prejudicial violation of the right to remain silent.

a. When a person expressly declares he does not want to answer police questions, police questioning must cease.

When a person expresses "an objective intent to cease communication with interrogating officers," questioning must cease. *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014); *Miranda v. Arizona,* 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); U.S. Const. amend. 5; Const. art. I, § 9. Even if a person initially waives his right to silence, he may invoke his "right to cut off questioning" at any time. *Miranda*, 384 U.S. at 474.

A suspect's statement "that he did not want to talk with police," invoked the "right to cut off questioning." *Berghuis v. Thompkins*, 560 U.S. 370, 382,130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). When a suspect says, "I don't want to talk about it," there "is nothing equivocal or ambiguous about this statement. Indeed, it is difficult to imagine a clearer refusal." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 684, 327 P.3d 660 (2014).

The Court of Appeals agreed the trial court erred by ruling Berhe did not invoke his right to remain silent when a detective asked him to explain what he was doing at the time of the incident and Berhe said:

> I don't even want to talk to you, dog. I don't even want to talk to you. I don't even want to talk to you or you.

CP 152; Slip op. at 9. As *Cross* explains, it is "objectively unreasonable" to conclude the declaration, "I don't want to talk" is equivocal. 180 Wn.2d at 684. By saying "I don't want to talk" three times, there was nothing ambiguous about Berhe's desire to cut off questioning.

The Court of Appeals ruled this error was harmless by calling it "a few extra lines of similar dialogue." Slip op. at 9. But this harmless error analysis did not presume the error harmful and it did not account for the additional harmful admission of other statements where Berhe invoked his right to silence by actually refusing to answer the questions posed.

b. When a person refuses to answer police questions, his behavior cannot be used as evidence against him.

Even after *Miranda* warnings, a suspect retains the right to selectively refuse to answer questions and no negative inference may

follow. *State v. Fuller*, 169 Wn. App. 797, 810, 832, 282 P.3d 126 (2012). Evidence denying participation in an offense is irrelevant, inadmissible, and not helpful to proving the charged offense. *Id.* at 805. When a suspect does not answer police questions in a post-*Miranda* interview, this response is not inculpatory – on the contrary, it is "inherently ambiguous" because the suspect may be relying on the right to silence. *Id.* at 815, quoting *Hurd v. Terhune*, 619 F.3d 1080, 1088 (9th Cir. 2010). Evidence of conduct indicating a person evades police is also only "marginally probative" of guilt because it is highly speculative whether it relates to the charged incident. *State v. Freeburg*, 105 Wn. App. 492, 498, 20 P.3d 984 (2001).

As *Fuller* dictates, a suspect's lack of cooperation during custodial interrogation may not be used as substantive proof of guilt. 169 Wn. App. at 185. Courts "will not accept pyramiding vague inference[s]" to infer that a person's behavior at the time of arrest resulted from "consciousness of guilt" of the particular charged offense. *State v. McDaniel*, 155 Wn. App. 829, 854, 230 P.3d 245 (2010).

The prosecution introduced into evidence Berhe's custodial statements to interrogating detectives. These statements were obtained after Berhe waited over seven hours alone in a small barren interview

room following his arrest. Ex. 63; 2/11RP 2263, 2289. From the outset, he refused to answer basic questions, including the name of the person he was with when arrested. Ex. 63RP 2-6, 8, 9.

Despite Berhe's refusal to answer questions, the court ruled his interactions with police admissible. This included the police berating Berhe for not "talk[ing] to me," and for refusing to "cooperate and answer some questions." CP 149-50; Ex. 63RP 7-8.

The jury learned Berhe was hostile because, "I already got a bad history with you guys." CP 150; Ex. 63RP 8-9. The prosecution had said it would omit this statement from the video played for the jury but it did not, and Berhe's "bad history" with the detectives was presented as evidence against him. 1/20RP 344; Ex. 63RP 8-9.

In addition, Berhe complained about being "treated like shit," accused the police of "playing fucking games" with him, and cursed many times. Ex. 63RP 5-8, 11-12.

These interactions highlighted Berhe's efforts to remain silent. It was presented as substantive evidence from which the jury could infer guilt despite its lack of probative value and its implicit invocation of the right to remain silent. The video of Berhe's interrogation offered no

evidence explaining the incident itself. Instead, it invited the jury to hold his silence against him. *Fuller*, 169 Wn. App. at 816, 818.

Taking together Berhe's plain invocation of his right to remain silent and his repeated refusals to answer specific questions, the admission of Berhe's statements to police violated his rights to remain silent under article I, section 9 and the Fifth Amendment. This Court should grant review based on the Court of Appeals refusal to presume the error prejudicial and its failure to treat Berhe's refusal to answer questions as evidence that used his right to remain silent against him.

4. The prosecution used improper tactics to secure a conviction.

Prosecutorial misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); U.S. Const. amend. 14; Const. art. I, §§ 3, 22.

It is "flagrant misconduct" for the prosecution "to shift the burden of proof to the defendant." *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). Improper burden shifting occurs when the prosecution presents the jurors with a "false choice" in what is required to acquit the defendant. *Id.* It is also misconduct for the prosecution to

mischaracterize the defense theory in rebuttal and improperly create a "straw man" that the prosecution may easily destroy. *State v. Thierry*, 190 Wn. App. 680, 694, 360 P.3d 940 (2015).

Here, the prosecution wildly exaggerated the defense's argument in rebuttal, repeatedly insisting the jury must "buy off" on several far-fetched theories to acquit. 2/24RP 3331-2. The defense objected but the court overruled these objections. *Id.* at 3332, 3340, 3343. This extreme version of the defense impugned their integrity, presented the jury with a false choice, and eroded the prosecution's burden of proof. By raising these arguments during rebuttal, it increased "their prejudicial effect." *Lindsay*, 180 Wn.2d at 443.

Prosecutors may not vouch for their witnesses' veracity or inject their own opinions or experience into the proceedings. *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (prosecutor's expression of personal opinion of guilt is improper). Courts have "emphasize[d] that prosecutors should not use 'we know' statements in closing argument." *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005). Vouching is particularly harmful because a prosecutor "carries a special aura of legitimacy" as a representative of the State. *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 2000).

Here, the prosecutor repeatedly told the jury "we know" various disputed facts; assured the jury of government's opinion of Berhe's guilt by saying "we are convinced he's the shooter"; and injected himself into the proceedings as if he were also a juror by telling jurors "we don't have to decide" some aspects of the case. The Court of Appeals agreed these comments were not a good choice but did not find them improper. Slip op. at 17.

The combination of trial errors may deprive a person of a fair trial, even where some errors viewed alone might not be grave enough to require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); U.S. Const. amend. 14; Const. art. I, § 3. The cumulative harm generated by errors in this case had an overarching prejudicial effect. By overruling the defense's numerous objections, the court lent "an aura of legitimacy to what was otherwise improper argument." *Davenport*, 100 Wn.2d at 764.

The prosecution's injection of what "we know" throughout its closing argument persuaded the jury to adopt the prosecution's version of events for improper reasons. Its impugning of defense counsel and misrepresentation of the law as well as the defense's argument undermined the jury's evaluation of the weaknesses in the prosecution's

case. Multiple errors occurred in a case where the evidence rested on tenuous eyewitnesses who did not see the incident and participants who gave conflicting stories and seemed to be hiding information. Review should be granted.

5. Recent case law demonstrates the court misunderstood its sentencing discretion to craft an exceptional term below the standard range for firearm enhancements.

The court's sentencing authority stems from statute. *See In re Mulholland*, 161 Wn.2d 322, 329-30, 166 P.3d 677 (2007). RCW 9.94A.535 gives the court authority to depart below the standard range when it identifies substantial and compelling reasons for doing so. *Id.* "While no defendant is entitled to an exceptional sentence . . ., every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson,* 154 Wn.2d 333, 342, 111P.3d 1183 (2005) (quoted in *Mulholland,* 161 Wn.2d at 34).

In *Mulholland,* the court held that the SRA gives the trial court discretion to impose a mitigated sentence of concurrent terms for serious violent offenses, even though RCW 9.94A.589(1)(b) states that sentences for these offenses must be consecutive. 161 Wn.2d at 329-31.

Likewise in *State v. McFarland*, 189 Wn.2d 47, 53-54, 399 P.3d 1106 (2017), this Court ruled the statutory provision directing firearm-related sentences be served consecutively did not prohibit a court from imposing concurrent terms as part of an exceptional sentence. Because there is "nothing in the SRA precluding concurrent exceptional sentences for firearm-related convictions," the court retains authority to impose such a sentence. *Id.*

Similarly to *Mulholland* and *McFarland*, a statute provides that firearm enhancements "shall" be imposed consecutively. RCW 9.94A.533. This makes the presumptive sentence for firearm enhancements consecutive terms, unlike the typical presumption of concurrent sentences for the standard range. *State v. Brown*, 139 Wn.2d 20, 27-28, 983 P.2d 608 (1999). But it does not prohibit a court from considering an exceptional sentence.

In *Brown*, the court held that the statute adding deadly weapon enhancements bars an exceptional sentence below the standard range for that enhancement. *Id.* As Justice Madsen explained in *State v. Houston-Sconiers*, 188 Wn.2d 1, 35, 391 P.3d 409 (2017) (Madsen, J., concurring), *Brown* misconstrued the controlling statutory language. The statutory scheme does not prohibit a court from imposing an

exceptional sentence that includes a firearm or deadly weapon enhancement. Indeed, it may amount to cruel and unusual punishment to misinterpret the statutory scheme in this fashion. *Id.* at 36. *Brown*'s misinterpretation of the statutory scheme is both incorrect and harmful because it requires courts to impose sentences far longer than a court believes the SRA otherwise mandates.

Neither RCW 9.94A.533 nor RCW 9.94A.535 prohibit the imposition of an exceptional mitigated sentence for firearm enhancements. RCW 9.94A.533 does not mention exceptional sentences. And RCW 9.94A.535 states that the multiple offense policy applies when case-specific mitigating circumstances arise.

Consequently, while the presumptive standard range for firearm enhancements provides for consecutive terms under RCW 9.94A.533, courts are not precluded from considering the applicability of a reduced term under the strictures of the exceptional sentence statute.

Here, the court agreed there was substantial and compelling reasons for an exceptional sentence involving concurrently imposed terms but believed it lacked authority to impose a concurrent sentence for the firearm enhancement. 5/26RP 172. Review should be granted to

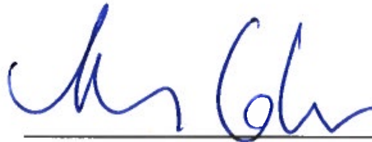
address whether recent case law describing the court's authority to impose an exceptional sentence applies to firearm enhancements.

E. CONCLUSION

Based on the foregoing, Petitioner Tomas Berhe respectfully requests that review be granted pursuant RAP 13.4(b).

DATED this 30th day of May 2018.

Respectfully submitted,



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TOMAS MUSSIE BERHE, Appellant.	DIVISION ONE No. 75277-4-I UNPUBLISHED OPINION FILED: February 5, 2018

DWYER, J. — Tomas Berhe was charged and convicted of murder in the first degree and assault in the first degree, each with a firearm enhancement. On appeal, Berhe contends that he was deprived of a fair trial based on racial animus among the jurors and flagrant prosecutorial misconduct. Berhe also contends that the trial court erred by permitting the State to admit evidence of statements that he made after invoking his right to remain silent, admitting ballistic evidence, and refusing to impose a sentence below the standard range. Finding no error warranting reversal, we affirm.

I

Shortly after midnight on July 22, 2013, Everett Williams was shot four times and killed while sitting in the front passenger seat of a parked vehicle. One bullet passed through Williams and struck the arm of Michael Stukenberg, who was sitting in the driver's seat of the vehicle. Several people in the surrounding area saw an individual flee the scene of the shooting in an automobile.

Police quickly matched the witnesses' description of the suspect vehicle with a vehicle driving erratically on the freeway, roughly 1.5 miles from the scene of the shooting. The individual sitting in the front passenger seat fit the witnesses' description of the shooter. Police pulled the vehicle over and detained the driver, Elijah Washington, and the passenger, Tomas Berhe. Police recovered a handgun from underneath the driver's seat.

Berhe was charged and convicted of murder in the first degree with a firearm enhancement and assault in the first degree with a firearm enhancement. The trial court polled the jury and each juror confirmed that the verdicts returned were the verdicts of the jury as a whole and the verdicts of that juror individually. The sentencing court imposed concurrent sentences of 300 months of confinement for the murder conviction and 113 months of confinement for the assault conviction. The sentencing court further imposed 60 months of confinement for each firearm enhancement, to be served consecutively. Berhe now appeals.

II

Berhe first contends that the trial court erred by permitting the State's ballistic examiner to offer opinion testimony during trial. Berhe asserts that ballistic testing is unreliable and scientifically dubious and that the expert's opinion was misleading and contrary to the underlying science.

In determining the admissibility of evidence based on novel scientific theories or methods, Washington courts employ the "general acceptance" standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). "The

Frye standard requires a trial court to determine whether a scientific theory or principle 'has achieved general acceptance in the relevant scientific community' before admitting it into evidence." In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (internal quotation marks omitted) (quoting In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993)). "When a party fails to raise a Frye argument below, a reviewing court need not consider it on appeal." In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006). Moreover, particularly where evidence is based on a routinely used and "familiar forensic technique," an objection to that evidence must be sufficiently specific to inform the trial court that a Frye challenge is intended. State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006).

"Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact." State v. Gregory, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006). "The qualification of an expert to give opinion testimony is a matter within the sound discretion of the trial court, and the trial court's determination will not be disturbed unless that discretion is manifestly abused." State v. Brown, 17 Wn. App. 587, 596, 564 P.2d 342 (1997).

Here, tool mark and firearms forensic scientist Kathy Geil testified on behalf of the State. Geil testified as to the procedure that she used to test the firearm recovered from the vehicle in which Berhe was detained. This procedure

involved test firing five bullets from the firearm and comparing the microscopic markings on the fired casings and bullets with those recovered from the crime scene. Geil testified that, after comparing the samples from her own test fired bullets to the bullets recovered from the crime scene, "I was able to see that they all had the same markings . . . I was able to identify them as having come—or as having been fired from this firearm."

During cross-examination, Berhe's counsel questioned Geil regarding the accuracy and scientific certainty of ballistic testing. Defense counsel asked Geil about the manufacturer of the firearm that was recovered by police. Counsel asked Geil if she knew how many firearms were produced by that same manufacturer. Geil did not know. Counsel then asked Geil whether it was possible that another firearm produced by that manufacturer could have similar microscopic irregularities as the firearm that was recovered by police. Geil stated that she had not examined every firearm produced by that manufacturer and therefore could not answer with certainty, but that she would assume that there would be some randomness in each firearm. Geil testified that she made her determinations based on her own experience.

Berhe's attorney then asked, "[Y]ou have told us that you cannot say with 100 percent certainty that these bullets and these cartridge cases, that it—you cannot say that it came from this particular gun to the exclusion of any other gun in the universe; you are not able to say that?" Geil replied, "Right. With a theoretical understanding that the worlds can collide, right. There is—

theoretically, I can't say to all exclusion to all other firearms, you know. We just haven't examined them."

On appeal, Berhe contends that ballistic testing is scientifically dubious and therefore unreliable. By so contending, Berhe "attempts to transform that which should have been raised as an evidentiary challenge in the trial court into a question of constitutional significance on appeal." In re Det. of Post, 145 Wn. App. 728, 755, 187 P.3d 803 (2008), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010). But Berhe did not request a Frye hearing in the trial court and, thus, has not preserved such an evidentiary challenge for review. Post, 145 Wn. App. at 755-56 (citing Taylor, 132, Wn. App. at 836).

Berhe also contends that Geil's testimony was misleading because it presented ballistic testing as "definitive science." The nature of Berhe's contention is unclear. Again, Berhe never requested a Frye hearing or objected to the use of ballistic testing evidence. Neither did Berhe object to Geil's qualifications to testify as an expert witness on this subject. Indeed, Geil thoroughly explained the procedure behind ballistic testing and its limitations. Geil did not, as Berhe asserts, testify that there was an "absolute and scientifically determined match" between the firearm and the bullets recovered from the crime scene. To the contrary, Geil made clear that her opinion was based on her own experience and that she had not examined every firearm in existence and, therefore, could not definitively rule out the possibility that another firearm might be a match.

Finally, Berhe contends that the trial court erred by denying his motion in limine to prohibit Geil and the prosecutor from characterizing ballistic testing as "science." Berhe raises this contention for the first time in his reply brief and has not assigned error to a related trial court ruling. Accordingly, we decline to reach this issue. RAP 10.3; see State v. Hudson, 124 Wn.2d 107, 120, 874 P.2d 160 (1994) (appellate courts will not consider arguments raised for the first time in a reply brief); see also Valente v. Bailey, 74 Wn.2d 857, 858, 447 P.2d 589 (1968) (appellate courts will not consider alleged errors that are not set forth in the "assignments of error" section of the brief).

There was no error.

III

A

Berhe next contends that the trial court erred by admitting statements that he made to police after invoking his right to remain silent. We agree, but deem the error harmless.

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution guarantee a criminal defendant the right to be free from self-incrimination. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. This right prevents the State from using statements made by the defendant during a custodial interrogation unless the defendant was informed of his or her Miranda[1] rights. In re Pers. Restraint of Cross, 180 Wn.2d 664, 682, 327 P.3d 660 (2014). "Any

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

waiver of these rights by the suspect must be knowing, voluntary, and intelligent." State v. Piatnitsky, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). "Even once waived, a suspect can invoke these rights at any point during the interview and the interrogation must cease." Piatnitsky, 180 Wn.2d at 412. "It is well established that Miranda rights must be invoked unambiguously." Piatnitsky, 180 Wn.2d at 413 (citing Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)). The inquiry is an objective one and asks whether "'a reasonable police officer in the circumstances would understand the statement to be [an invocation of Miranda rights].'" Piatnitsky, 180 Wn.2d at 413 (alteration in original) (quoting Davis, 512 U.S. at 459).

We review a trial court's erroneous admission of custodial statements for harmless error. Cross, 180 Wn.2d at 678. Constitutional error is harmless if we are "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result, despite the error." State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995).

Here, Berhe was advised of his Miranda rights at the time of his arrest. Berhe was then transported to the homicide unit and was again read his Miranda rights. Berhe concedes that, at that time, he waived his right to remain silent by engaging the detectives in conversation. The entire interrogation was audio and video recorded.

Berhe was hostile toward the detectives during the interrogation. For example, Berhe refused to tell the detectives where he was coming from the night that he was arrested. When asked why he would not answer, Berhe

responded, "You guys don't understand, man. You guys do not understand this shit. I kept trying to be, you know, cooperative and everything and try to talk to those guys out there and they just kept treating me like shit. . . . So why the fuck should I be treating anybody else better?" Berhe refused to answer the detective's questions concerning who owned the vehicle that Berhe was a passenger in when police arrested him.

> BERHE: I already know both you guys' styles. I already know how you guys do this shit. Okay. So I'm not going to play this sick game with you guys anymore.
> WEKLYCH: Who owns the car?
> BERHE: It doesn't matter.
> WEKLYCH: It doesn't?
> BERHE: It doesn't matter. What if you own it? What the fuck.

The detectives persisted in questioning Berhe despite his uncooperative attitude. At one point during the interrogation, Detective Russell Weklych asked Berhe what he was doing the night that he was arrested.

> BERHE: What do you mean, what I—I don't even want to talk to you, dog. I don't even want to talk to you. I don't want to talk to you or you.
> WEKLYCH: Why are you so ticked off?
> BERHE: Because I don't like that fucking smirk you got on your face looking at me like that. I know you're up to some fucking fucked-up ass games and I already have a fucking history with you. So it doesn't matter. And I know that shit right there is recording, I don't care.
> WEKLYCH: Okay.
> BERHE: I don't care. You're not telling me what the fuck I'm here for. Those officers didn't tell me what the fuck I'm here for. But you're just going to come in here and question me and try to role play me along.
> WEKLYCH: What would you like me to do?
> BERHE: I would like you not to talk to me about shit and tell me what the fuck I'm here for. All you telling me is, oh, I'm investigating an incident. What incident?

The trial court held a CrR 3.5 hearing to determine if and when Berhe invoked his right to remain silent. The trial court concluded that Berhe had unequivocally invoked his right to remain silent when Berhe told the detectives, "I would like you not to talk to me about shit and tell me what the fuck I'm here for." Accordingly, the trial court concluded that all of Berhe's statements prior to that statement were admissible.

Berhe contends that he unequivocally invoked his right to remain silent earlier in the interrogation. Specifically, Berhe asserts that he invoked that right when he stated, "What do you mean, what I—I don't even want to talk to you, dog. I don't even want to talk to you. I don't want to talk to you or you."

Berhe is correct. Viewing Berhe's statements objectively, a reasonable police officer in the circumstances would understand that Berhe was invoking his right to remain silent by repeatedly stating, "I don't even want to talk to you." By ruling otherwise, the trial court erred.

Nevertheless, the trial court's error was harmless. The two erroneously admitted utterances were irrelevant to the crime and did not reveal any new information to the jury. Contrary to Berhe's assertions, the erroneously admitted statements did not introduce the jury to Berhe's character and temperament. Berhe was hostile, combative, and uncooperative throughout the duration of the interrogation. The admission of a few extra lines of similar dialogue did nothing to change that. The error was harmless.

B

Berhe also contends that the trial court erred by admitting the videotape recording of his interrogation. Berhe asserts that the video recording was not relevant, that its probative value was outweighed by the danger of unfair prejudice, and that the trial court should have so ruled. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. In re Det. of Twining, 77 Wn. App. 882, 891, 894 P.2d 1331 (1995). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds or reasons. State v. Rodriquez, 187 Wn. App. 922, 939, 352 P.3d 200 (2015). A defendant's failure to object to the admission of evidence waives the issue on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).

Only relevant evidence is admissible. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Unfair prejudice "is that which is more likely to arouse an emotional response than a rational decision by the jury." State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990).

Here, Berhe raises several vague contentions concerning the trial court's decision to admit the video recording of his custodial interrogation. Berhe asserts that (1) the video recording was not relevant evidence because he did not admit to anything during the interrogation, and (2) the video recording was unfairly prejudicial because it showed him being combative and hostile toward the detectives and because he indicated during the interrogation that he had past experience dealing with the police.

As a preliminary matter, it does not appear that Berhe objected to the admission of the videotape recording. In his brief, Berhe asserts that he "asked to exclude the video" recording but the citation to the record that he provides reveals no such request. Rather, the record indicates that Berhe merely objected to the admission of certain statements made during the interrogation (concerning Berhe's past experiences with the police). Those statements were edited out of the video recording and Berhe's counsel approved of the edits. Thus, Berhe received the remedy that he sought.

But even had Berhe objected to the admission of the video recording on the grounds that he now raises, his claim would still fail. First, the video recording did not need to show Berhe admitting to a crime before it could be deemed at least "minimally relevant" because it showed Berhe lying to detectives concerning several key matters. Second, although Berhe's demeanor during the interrogation was certainly unflattering, he has not shown that the risk of unfair prejudice outweighed the probative value of the video recording. There was no abuse of discretion.

IV

Berhe next contends that the prosecutor committed flagrant misconduct throughout the trial, depriving him of a fair trial. This is so, he asserts, because the prosecutor improperly shifted the burden of proof, vouched for the credibility of the State's witnesses, expressed his personal opinion of Berhe's guilt, misstated the law, impugned the role and integrity of defense counsel, invited the jury to decide the case on emotional grounds, and made statements that invaded the province of the jury. None of these claims warrant appellate relief.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). A defendant must object to a prosecutor's improper argument at trial. "'[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.'" State v. Reed, 168 Wn. App. 553, 577-78, 278 P.3d 203 (2012) (alteration in original) (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994)). If a defendant does not object to the alleged misconduct at trial, the defendant is deemed to have waived any claim of error unless it is shown that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

A

Berhe first contends that the prosecutor, in rebuttal argument, impermissibly shifted the burden of proof by presenting the jurors with a "false choice" as to that which was required to acquit Berhe.

It is misconduct for a prosecutor to shift the burden of proof to the defendant. Miles, 139 Wn. App. at 890. A prosecutor engages in misconduct by arguing that the jury must conclude that the State's witnesses are either lying or mistaken in order to return a verdict of not guilty. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Similarly, "[t]he tactic of misrepresenting defense counsel's argument in rebuttal, effectively creating a straw man easily destroyed in the minds of the jury, does not comport with the prosecutor's duty to 'seek convictions based only on probative evidence and sound reason.'" State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)), review denied, 185 Wn.2d 1015 (2016).

However, a prosecutor has "wide latitude to argue reasonable inferences from the evidence." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "[T]he prosecuting attorney is entitled to make a fair response to the arguments of defense counsel." State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). In this regard, "[i]t is not misconduct for a prosecutor to argue that the evidence does not support the defense theory." State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

Here, counsel for Berhe argued during closing argument that Berhe was innocent, that the State ignored witnesses who contradicted its theory of the case, and that those witnesses who did testify on behalf of the State were lying.

> Over the last month, few weeks, month, you have heard from approximately 40 witnesses. They fall into two general categories: Eyewitness who didn't see what happened but are trying very hard to help. . . . The second category is witnesses from Everett's party circle who did see what happened, and they are trying very hard to obscure the truth.
>
> And there is actually a third group of witnesses in this case. These are the witnesses that the State ignored. . . . The State has ignored witnesses that contradict their story line just like the detectives did.

Berhe's attorney also argued that the State's witnesses were lying to protect the real killer.

> Claire is lying about what she saw to protect someone, and it's not Tomas. She had just met Tomas that day. Lucci, Elijah, and Mike are also lying. They are simply not consistent with themselves or each other. And the question then becomes not if they are lying but why? It is to protect someone, and it's not Tomas. They each point finger at Tomas in inconsistent ways, in ways that are uncorroborated by any forensic evidence or any eyewitness evidence.

In response to defense counsel's argument, the prosecutor's rebuttal argument included the following:

> The defense argument here can be really boiled down to this: It requires you to buy off on three principles.
>
> One is that there is a deep conspiracy to hide the true identity of the true killer.
>
> Two, there is a deep conspiracy to frame Berhe, the innocent patsy.
>
> And three, that Berhe is the unluckiest man in the world.
>
> You have to—their argument is that you have to buy off on all three of those theories because if one of them collapses, the whole defense argument collapses.
>
> Conspiracy Theory Number 1, that there is a deep conspiracy where Stukenberg, Cascioppo, and Washington are

> covering up for the real killer. That's certainly a theory. It's not supported by any evidence.

Berhe then interposed an objection, asserting that the prosecutor's rebuttal argument constituted burden shifting. The trial court overruled the objection. The prosecutor continued:

> There is no doubt that the burden of proving those elements that I showed you on the screen are mine. I'm not shifting that burden on them. All I'm saying is they come up here, and they have made an impassioned argument for an hour and 15 minutes, right?
>
> So what supports those arguments that they are making? They don't get to come up here and say a bunch of things and have you just accept them. Scrutinize it.
>
> Where is the evidence of this conspiracy theory?
>
> . . . .
>
> There is no evidence to support Conspiracy Theory Number 1, which is a conspiracy to hide evidence.
>
> The second prong that they absolutely have to have you believing is that—it's more far-fetched than Number 1—is that this deep conspiracy requires Stukenberg, Cascioppo, and Washington to not only cover up for the real killer, but they are willing to finger an innocent patsy.
>
> Where is the evidence of that?
>
> There is none.
>
> . . . .
>
> The conspiracy theory also requires you to believe that he is the unluckiest man in the world. Why I say that is because it requires you to ignore all the other evidence we talked about, the concrete, tangible, evidence.
>
> . . . .
>
> I don't want to sound flip, but this is the type of conspiracy that the wackiest conspiracy website would not even give any time to.
>
> I'll skate through this in the interests of time.
>
> They ask you to view evidence very differently than we do. It's up to you how you view the evidence.
>
> Again, I suggest that you view the evidence first by taking a look at what's concrete and what's tangible and working from there. They are asking you to kind of throw it all up on the wall and just take little bits and pieces from what people say and, since it's a big mess, throw your hands up in the air, and find him not guilty.

Contrary to Berhe's assertions, the prosecutor's rebuttal argument was not an improper characterization of the defense's theory. Berhe's counsel argued that Berhe was innocent and that the State and its witnesses were lying to protect the identity of the true killer. The prosecutor's rebuttal argument was a direct response to that argument. At no point did the prosecutor argue to the jury that it must believe the defense's theory or that it must disbelieve the State's witnesses before it could acquit. Rather, the prosecutor (1) summarized the argument made by defense counsel, (2) argued that there was no evidence to support the defense's theory, and (3) urged the jury to consider all of the evidence. Responding to defense counsel's argument and arguing that no evidence supports it is not misconduct. Brown, 132 Wn.2d at 566; Graham, 59 Wn. App. at 429.

B

Berhe next contends that the prosecutor improperly vouched for the credibility of the State's witnesses and injected his personal opinion into the case. This is so, he asserts, because the prosecutor repeatedly used "we know" statements during closing argument.

It is improper for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). "'Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.'" State v. Robinson, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015) (internal quotation marks omitted) (quoting

State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010)). "Prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." State v. Allen, 161 Wn. App. 727, 746, 255 P.3d 784 (2011) (internal quotation marks omitted) (quoting State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)), aff'd, 176 Wn.2d 611, 294 P.3d 679 (2013).

Here, Berhe asserts that the prosecutor used "we know" statements 18 times during closing argument. For example, the prosecutor stated during closing argument:

> But now let's look at James Brighton's testimony. Not in isolation, but in relation to all the other evidence that we already know is the tangible, concrete stuff. And when we can compare it to that stuff and we compare it to that evidence and we view it in conjunction with that evidence, we are convinced that Berhe is the shooter, right? It's proven beyond a reasonable doubt.

Berhe objected to the prosecutor's use of "we" at trial and contends on appeal that such statements constitute vouching.

As a preliminary matter, Berhe provides only a single out-of-state authority for the proposition that it is always misconduct for a prosecutor to use "we know" statements during closing argument. We have previously rejected such a contention. See Robinson, 189 Wn. App. at 894 (noting that "we know" statements are not always misconduct).

But that does not mean that "we" statements are always appropriate. To the contrary, courts routinely chastise prosecutors for the use of such statements. See United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005) (a prosecutor's use of "we know" "readily blurs the line between improper vouching and legitimate summary"); United States v. Bentley, 561 F.3d 803, 812

(8th Cir. 2009) (it is improper to use "we know" "when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility"); State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006) ("[A] prosecutor is not a member of the jury, so to use 'we' and 'us' is inappropriate and may be an effort to appeal to the jury's passions.").

However, a prosecutor's use of "we" or "we know" in argument is unlikely to warrant reversal. Although Berhe complains that the prosecutor used "we" statements repeatedly, he does not identify a single instance in which the prosecutor's use of such a statement placed the prestige of the government behind a witness or indicated that information not presented to the jury supported the State's case. See Robinson, 189 Wn. App. at 892-93. Here, as in Robinson, the prosecutor's use of "we know" did not imply special knowledge, express a personal opinion, or attempt to appeal to the jury's passions. 189 Wn. App. at 893-94.

Prosecutors should refrain from using "we" and "we know" statements during closing argument. The jury and the prosecutor are not aligned against the defendant. Nevertheless, the prosecutor's statements at issue here did not constitute vouching and, thus, did not constitute misconduct.

C

Berhe next contends that the prosecutor engaged in misconduct by misstating the law and by impugning the role and integrity of defense counsel during rebuttal argument.

A prosecutor commits misconduct by misstating the law in closing argument. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). It is also misconduct for the prosecutor to disparagingly comment on defense counsel's role or impugn the integrity of defense counsel. Thorgerson, 172 Wn.2d at 451.

Here, during closing argument, Berhe's attorney argued that the State had strategically declined to call certain witnesses to testify. Berhe's counsel suggested that these witnesses contradicted the State's time line.

> And there is actually a third group of witnesses in this case. These are the witnesses that the State ignored. The State's case, his opening statement, his closing statement, the State's case has been misleading. The State has ignored witnesses that contradict their story line just like the detectives did.
>
> . . . .
>
> Also, the State has mentioned only these two eyewitnesses, choosing to leave out all the contradictory 911 callers and neighbors.
>
> . . . .
>
> Despite the fact that there were nine people in the Eastlake parking lot that night, nine people who likely saw who the real shooter was, the State called Lucci, Claire, Mike, and Elijah. We did not hear from Dominic. Where was Dominic? We did not hear from Kevin Simmonson. Where was Kevin? We did not hear from Jonah Evett. Where was Jonah Evett? The State failed to call witnesses who would contradict their story line, just like the detectives failed to follow leads that pointed to a suspect other than Tomas.

Counsel for Berhe also noted during closing argument that the State failed to present evidence to corroborate a witness's testimony.

> Despite the fact that Detective Cruise told us he spoke to all other 13 homicide detectives at Seattle Police Department about recent homicides, he was unable to corroborate Elijah's story. There is no corroboration that Tomas even has family in Seattle, in Washington nor any corroboration that Elijah and Tomas even went to Greenlake that day.
>
> If the State could corroborate his story with cellphone tower data that they said—Detective Cruise said they received, he would

> have heard it. You would have heard that evidence. You didn't hear it because they don't have it. Detective Cruise told you himself he was never able to figure out any motive.

In rebuttal argument, the prosecutor responded to both arguments made by defense counsel.

> They talk about missing witnesses, and the way they phrased it, the way counsel phrased it, was the State didn't call Dominic, they didn't call Kevin, they didn't call Jonah because they would contradict their story line.
>
> Well, where does that come from? Is there evidence that Dominic, Kevin, and Jonah would contradict the State's story line? That's the inference they want you to draw, but there is no instruction at all that the Judge gave you that says if the State doesn't call a witness, you should draw a negative inference from that; you should assume that that person is going to contradict the State's story line. There is absolutely no authority for that. That's their theory. They want you to buy off on it, but it's not supported by the law.
>
> . . . .
>
> They talk about the cell tower evidence. What they ask you to assume—again, it's not in the law—but they have asked you to assume that since the State didn't present any of this evidence, it's bad for the State. There's no law that says that.

On appeal, Berhe contends that the prosecutor's rebuttal argument misstated the law and impugned the role and integrity of defense counsel. This is so, he asserts, because the prosecutor suggested that defense counsel did not have a right to argue that the State's failure to properly investigate and present evidence could be used to find reasonable doubt. Moreover, Berhe avers, the prosecutor's rebuttal argument maligned defense counsel by suggesting that defense counsel was deceiving the jurors.

As a preliminary matter, Berhe did not object to the prosecutor's rebuttal argument on these grounds at trial. Accordingly, he must demonstrate not only that the prosecutor's statements were both improper and prejudicial in the

context of the entire argument, but that the statements were "so flagrant and ill intentioned that no curative instruction would have been capable of neutralizing the resulting prejudice." Reed, 168 Wn. App. at 578.

Berhe's contentions are unpersuasive. Just as defense counsel was entitled to argue that the State had fallen short of meeting its burden, the prosecutor was entitled to make a "fair response to the arguments of defense counsel." Brown, 132 Wn.2d at 566. Additionally, nothing in the prosecutor's rebuttal argument served to impugn the role or integrity of defense counsel. Prosecutors are afforded significant latitude in closing arguments—it is not improper to disparage opposing counsel's arguments. Warren, 165 Wn.2d at 30. Moreover, even assuming that the prosecutor's rebuttal argument did misstate the law, Berhe has made no attempt to show that such a misstatement could not have been neutralized through a proper curative instruction. No appellate relief is warranted.

D

Berhe next contends that the prosecutor, in closing argument, improperly encouraged the jury to reach a verdict based on what "feels right."

It is misconduct for a prosecutor to appeal to the jury's passion and prejudice and encourage the jury to base its verdict on emotion, rather than on properly admitted evidence. Glasmann, 175 Wn.2d at 710.

Here, prior to discussing the elements of the charged crimes, the prosecutor made the following argument:

> The law is not a mystic thing, right? It's supposed to represent us as a society. That's what the law is. Our shared

> beliefs, our shared understanding, our shared morals. The law is simply a codification of it. We put it in writing, we have some numbers attached to it, and we put it all in a book. And that's what you have before you in the form of these jury instructions: The law.
>
> At first blush, you might look at this and think, God, that's really complicated, it's really wordy, it's killed a lot of trees. It might be confusing. But I suggest to you it's not. Take a look at it. If you are confused by it, read it again because if you read it carefully and you think about it, you will see that it makes sense. That's because the law is rooted in our common intellectual sense. The law is also rooted in our common moral sense. Rooted in our common intellectual sense and rooted in our common moral sense.
>
> What that means is if we apply the law to the facts that are proven at trial, if we follow the law, we are going to reach the correct verdict. And when we do that, because it's our shared common intellectual sense and our common moral sense, when we follow the law, it will feel right. And it will feel right—

Berhe interposed an objection, asserting that the prosecutor's argument constituted improper vouching. The trial court overruled the objection and the prosecutor continued:

> It will feel right here, intellectually. It will feel right here, morally. It will feel right here. That's because it makes sense. The law makes sense. It makes sense here.

Contrary to Berhe's assertions, the prosecutor's argument did not encourage the jury to render a verdict based on what "feels right." Rather, the context of the closing argument makes clear that the prosecutor was describing how *following and applying the law* "feels right." Such an argument is not misconduct. Indeed, "courts frequently state that a criminal trial's purpose is a search for truth and justice." State v. Curtiss, 161 Wn. App. 673, 701, 250 P.3d 496 (2011).

In any event, the trial court instructed the jury to reach a decision "based on the facts proved to you and on the law given to you, not on sympathy,

prejudice, or personal preference." The jury is presumed to have followed the court's instruction. Curtiss, 161 Wn. App. at 702. Berhe fails to establish error.

E

Berhe next contends that the prosecutor improperly misrepresented facts not in evidence during his examination of Detective Alan Cruise.

Prior to trial, counsel for Berhe sought to admit evidence of a firearm found on the body of the victim. Defense counsel explained that "there is evidence in this case that the firearm that was found on Mr. Williams' person was a firearm that he stole from Dominic Oliveri." Counsel continued, "It's the defense theory, obviously, that Mr. Oliveri had motive to kill Mr. Williams and sought to do so on the day of the incident." Counsel noted, however, that Berhe had no intention of calling Oliveri to testify because "[o]bviously, Mr. Oliveri will invoke his Fifth Amendment privilege. He likely won't be with us to discuss his take on it."

Neither counsel for Berhe nor the State had been able to directly contact Oliveri. Both parties had spoken to Oliveri's counsel, Tim Leary, who denied requests to speak with Oliveri and stated that Oliveri would exercise his right to remain silent if called to testify. Both parties recognized that Oliveri could not make a "blanket invocation" of his right to remain silent when he did not know what questions would be asked of him. Nevertheless, both parties notified the trial court that they would not seek to call Oliveri as a witness.

At trial, Berhe's attorney sought to implicate Oliveri by eliciting testimony from several witnesses. Several witnesses testified that Oliveri had disappeared

following the murder. In response to that testimony, the State elicited the following testimony from Detective Cruise, who was involved in investigating the case:

> Q. Let me ask you about Dominic Oliveri.
> A. Okay.
> Q. You told us that you did interview him pretty early on in this investigation.
> A. Yes.
> Q. Have you had throughout this investigation reliable contact information for Mr. Oliveri?
> A. I have.
> Q. Do you continue to have reliable contact information for Mr. Oliveri?
> A. I do.
> Q. Do you know if that information was shared with the defense?
> A. Yes, it was.

Berhe did not object to the prosecutor's line of questioning. Rather, following a brief recess, Berhe's attorney argued to the trial court that the prosecutor's questions created the insinuation that defense counsel spoke with Oliveri, did not like what he had to say, and decided to not call him to testify. The trial court agreed that the jury would wonder why Oliveri was not called to testify if both parties were in contact with him. Accordingly, the trial court permitted Berhe's counsel to elicit testimony clarifying that the parties had successfully contacted Leary, but not Oliveri himself. Furthermore, the trial court ruled that neither party could elicit testimony that Oliveri had invoked his Fifth Amendment rights.

On appeal, Berhe contends that the prosecutor's line of questioning improperly injected information implying that Oliveri was an available witness and

faulting the defense for failing to call him. Berhe also complains that the jury was never told that Oliveri was asserting his Fifth Amendment right to remain silent.

Berhe's contentions are unavailing. As discussed herein, Berhe did not object to the prosecutor's line of questioning. Rather, Berhe sought to elicit testimony clarifying that the defense had contact information for Oliveri's attorney, rather than contact information for Oliveri himself. The trial court granted Berhe's request. Detective Cruise later testified that he had contact information for only Oliveri's attorney and that Oliveri himself was unwilling to speak with Cruise. As for Berhe's contention that he was somehow prejudiced by the fact that the jury was not told that Oliveri was invoking his Fifth Amendment rights, counsel for Berhe explicitly told the trial court that he was *not* seeking to elicit such testimony. There was no error.

F

Berhe also contends that the prosecutor improperly invaded the province of the jury by eliciting opinion testimony about a surveillance video.

Detective Jon Engstrom testified on behalf of the State. Engstrom's role in this case was to provide technical investigation support. Specifically, Engstrom recovered surveillance video from a convenience store in Eastlake. Engstrom testified that, after collecting the surveillance video, he checked the date and time on the video and compared it to his cellular phone.

The State called Detective Cruise and the surveillance video was played for the jury. As the video was playing, the prosecutor asked Cruise various questions about the individuals who appeared in the video. Berhe objected to

the testimony. "Your Honor, Detective Cruise does not have any independent knowledge of what was going on on that day. He is just looking at the same thing the jurors are looking at. He does not have any expertise in reviewing this video. I would just ask that the jurors be allowed to see the video." The trial court ruled that the State could ask Cruise what he saw on the video.

On appeal, Berhe contends that the prosecutor improperly invaded the province of the jury by asking Cruise to identify the various people who appeared in the video. But Berhe fails to elaborate further as to how the complained of conduct constitutes prosecutorial misconduct. Berhe's contention is better framed as an assignment of error to the trial court's evidentiary ruling permitting Cruise to give lay opinion testimony concerning the identity of the individuals in the video.

We review a trial court's ruling admitting evidence for an abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), aff'd, 129 Wn.2d 211, 916 P.2d 384 (1996).

Berhe makes no argument that he was prejudiced in any way by Cruise's testimony concerning what he saw on the surveillance video. Indeed, he does

not even dispute that the individuals who appeared on the video were the same individuals identified by Cruise. Berhe's contentions that Cruise's testimony invaded the province of the jury and that the prosecutor committed misconduct by eliciting such testimony are nothing more than conclusory arguments, lacking support.

There was no error.

V

Berhe next contends that he was deprived of a fair trial because, he avers, racial animus existed among the jurors. Berhe asserts that the trial court erred both by not holding a full evidentiary hearing on the allegation and by denying his motion for a new trial. We disagree.

"Under Washington law, the right to a jury trial includes the right to an unbiased and unprejudiced jury." State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994). Minimal standards of due process are violated by the failure to provide a defendant with a fair hearing. Jackson, 75 Wn. App. at 543.

Trial courts have "significant discretion to determine what investigation is necessary on a claim of juror misconduct." Turner v. Stime, 153 Wn. App. 581, 587, 222 P.3d 1243 (2009). "A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). "In general, it is preferable to resolve the question of juror bias during voir dire rather than through a postverdict motion for a new trial. When, however, this type of issue is

raised postverdict and the moving party has made a prima facie showing of bias, an evidentiary hearing is always the preferred course of action." Jackson, 75 Wn. App. at 543-44.

We review a trial court's decision to deny a motion for a new trial for an abuse of discretion. Dean v. Grp. Health Coop. of Puget Sound, 62 Wn. App. 829, 834, 816 P.2d 757 (1991). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Littlefield, 133 Wn.2d at 46-47.

Here, following entry of the verdicts, one of the jurors (the holdout juror) voluntarily contacted defense counsel and stated that she believed that juror misconduct had occurred. Berhe sought a time extension to file a motion for a new trial and the State requested a hearing to discuss the motion. In the interim, the trial court was contacted by at least one other juror who complained of unsolicited contact from defense counsel. Following a hearing, the trial court ordered the parties to refrain from initiating further contact with the jurors. The trial court sent a letter to the jurors, informing them that counsel would like to speak with them and providing them with counsel's contact information.

Defense counsel worked with the holdout juror to craft a declaration that set forth the holdout juror's concerns. The declaration stated that the holdout juror did not believe that Berhe was guilty, that she felt personally attacked and belittled during the deliberation process, and that she felt that these attacks were the result of implicit racial bias.

The holdout juror stated in her declaration that she was accused of being "partial" toward Berhe because she was the only African American juror. The holdout juror stated that some jurors reacted negatively and verbally aggressively toward her after she raised concerns about police misconduct toward African Americans. The holdout juror stated that the treatment that she received from the other jurors made her feel "emotionally abused; so much so that it became debilitating," and that she "couldn't handle the pressure of being a hold-out anymore."

The holdout juror's declaration set forth no allegations of racially charged remarks or race-based derision made by the other jurors. Neither did the declaration allege that the jurors were biased against Berhe because of his race. Rather, the declaration consisted of the holdout juror's subjective impressions regarding the other juror's conduct and the conclusory statement that such conduct must have been the result of implicit racial bias.

Six other jurors voluntarily contacted the prosecutor and provided declarations concerning the deliberation process. Each juror was asked two questions: (1) "Did you personally do anything to [the holdout juror] which was motivated by racial bias during deliberations?" and (2) "Did you observe any other juror do anything to [the holdout juror] which appeared to be motivated by racial bias during deliberations?" Each of the jurors answered both questions in the negative. Several of the jurors expressed frustration with the holdout juror because, although she resisted the notion that Berhe was guilty, she "could not support her position with any of the evidence," "bas[ed] her position on sentiment

rather than facts & reasoning," and "had not been open[] minded during the entire process."

The trial court considered the declarations submitted by each party. The trial court observed that the holdout juror was the only African American on the jury and that she was the last juror to vote to convict. The trial court further noted:

> In her declaration, [the holdout juror] stated that she felt personally attacked by her fellow jurors.
>
> . . . The jury was polled at the time of the verdicts. Each juror was asked if the verdicts were the verdicts of the jury as a whole and that juror's verdicts individually. Each juror, including [the holdout juror], verbally stated that the verdicts returned were the verdicts of the jury as a whole and that juror's verdicts individually.
>
> . . . The only evidence to support [the holdout juror's] subjective feeling that she was attacked by her fellow jurors because of her race comes from [the holdout juror's] declaration.
>
> . . . The only evidence that race may have inappropriately been discussed by the jurors during deliberations comes from [the holdout juror's] declaration.
>
> . . . The only evidence that members of the jury were implicitly or explicitly racially bias[ed] or inappropriately considered race comes from [the holdout juror's] declaration.

The trial court arrived at the following conclusions:

> It is not inappropriate for jurors to press other jurors on their respective positions during deliberations.
>
> . . . The remaining hold-out juror is frequently subject to pressure by fellow jurors and such pressure is not inappropriate.
>
> . . . The court finds that there is insufficient evidence to conclude that juror misconduct occurred with respect to racism – implicit or explicit.

> . . . Mr. Berhe failed to make a prima facie showing of juror misconduct warranting an evidentiary hearing. State v. Jackson, 75 [Wn. App. 537, 879 P.2d 307] (1994).

On appeal, Berhe asserts that the holdout juror's declaration necessarily constitutes a prima facie showing of racial bias and that the trial court erred by failing to hold an evidentiary hearing in light of that declaration. Berhe relies on our opinion in Jackson, 75 Wn. App. 537, in support of this proposition.

Jackson involved an African American defendant who moved for a new trial based on allegations of racial bias and misconduct by one of the jurors (juror X). Jackson obtained a declaration from a juror who overheard juror X making racially charged statements during deliberations. For example, juror X was overheard complaining about having to interact with people of color during a family reunion: "The worst part of the reunion was that I had to socialize with the coloreds," "[y]ou know how those coloreds are." Jackson, 75 Wn. App. at 540 (internal quotation marks omitted).

The trial court in Jackson considered the declaration and denied the motion for a new trial, finding that juror X's statements did not indicate racial bias. 75 Wn. App. at 542. We reversed, holding that the trial court erred by denying Jackson's motion for a new trial without first conducting an evidentiary hearing.

> The trial court, however, decided not to conduct an evidentiary hearing and, based only on the affidavit, denied Jackson's motion for a new trial. In a case where the defendant was African-American, the defendant's alibi witnesses were African-American, and the ultimate outcome turned on credibility, this was error. An evidentiary hearing was the only appropriate course of action given Jackson's prima facie showing of racial bias. Accordingly, we hold that as a matter of due process, the trial court erred when it ruled on Jackson's motion for a new trial without having conducted an evidentiary hearing.

Jackson, 75 Wn. App. at 544 (footnote omitted). In so holding, we noted that Juror X's statements "create[d] a clear inference of racial bias" and that such statements "demonstrated that juror X held certain discriminatory views which could affect his ability to decide Jackson's case fairly and impartially." Jackson, 75 Wn. App. at 543.

Here, unlike in Jackson, the holdout juror's declaration contained no details buttressing the allegation of racial bias. The declaration set forth the holdout juror's subjective perceptions concerning the conduct of the other jurors and the holdout juror's belief as to the reasons for that conduct. The trial court credited the holdout juror's perceptions. But, the court concluded, those perceptions did not indicate racial bias among the jurors. Rather, the trial judge reasoned, they reflected pressures commonly experienced by holdout jurors. The holdout juror's assertion of racial bias was, thus, a conclusory allegation lacking particularized factual support.

The trial court approached this issue in a deliberate and careful manner. The trial court considered the holdout juror's declaration and found that the allegations contained therein, taken at face value, were insufficient to establish a prima facie showing of racial bias. In so ruling, the trial judge had "the advantage of observing the demeanor of the jurors during voir dire and throughout the trial." Dean, 62 Wn. App. at 838. The judge's decision to deny Berhe's request for a more expansive evidentiary hearing or a new trial was tenable and consistent with the standards articulated in Jackson, 75 Wn. App. at 544.

The trial court did not abuse its discretion by proceeding as it did. Nor did it err by concluding that neither a fuller hearing nor a new trial was warranted.

VI

Berhe next contends that the sentencing court misunderstood its authority to impose concurrent sentences for each of the firearm enhancements.

Berhe was sentenced to a total term of confinement of 420 months. Berhe's sentence consisted of a 300 month standard range sentence for the murder charge and a 113 month standard range sentence for the assault charge, to be served concurrently. The court imposed two 60 month sentences for the firearm enhancements, to be served consecutively. The court rejected Berhe's request to have the firearm enhancements served concurrently after finding that it did not have the authority to do so.

On appeal, Berhe contends that the court erred by refusing to impose concurrent sentences for the firearm enhancements. This is so, he asserts, because the court misunderstood its authority to impose such a sentence.

Pursuant to RCW 9.94A.533(3)(e), firearm enhancements are "mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." This statutory language deprives sentencing courts of the discretion to impose an exceptional sentence with regard to firearm enhancements. State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999).

Nevertheless, Berhe asserts that Brown is no longer good law and that State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), provides such

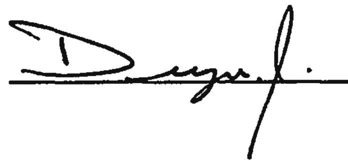
discretion to sentencing courts. He is wrong. Houston-Sconiers holds that "sentencing courts must have complete discretion to consider mitigating circumstances *associated with the youth of any juvenile defendant*." 188 Wn.2d at 21 (emphasis added). Accordingly, Houston-Sconiers overruled the holding in Brown "with regard to juveniles." Houston-Sconiers, 188 Wn.2d at 21.

Berhe is not a juvenile. Accordingly, his sentence was unaffected by the Houston-Sconiers decision.

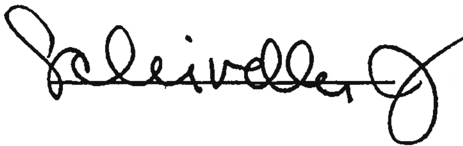
VII

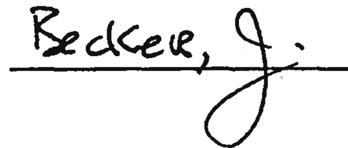
Finally, Berhe contends that cumulative errors mandate the reversal of his conviction. Other than the single, harmless error of admitting certain custodial statements, Berhe has not demonstrated any trial court error. There is nothing to accumulate. Accordingly, this contention does not warrant appellate relief.

Affirmed.



We concur:





APPENDIX B

FILED
4/30/2018
Court of Appeals
Division I
State of Washington

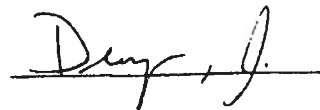
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TOMAS MUSSIE BERHE, Appellant.	DIVISION ONE No. 75277-4-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Tomas Berhe, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75277-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: May 30, 2018

WASHINGTON APPELLATE PROJECT

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