Supreme Court No. 96540-4
(COA No. 76005-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON GAMACHE,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. IDENTITY OF PETITIONER

Jason Gamache, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Gamache seeks review of the Court of Appeals dated October 22, 2018, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals ruled Mr. Gamache could not raise a confrontation clause violation on appeal because his lawyer objected to an officer recounting hearsay statements from a non-testifying witness without citing the constitutional provision underlying this error. This Court is presently reviewing a similar issue in *Burns*, S.Ct. No. 95528-0. Should this Court grant review of the confrontation clause violation that occurred when a police officer told the jury information he learned from a non-testifying witness who was reporting a crime, where the Court misapplied the rules governing a person's ability to raise manifest constitutional issues on appeal?

2. Because jurors are easily swayed by DNA evidence, mischaracterizing DNA evidence is particularly prejudicial. The prosecution misrepresented the facts in evidence by repeatedly telling jurors DNA definitively connected Mr. Gamache to the killing. Several state courts have reversed convictions predicated on similar misconduct. Should this Court grant review to address the harmful effects of prosecutors misleading the jury about DNA evidence?

3. The court instructed the jury it could convict Mr. Gamache of felony murder based on either robbery or attempted robbery, but the State offered no evidence that a robbery or attempted robbery preceded and was causally connected to however the death occurred. Should this Court grant review based on the lack of evidence critical to establishing felony murder?

D. STATEMENT OF THE CASE

Wayne McCune died in his home from stab wounds on August 2, 2013. 8/16RP 463, 479.[1] He was 60 years old and suffered from disabling back pain for which he took potent pain medications daily. 8/2RP 180-81, 188. Due to his chronic pain, he had long contemplated

[1] The verbatim report of proceedings is referred to by the month and date of the hearing. All cited hearings occurred in 2016.

suicide and his wife assumed he took his own life when she found him; but investigators later determined the wounds were not self-inflicted. 8/2RP 188-89, 217; 8/16RP 479. It is possible that someone stole pain pills from him on the day he was killed but Ms. McCune did not know if any were missing. *Id.* at 228. Mr. McCune did not lock his front door when he was at home. *Id.* at 218.

Several forensic experts estimated his time of death as between 2 and 4 p.m., including medical examiner Michelle Lubin, although Dr. Lubin could not "rule out" an earlier time of death. 8/16RP 454-55; 8/17RP 681; 8/22RP 920-21; 8/23RP 1072-74. A neighbor saw Mr. McCune at about 1:15 p.m., walking his dog. 8/18RP 740. Security cameras from Muckleshoot Casino showed Jason Gamache inside the casino continuously from 10:35 a.m. until 5:33 p.m. this day, as well as from 8:54 to 9:04 a.m., leaving a short time in the morning when his actions were not constantly monitored. 8/9RP 808, 818-39.

Mr. Gamache previously lived near Mr. McCune, in a duplex next door to Ruby Jo and Bill Brazeal. 8/8RP 714. The Brazeals were "best friends" with the McCunes. 8/2RP 194. Ms. Brazeal suffers from severe back pain and needs daily medication, and Mr. McCune would sometimes give her pills if she needed them. 8/8RP 711-12, 771, 774.

She was also friends with Mr. Gamache, and was at the casino with him the day Mr. McCune died. 8/8RP 724. That day, Mr. Gamache gave her a single opened capsule with granules that she guessed was Avinza, a pill Mr. McCune took. 8/8RP 742-43. But Ms. Brazeal said she could not remember "diddly squat" about the day. 8/8RP 767; *see also Id.* at 776 ("I don't remember half of this BS.").

On January 9, 2012, almost two years earlier, Mr. McCune accused Mr. Gamache of entering his home while he was napping and trying to take one of Mr. McCune's pain pills. 8/8RP 687-88. Before this incident, the men were friends and they shared pain pills they both were prescribed for injuries. *Id.* at 690. Mr. McCune called the police in 2012, reported his suspicions, and told the officer to tell Mr. Gamache he was no longer welcome in his home. *Id.* at 687-89, 692.

No forensic trace of Mr. Gamache was found in Mr. McCune's home. The police did not test blood stains on the wall near Mr. McCune, obtain fingerprints from the wall surfaces near his body, or find fibers linking Mr. Gamache with Mr. McCune's home. 8/22RP 831, 836, 843-45; 8/23RP 1011-12.

When Mr. Gamache was arrested five days after Mr. McCune's death, the toe box of his right shoe had a small drop of blood which a

forensic scientist concluded contained Mr. McCune's genetic profile at a statistical likelihood of one in 850 quadrillon. 8/9RP 852; 8/17RP 550-51. One forensic expert doubted the spot of blood could have been deposited during the incident based on its shape and when the shoe had no blood on the bottom tread. 8/22 888, 896-97, 933.

Police searched Mr. Gamache's car. 8/3RP 356. They found a purple rag with tiny, partial, incomplete DNA profile that was a mixture of at least two people's DNA. 8/17RP 565-66. Mr. Gamache was ruled out, but the partial profile could have been Mr. McCune's, at a ratio of 1 in 260,000 people in the United States. *Id.* Several days after Mr. McCune died, the police took a bag of Mr. McCune's pill bottles from Mr. McCune's sister-in-law. 8/2RP 228; 8/18RP 710-11. The lid of one pill bottle contained a DNA mixture of several people, including Mr. McCune. 8/17RP 566-67. They could not determine the second contributor but Mr. Gamache could not be ruled out and it was "230 times more likely" than random in the U.S. population that the incomplete genetic profiles reflected a mixture of both men's DNA on this one pill bottle's lid. 8/17RP 567.

The prosecution charged Mr. Gamache with first degree felony murder premised on committing or attempting to commit second degree

robbery. CP 1. In its opening statement and closing argument, the prosecution insisted the DNA on the pill bottle "matches" Mr. McCune and Mr. Gamache, and the DNA on the cloth mitt "belong[ed] to Wayne McCune," which was proof beyond a reasonable doubt. 8/1RP 211; 8/24RP 229, 232, 237. Mr. Gamache was convicted as charged and received a standard range sentence based on an offender score of "0." CP 172, 199-201.

Other factual details from this lengthy trial are presented below and in argument sections of Appellant's Opening and Reply Briefs.

E. ARGUMENT

1. The Court of Appeals impermissibly permitted the State to center its case on speculative evidence of a prior uncharged allegation of wrongful conduct that should never have been admitted.

a. Evidence of uncharged wrongful conduct is inadmissible to show the accused has a propensity to commit similar misconduct.

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. It includes the right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

Due process protects against the admission of unreliable evidence. *Michigan v. Bryant*, 562 U.S. 344, 370 n.13, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011); U.S. Const. amends. 5, 14; Const. art. I, § 3. Erroneous evidentiary rulings, including admitting unreliable hearsay evidence, may "rise to the level of a due process violation." *Bryant*, 562 U.S. at 370 n.13 (citing inter alia *Montana v. Egelhoff,* 518 U.S. 37, 53, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)).

The prosecution's case relied heavily on allegations that almost two years before the charged crime, on Mr. Gamache entered Mr. McCune's home without permission and tried to steal a pain pill. Mr. Gamache objected under ER 403's rule barring evidence that is more prejudicial than probative, ER 404(b)'s prohibition on uncharged acts, and ER 801's prohibition on out-of-court statements admitted for their truth. CP 26-28; 7/13RP 35-36; 7/20RP 197-98. Because the prosecution wanted to prove this allegation with out-of-court accusations made to the police by non-testifying witnesses, the evidence was also barred by the confrontation clauses of the Sixth Amendment and Article I, section 22.

b. The Court of Appeals improperly ruled a confrontation clause violation requires an express citation to the constitution based on a distorted reading of RAP 2.5.

This Court has granted review in a case challenging Division One's determination that confrontation clause violations are completely insulated from review where the evidence is objected to below but the confrontation clause is not expressly cited to the trial court in the course of that objection. *State v. Burns*, 191 Wn.2d 1004, 428 P.3d 123 (2018) (granting review on "whether a confrontation clause issue may be raised for the first time on appeal). The unpublished Division One opinion for which this Court granted review cited *State v. O'Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012), for the proposition that "the right to confrontation is lost" if the objections raised at trial involve hearsay rather than confrontation. *Burns*, COA No. 75537-4-I, 2018 WL 418759, *5 (2018) (unpublished).

Just as Division One did in *Burns*, it ruled Mr. Gamache is not entitled to review of the confrontation clause violation that arose when the State introduced evidence of statements made to a police officer in the context of investigating an alleged crime. Slip op. at 12. While Mr. Gamache did not cite the confrontation clause, he explicitly objected on the basis that no competent witnesses could explain what Mr. McCune

told the police years earlier. The officer's testimony recounting what Mr. McCune told him was testimonial and its erroneous admission is a manifest constitutional error in addition to being implicitly presented to the court in the context of the defense objections.

This Court should grant review to determine whether Division One's determination that confrontation clause violations are waived unless counsel provides technically precise objections is contrary to both RAP 2.5 and case law according a person the right to raise constitutional errors on appeal. *See, e.g., State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007) ("Kronich's Confrontation Clause claim involves a manifest error affecting a constitutional right and is thus subject to review despite his failure to properly preserve the issue at trial."). Because the connection between the 2012 incident and the charged crime were critical to showing Mr. Gamache's involvement, the officer's testimony was important to the State's case and cannot be harmless beyond a reasonable doubt. *See State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012).

c. The Court of Appeals unreasonably forgave the trial court for failing to accurately assess the clear test for admissibility of uncharged conduct.

ER 404(b) categorically bars evidence used to show the accused person is the type of person who would commit the crime because he did a similar wrongful act in the past. *State v. Gresham,* 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli,* 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Allegations of uncharged misconduct are presumed inadmissible. *State v. Everybodytalksabout*, 145 Wn.2d 456, 465-68, 39 P.3d 294 (2002). ER 403 likewise requires a court to weigh the prejudicial effect of evidence against its valid probative value.

Before a court admits uncharged misconduct, it must find the evidence is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused's propensity to commit certain acts, and (3) its substantial probative value outweighs its prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing *Saltarelli*, 98 Wn.2d at 362); ER 404 (b).[2] Doubtful cases should be resolved in favor of the defendant. *Smith*, 106 Wn.2d at 776.

[2] Under ER 404(b):

The court's ER 404(b) "analysis must be conducted on the record." *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (internal citation omitted). Here, the court admitted the January 2012 allegation after deeming it relevant, without completing the mandatory ER 404(b) analysis. 7/19RP 182-83, 7/20RP 198-99; *see Smith*, 106 Wn.2d at 776.

Relevancy alone is inadequate for admitting an allegation of an uncharged, similar attempted theft from the same victim. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999) ("Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith"). Even if relevant, the court may not admit other crimes evidence if "its probative value is outweighed by danger of prejudice." *State v. Holmes*, 43 Wn. App. 393, 400, 717 P.2d 766 (1986). Because the court did not weigh the prejudicial effect, and never determined that the evidence would not be unfairly used to find Mr. Gamache "acted in

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> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

conformity with his propensity to commit crimes," it did not properly apply the controlling legal framework. *Id.*

The court agreed that if Mr. Gamache tried to steal before, it could show he did so here. 7/13RP 32-34. To imply Mr. Gamache is the thief now because he was a thief before constitutes propensity evidence. *State v. Briejer*, 172 Wn. App. 209, 226-27, 289 P.3d 698 (2012); *State v. Trickler*, 106 Wn. App. 727, 734, 25 P.3d 445 (2001).

The court improperly admitted evidence that Mr. Gamache previously tried to steal pills from Mr. McCune under ER 404(b) and ER 403 because it let jurors infer that because he stole once, he must have stolen again. The prior wrongful conduct was used for propensity purposes and its unfair prejudice fair outweighed its probative value.

The court's failure to conduct the mandatory analysis and admit this evidence requires review. The Court of Appeals summarily concluded this error did not materially affect the outcome of the case, but this evidence was a linchpin for the State and its admission was crucial.

2. This Court should review the clear prejudicial effect of the prosecution misleading the jury about the scientific value of DNA evidence.

a. Several other state courts treat the dangerous consequences of the State misleading the jury about DNA evidence as significantly prejudicial.

"[J]urors place a great deal of trust in the accuracy and reliability of DNA evidence." *Whack v. State*, 73 A.3d 186, 188 (Md. 2013); *see Maryland v. King*, _ U.S. _, 133 S. Ct. 1858, 1966, 186 L. Ed.2d 1 (2013) (significance of DNA to criminal justice system is undisputed).

When a prosecutor overstates the strength of DNA evidence, in a case where DNA evidence is of central importance, it undermines the fairness of the proceedings. *Whack*, 73 A.3d at 188, 198. A prosecutor's claim that DNA evidence "directly linked the defendant to the murder although it did not" is likely to have a "powerful influence on the jury." *People v. Wright*, 37 N.E.3d 1127, 1135 (NY 2015). The prosecution "must abide by the limitations of its own proof and not make claims that its DNA evidence is more probative than the expert's testimony has shown it to be." *Duncan v. Commonwealth*, 322 S.W.3d 81, 96 (Ky. 2010).

In *Wright*, DNA evidence showed the defendant could not be excluded from a mixed sample on a ligature. 37 N.E.3d at 1127. But the

prosecutor argued it was the defendant's "DNA profile included on the ligature" and "matches" him. *Id.* at 1135. New York's highest court ruled that defense counsel's failure to object to the prosecution's inaccurate claim DNA evidence was conclusive constituted ineffective assistance of counsel, because it was contrary to the trial testimony and is powerfully influential to jurors. *Id.* at 1136-37.

In *Duncan*, the prosecutor acted as if the evidence showed the defendant's DNA was present but the evidence did not "reasonably yield" such a claim. 332 S.W.3d at 92. "[G]iven the immense weight jurors are apt to accord DNA evidence" the prosecutor's misrepresentation of the strength of DNA evidence rendered the trial manifestly unfair. *Id.* at 93.

b. The prosecution's thematic misrepresentation of DNA evidence merits review by this Court due to the lack of controlling case law and the unfairness of the argument.

In both opening statements and closing argument, the prosecution insisted DNA evidence from a pill bottle belonged to Mr. Gamache. 8/24RP 237 (Mr. Gamache's DNA "is on the empty [pill] bottle."); 8/1RP 211 (DNA on pill bottle "matches" Mr. McCune and Mr. Gamache). But the evidence only yielded a limited and confusing potential statistical likelihood of Mr. Gamache's connection to the pill

bottle. There was an inconclusive profile from which Mr. Gamache could not be excluded as part of a mixed sample, and statistically it was only 230 times more likely than random within the U.S. that both Mr. McCune and Mr. Gamache's DNA was on this critical piece of evidence. 8/17RP 567. Yet the prosecution characterized this DNA as a "match" and "damning evidence" undercutting Mr. Gamache's claim he had not seen Mr. McCune in over one year. 8/24RP 228-29; 8/1RP 211.

It repeated this argument, claiming that "invisible" evidence on the pill bottle was a "mixture of DNA, Wayne McCune's and the Defendant's." 8/24RP 231-32. He contended Mr. Gamache's failure to explain his DNA proved his guilt because "[w]e know" his DNA was put there recently. *Id.* at 232. He referred to the pill bottle as one with "Mr. Gamache's DNA." *Id.* at 232. This DNA evidence was "proof beyond a reasonable doubt," according to the prosecutor. *Id.* at 233.

The prosecutor also overstated the DNA evidence on the cloth mitt in Mr. Gamache's car. 8/17RP 564; 8/1RP 211. DNA analyst O'Neill concluded "human blood was detected" on the mitt in a few small spots. 8/17RP 564; Ex. 89 (slides 47-49). One part of the mitt revealed a "partial profile mixture," meaning it was not sufficient to show anyone's profile. 8/17RP 565. This sample was consistent with

two contributors, the major contributor matched Mr. McCune's profile at a statistical likelihood of 1 in 260,000. 8/7RP 566. Otherwise there was only inconclusive trace evidence on the mitt. *Id.*

Since there are over 326.1 million people living in the United States, the likelihood of this profile belonging to another person at random at a likelihood of 1 in 260,000 people is far from definitive.[3] Yet the prosecutor presented this evidence to the jury as a conclusive match without qualification. The prosecutor described the evidence as "a bloody rag with Wayne McCune's DNA on it," which is "really powerful stuff just by itself," even though the "rag" was also far from bloody. 8/24RP 229.The prosecutor repeatedly insisted that the "cloth rag or mitt" has "got Mr. McCune's DNA on it." 8/24RP 229-31. And he called it extremely damning evidence" against Mr. Gamache. 8/24RP 229-31; *see also Id.* at 233 ("you have the rag"). The prosecutor never mentioned the limited statistical likelihood, and instead presented it as definitive proof of a single match to Mr. McCune.

Overstating the probative value of DNA evidence is substantially likely to mislead the jury. *Whack*, 73 A.3d at 188;

Duncan, 322 S.W.3d at 93. The prosecution is never permitted to make claims about the evidence that are not supported by the record. *State v. Ramos*, 164 Wn. App. 327, 341, 263 P.3d 1268 (2011). Exaggerating the value of DNA evidence is likely to confuse the jurors, who will place great weight in DNA evidence. *State v. Bloom,* 516 N.W.2d 159, 169 (Minn.1994) ("we will not hesitate to award a new trial to a defendant if our review of the trial record reveals that quantitative or qualitative DNA identification evidence was presented in a misleading or improper way.").

These misstatements were not isolated comments, but part of the prosecution's theme where this DNA connection was critical to the case. The prosecution's thematic insistence that DNA evidence from the pill bottle and rag conclusively established Mr. Gamache's guilt, when the evidence did not support this contention, could not have been effectively erased from the jury's consideration by an instruction to base the verdict on their recollection of the record. *See State v. Evans*, 163 Wn. App. 635, 647, 260 P.3d 934 (2011).

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[3] World Population Review, available at: http://worldpopulationreview.com/countries/united-states-population/ (last viewed Sept. 28, 2017).

This Court should grant review because outsized effect DNA evidence has in case requires the State to use it properly for a trial to be fair. *See State v. Monday*, 171 Wn.2d 667. 676, 257 P.3d 551 (2011) ("The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated").

These errors were not alone. The prosecution also used prejudicial testimony of Mr. Gamache's arrest for other crimes. Opening Brief at 43. It elicited the bolstering expert opinion of the chief medical examiner who did not testify, to vouch for its own witness on the time of death, which was a critical point because Mr. Gamache could not be guilty unless the State proved the killing happened at a certain time. *Id.* at 44-46. These combination of trial errors deprived a Mr. Gamache of a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); U.S. Const. amend. 14; Const. art. I, § 3.

3. Absent evidence that an alleged robbery occurred before and caused the death, there was insufficient evidence of felony murder.

Felony murder requires the prosecution to prove that the accused person committed or attempted to commit a particular felony and "in the course of or in furtherance of . . . or in immediate flight" from this felony, the accused person caused the death of another person. RCW

9A.32.030(1)(c). The prosecution must prove each element of the crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. "[W]hen at least one means lacks sufficient evidentiary support," the prosecution fails to meet its burden of proof. *State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017).

It is essential for the State to prove an "intimate connection" between the killing and the felony. *State v. Brown*, 132 Wn.2d 529, 607-08, 940 P.2d 5456 (2007). The felony and resulting death must be "in close proximity in terms of time and distance." *Id.* "In other words, more than a mere coincidence of time and place is necessary." *Id.*

This causal connection does not apply to a killing that occurred close in time, or at the same place, absent unless there is "a causal connection between the two such that the *death* must have been a probable consequence of the *felony*, not the other way around." *State v. Hacheney*, 160 Wn.2d 503, 519, 158 P.3d 1152 (2007) (emphasis in original).

Here, the prosecution had no evidence that the death occurred before or even in relation to the alleged robbery. And there was no evidence an attempted robbery occurred, without it being completed.

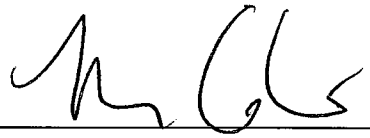
Given this absence of critical evidence, there was insufficient proof to permit a conviction. This Court should grant review.

F. CONCLUSION

Based on the foregoing, Petitioner Jason Gamache respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 16th day of November 2018.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. JASON LEE GAMACHE, Appellant.	No. 76005-0-I DIVISION ONE UNPUBLISHED OPINION FILED: October 22, 2018

BECKER, J. — Jason Gamache was convicted of felony murder. The evidence showed that he broke into the home of a sleeping neighbor and stabbed him to death in the course of stealing his pain medication. We affirm.

FACTS

On the morning of August 2, 2013, Wayne McCune's wife left their home around 7:00 a.m. to go to work. When she returned around 6:00 p.m., she found McCune lying dead on the floor. McCune had been stabbed 25 times and his carotid artery was severed. The file cabinet drawer where McCune kept his pain medication had been forced open. Two pill bottles, containing hydrocodone-acetaminophen and Avinza, were found empty.

Auburn police interviewed McCune's neighbor, Ruby Jo Brazeal. She told them Jason Gamache had been staying with her, but she had not seen him since the day of McCune's death. Gamache, Brazeal, and McCune all suffered from chronic health conditions, and regularly took prescription pain medication. In the

past, McCune and Gamache had shared medications. They had a falling out in 2012 when Gamache tried to take some of McCune's pain medication without permission. Since that time, the two had not had any contact.

The police pieced together Gamache's whereabouts on the day of McCune's death. Gamache met Brazeal at the nearby Muckleshoot Casino just before 9:00 a.m. He told her he was leaving to pick up pain medication from the pharmacy. Surveillance video showed Gamache leaving the casino at 9:01 a.m. and returning at 10:35 a.m. When he returned, he was wearing different clothes. Gamache then offered Brazeal roughly 15 hydrocodone-acetaminophen pills and a pill bottle containing granules from an Avinza capsule. Gamache remained at the casino until 5:30 p.m. that day.

After leaving the Muckleshoot Casino, Gamache traveled to the Snoqualmie Casino. Surveillance video showed that Gamache largely remained in his vehicle in the casino parking lot over the next five days, until he approached a shuttle bus driver complaining of pain and dizziness. An ambulance took him to a nearby hospital where Gamache told a doctor that he had been mugged. After being treated for dehydration, Gamache left the hospital and walked back to his vehicle at the Snoqualmie Casino. Officers located him there on August 7 and arrested him.

In Gamache's vehicle, officers found a single Avinza tablet and a rag containing what appeared to be blood. Blood on the rag was consistent with McCune's DNA (deoxyribonucleic acid). A blood stain found on Gamache's shoe

was also consistent with McCune's DNA. The shirt Gamache was wearing when he left the Muckleshoot Casino on the morning of the murder was never located.

Gamache initially denied that he had left the Muckleshoot Casino for an hour and a half that morning. Informed that the casino surveillance video contradicted his statement, Gamache changed his story and told police that he left to go to a nearby secondhand store. The store's video surveillance did not show Gamache at the store. Gamache gave conflicting statements to the police about the clothes he was wearing on the day of the murder and his whereabouts in the five days following the murder.

The State charged Gamache with felony murder in the first degree predicated on both second degree robbery and attempted second degree robbery. After a four week trial, the jury convicted Gamache as charged. He was sentenced to 280 months.

Sufficiency of the Evidence

Gamache's first challenge is to the sufficiency of the evidence supporting felony murder. "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). "'When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.'" Kintz, 169 Wn.2d at 551, quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Although Gamache contested the

State's evidence at trial, the presence of conflicting evidence does not mean the guilty verdict was not supported by sufficient evidence. Reviewing courts "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064, review denied, 174 Wn.2d 1007, 278 P.3d 1112 (2012).

To convict Gamache of felony murder, the State had to establish that Gamache killed McCune "in the course of or in furtherance" of a predicate felony, or "in immediate flight therefrom." RCW 9A.32.030(1)(c)(5). The homicide must be within the "res gestae" of the predicate felony, i.e., "there was a close proximity in terms of time and distance between the felony and the homicide." State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990). Moreover, the State must prove "'that the death was a probable consequence of the felony and must specifically prove that the felony began before the killing.'" State v. Wang, ___ Wn. App. ___, 424 P.3d 1251, 1257 (2018), quoting State v. Irby, 187 Wn. App. 183, 201, 347 P.3d 1103 (2015), review denied, 184 Wn.2d 1036, 379 P.3d 953 (2016).

Gamache argues that any connection between him, McCune's death, and the robbery of McCune's pills was purely speculative, and therefore the State could not show that McCune's death was a consequence of the robbery. Gamache disregards the extensive evidence—circumstantial, but not speculative—that he forcibly took McCune's pills and McCune died in the course of the robbery. The drawer holding McCune's medication was found pried open, while the rest of McCune's home appeared to be left undisturbed. Gamache

knew where McCune kept his medication. Gamache knew he was not welcome in McCune's home. Gamache had no reason to enter McCune's home other than to obtain McCune's pain medication.

Two bottles of pills were empty, and on the day of McCune's murder, Gamache provided Brazeal with pills matching those missing from McCune's home. When questioned by police, Gamache repeatedly lied about his whereabouts on August 2. Gamache also lied about the shirt he was wearing when he left the casino.

Gamache had blood matching McCune's DNA profile on his shoes and on a rag in his car. At trial, the State's forensic scientist testified the blood "matches the DNA profile of Wayne McCune. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile is 1 in 260,000." The State's forensic scientist stated that "the DNA typing profile obtained from the bloodstains on the right shoe was consistent with coming from a male individual, and matches the DNA profile of Wayne McCune. And the estimated probability of selecting an unrelated individual at random from the United States population with a matching profile is 1 in 850 quadrillion." DNA found on McCune's empty hydrocodone-acetaminophen bottle was also consistent with a mixture of McCune's and Gamache's DNA. It was "230 times more likely that the observed DNA profile occurred as a result of a mixture of Wayne McCune and Jason Gamache than if it originated from Wayne McCune and an unrelated individual selected at random from the United States population."

We conclude there was sufficient proof that Gamache killed McCune in the course of robbing him.

The court allowed the jury to consider attempted robbery as well as robbery as the predicate for felony murder. Gamache argued that the evidence was insufficient to support a finding of attempted robbery because there was no way the jury could find that he fatally stabbed McCune with the intent to steal his pills, yet failed to complete the theft of the pills. Gamache contends the jury may not have been unanimous as to the means by which he was guilty of felony murder, and reversal is the required result. See State v. Lambert, 199 Wn. App. 51, 78, 395 P.3d 1080, review denied, 189 Wn.2d 1017, 404 P.3d 499 (2017) (reversing felony murder conviction due to insufficient evidence to support the alternative means of the predicate burglary).

It does not appear that an attempt is an alternative means of committing the completed crime. An attempt to commit a crime is defined as an offense included in the crime itself. RCW 10.61.010. In any event, the evidence was sufficient to prove Gamache either attempted a robbery or completed a robbery. Contrary to Gamache's claim, there is no authority holding that a conviction for attempt can be sustained only if the crime is not completed. Rather, to prove an attempt, the State must simply show that the defendant acted with the intent to carry out a crime and took a substantial step towards the completion of that crime. RCW 9A.28.020. As discussed above, the State presented substantial evidence from which a juror could infer that Gamache took the substantial step of entering McCune's home with the intent to take his pain medications. A

reasonable juror could have found that Gamache at least tried to rob Wayne of pills and killed him in the course of that attempt, even if the juror lacked certainty that Gamache actually had McCune's pills with him when he left the house.

Viewing the evidence in the light most favorable to the State, we conclude it was sufficient to prove that Gamache caused McCune's death in the course of robbing or attempting to rob him.

Detective Lind's Testimony

Gamache contends he was prejudiced by the admission of evidence regarding the 2012 incident in which he tried to take McCune's pain pills without permission. A pretrial hearing was held to determine the admissibility of the evidence. Auburn Detective David Lind testified that on January 9, 2012, some 18 months before the murder, he was dispatched to respond to a call from McCune. Lind said McCune told him that Gamache came into his home while McCune was sleeping and attempted to take his pain medication. According to Lind, McCune said he and Gamache had similar back problems and had a history of sharing medication. McCune told Lind that he did not wish to press criminal charges, but he wanted Gamache to know he was no longer welcome on his property. Lind testified that he then went across the street to speak to Gamache. Gamache admitted that he had tried to take some pills when he found McCune asleep and realized, when McCune woke up, that he had probably crossed a line. Lind said Gamache was apologetic. The incident ended with Lind informing Gamache that he was not welcome in McCune's home, and Gamache confirming that he understood.

After hearing Lind's testimony about Gamache's prior act, the trial court ruled it was admissible to show that Gamache knew where McCune kept his pills and knew McCune did not want Gamache in his house.

> And I'm satisfied the relevance of that is basically four things. One is that they shared medication. Secondly, from the statements of Mr. Gamache basically that Mr. McCune was asleep and it probably wasn't wise to take the pills. It goes to show that he knew where the pills were kept by Mr. McCune. Third, that there was a disagreement or complaint and that, fourth, as a result of that, the officer basically trespassed Mr. Gamache from the McCune residence.

At trial, Lind's testimony about his communications with McCune was kept to a minimum. At the start of Lind's direct examination, the prosecutor specifically requested that Lind not get into the specifics. Lind testified that McCune discussed a dispute he was having with Gamache over pain medication. "I was told basically that it was a neighbor dispute and that Wayne wanted to try and keep things civil amongst neighbors. And rather than going down a road of prosecution and potentially jail, he wanted to try and keep things friendly and decided that it would be more civil in nature than criminal." Gamache did not object. Lind moved on to testify about what Gamache said: that he found McCune sleeping, that he went to get a pill out of the cabinet, that McCune woke up and was surprised, and that he now understood, as a result of the officer's visit, that whatever agreement he and McCune had as neighbors "was now over and that he no longer wanted him at his residence."

In closing, the prosecutor emphasized that the testimony was offered to show Gamache's knowledge:

> The Defendant knows where Wayne McCune keeps his drugs. He knows what drugs Wayne McCune has.

> And that's exactly why that testimony from Officer Lind regarding that January 2012 incident, why that's important. When Officer Lind goes and talks to him, he admits -- he, being Mr. Gamache, admits that he knew where Wayne kept his drugs. He knew what type of drugs he kept, that he shared at times. He knew how to let himself in the home to access those.

Gamache contends admitting Lind's testimony was error because the jury was able to use it as propensity evidence, the prejudice of the testimony outweighed its probative value, and there was no limiting instruction. He also contends Lind's testimony contained hearsay and a portion of it violated the confrontation clause.

Propensity

Under ER 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This court reviews the trial court's ruling to admit or exclude 404(b) evidence for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). We find no abuse of discretion in the admission of Lind's testimony as proof that Gamache knew where the pills were and knew that McCune was unwilling to share them with him.

A trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This balancing of the probative value of a prior act versus its prejudicial effect should be done on the record. State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76

(1984). The absence of a record may preclude effective appellate review. "Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue." Jackson, 102 Wn.2d at 694. Gamache contends admitting the evidence of his prior encounter with McCune was reversible error because the court did not conduct an express on-the-record balancing.

Failure to balance probative value versus prejudice on the record "requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wn.2d 109, 126-27, 857 P.2d 270 (1993). If the record as a whole is sufficient to permit meaningful review, a reviewing court may affirm the introduction of ER 404(b) testimony. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447, review denied, 121 Wn.2d 1024, 854 P.2d 1084 (1993).

Evidence of Gamache's prior attempt to take McCune's pills was highly probative. McCune's murderer pried open the cabinet where McCune kept his medication, while leaving other items of value untouched. The trial court correctly identified the relevant purpose for admitting evidence of Gamache's earlier confrontation with McCune. It established that Gamache knew the pills were kept in McCune's cabinet and that he did not have permission to be in McCune's home. The parties argued about whether the evidence was more probative than prejudicial. The court instructed the State not to refer to the act as a "theft", and the overall tenor of the hearing demonstrates the court's awareness

of the obligation to balance probative value against prejudice even if the court did not use those specific words. The manner in which the prior act was presented emphasized its relevance for this proper purpose.

To the extent the court erred in being less explicit than our case law requires, the error did not materially affect the outcome of the trial. The record as a whole is sufficient to permit meaningful review, and we conclude the court did not abuse its discretion in admitting evidence of the previous pill-taking incident under ER 404(b).

No Limiting Instruction

Gamache contends the trial court should have given a limiting instruction when Lind testified. Trial courts are not required to provide a limiting instruction sua sponte. State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604 (2011). Defense counsel stated, "We don't have a limiting instruction in mind at this moment, but we'll think about that . . . ." The defense did not offer a limiting instruction. Because Gamache did not request a limiting instruction, the trial court did not err by failing to give one.

Hearsay

In the pretrial hearing, the trial court recognized that Detective Lind's testimony about his conversation with McCune during the prior incident would be hearsay to the extent that he quoted what McCune said. But because the significant information about the confrontation would come in through the non-hearsay statements Gamache made to Lind, the court concluded there would be no hearsay problem:

> [DEFENSE COUNSEL]: Your Honor, with respect to the hearsay, I would ask that when the officer goes to describe his contact with Mr. McCune that it be simply limited to, "We got a complaint from Mr. McCune," because anything else would just be --
>
> THE COURT: Well, he basically contacted Mr. McCune and I think everything else is going to come out through the statements and the conversation he had with Mr. Gamache. So, but clearly Mr. McCune's statements to the officer are hearsay. The fact that he went there, received a complaint, and talked to the Defendant, and that the Defendant confirmed a lot of the things that I -- or all of the things, I think, that I've just indicated I'm finding relevant. It should be fairly brief, I would think.

By failing to object to the minimal amount of hearsay the officer included in his recounting of what McCune said, Gamache waived the hearsay issue. Even were that not the case, the admission of hearsay is subject to harmless error analysis. State v. Watt, 160 Wn.2d 626, 630, 160 P.3d 640 (2007). Gamache does not identify any meaningful prejudice resulting from Lind's brief discussion of his conversation with McCune.

Confrontation Clause

Gamache contends the admission of Lind's testimony about what McCune said violated the Confrontation Clause because he could not cross-examine McCune about the January 2012 incident. The confrontation clause "'bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009) (internal quotation marks omitted), quoting Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

Because Gamache did not raise an objection based on the confrontation clause, the alleged error is not preserved for review. State v. O'Cain, 169 Wn.

App. 228, 232, 279 P.3d 926 (2012). In addition, any error was harmless. See Watt, 160 Wn.2d at 635.

Purpose of Arrest

Gamache claims the court erred by allowing the State to present an officer's testimony that Gamache was arrested on August 7 for "another matter." Although he classifies this as prosecutorial misconduct, it is properly characterized as another ER 404(b) issue.

In the wake of McCune's murder on August 2, 2013, Brazeal's husband realized his rifle was missing. Because Gamache was staying with the Brazeals, he became the prime suspect in the rifle's disappearance. The police issued an arrest bulletin for Gamache. When he was arrested at the Snoqualmie Casino on August 7, it was for theft of the rifle, not for murder. Ultimately, Gamache was not charged with stealing the rifle.

At trial, the parties grappled with how to describe the reason for Gamache's arrest. The evidence implicating him in the murder was largely undeveloped at the time of the arrest. The State was concerned that the jurors might think police improperly arrested Gamache based on a mere suspicion of murder if it was not explained that police had probable cause to arrest him for stealing a firearm. Gamache countered that testimony about an allegation of a stolen firearm was evidence of a prior bad act and inadmissible because it was irrelevant to the charge of murder. The trial court excluded mention of the firearm as more prejudicial than probative. The court ruled that instead, the jury

should simply be informed that the police arrested Gamache based on a bulletin about an unrelated crime.

Gamache objected that a vague reference to an arrest on a matter unrelated to the murder could lead the jury to speculate that he had been involved in another serious crime in addition to the murder. The trial court dismissed this concern as unrealistic:

> THE COURT: I think both the State and the defense are anticipating problems with the jury deliberation that aren't realistic. It is quite common, for example, when somebody's arrested for a warrant and then it leads to something, that the officers testify, we arrested him on something unrelated to this. And that's exactly what happened.

The officer who arrested Gamache at the Snoqualmie Casino testified that he did so as the result of a "be on the lookout" bulletin from the Auburn Police Department. The bulletin indicated that Gamache was "a person of interest in a homicide" and "that there was probable cause to arrest him on a separate matter."

We conclude the trial court was within its discretion to permit this testimony about the basis of the arrest. Investigation of the murder went on for another month before Gamache was charged. Part of the defense strategy at trial was to call into question the competence of the investigators. The State was legitimately concerned that if jurors were not informed there was a basis for the arrest other than suspicion that Gamache was involved in the murder, they would assume the Auburn police were "cowboys" who had arrested Gamache before they had developed probable cause.

Evidence is admissible under ER 404(b) to show the "res gestae" of a crime if it provides context for the jury to understand the sequence of events surrounding the crime. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Under this exception to ER 404(b), a party may complete the picture of the story of the crime rather than having the jury receive a fragmented account. State v. Tharp, 27 Wn. App. 198, 204-05, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). The admission of testimony that Gamache was arrested on "another matter" was not an abuse of discretion.

Expert Testimony

Gamache argues that the State committed misconduct by leading an expert witness down a line of questioning aimed at improperly bolstering the expert's credibility.

The alleged misconduct occurred during the testimony of an associate medical examiner, Michelle Lubin. Lubin's initial estimate placed McCune's death in early afternoon. But Lubin testified that she could not rule out that McCune died during the 9:00 a.m. to 10:35 a.m. window when Gamache was unaccounted for. The prosecutor followed up by asking Lubin if her opinion was in line with medical literature and the policies and practices of her office:

> Q. Okay. And, then, everything that you've discussed regarding that window, last seen alive, when he's found dead, and sort of all the caveats of the post mortem indicators, is that in line with the reputable, medical literature that you're familiar with?
> A. Yes.
> Q. Is that in line with the practice of your colleagues at the King County Medical Examiner's Office?
> A. Yes, it is.
> Q. Meaning the other Associate Medical Examiners?
> A. Yes.

> Q. And is that view and opinion in line with the practice and policies of the Chief Medical Examiner, Dr. Harruff?
> A. Yes, it is.

Gamache contends Lubin gave improper opinion testimony. Because he did not object at the time, there is not a ruling by the trial court to which error can be assigned. Instead Gamache claims the prosecutor committed misconduct by eliciting the allegedly improper testimony.

The burden rests on the defendant to show conduct by a prosecutor was both improper and prejudicial. Fisher, 165 Wn.2d at 747. Once proved, prosecutorial misconduct is grounds for reversal when there is a substantial likelihood the improper conduct affected the jury. Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. Fisher, 165 Wn.2d at 747.

The State may not use the hearsay statement of a third party to vouch for its witness. State v. Nation, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002), review denied, 148 Wn.2d 1001, 60 P.3d 1212 (2003). Citing this rule, Gamache contends the prosecutor improperly elicited Lubin's testimony that the Chief Medical Examiner, Dr. Harruff, agreed with her opinion about McCune's time of death. The gist of the elicited testimony was that Lubin's analysis was "in line" with the practices and policies of her office. Although the final question included an unfortunate reference to Dr. Harruff's "opinion", it did not indicate that he had reviewed and approved Lubin's analysis in this case. And because an instruction

to the jury to disregard the remark could have cured any potential prejudice, Gamache waived the objection by failing to object.

DNA Evidence

Chain of Custody

Gamache attacks the DNA evidence linking Gamache to McCune and his pill bottle in part by arguing the pill bottle evidence should not have been admitted because the chain of custody was unsecured.

McCune stored his pill bottles in a filing cabinet. In the immediate aftermath of finding McCune's body, his wife believed some of his pills were missing, but she attributed their absence to her mistaken belief that McCune had taken them as part of a plan to commit suicide. After the police left the home, McCune's wife moved the pills to her sister's adjoining duplex so they would be out of the way for the people cleaning the crime scene.

An autopsy revealed that McCune was murdered and that he did not have any of the missing pills in his stomach. By this point, officers had learned of Gamache's history with McCune and that Gamache was missing since the day of the murder. Three days after the murder, officers went to McCune's home to gather his pain medications. McCune's wife gave them a bag containing the pill bottles she had collected. The officer labeled the bag and the pill bottles and processed them for evidence. When the bottles were tested, one contained DNA evidence implicating Gamache.

Gamache moved to suppress this evidence. He argued that the bottles had not been protected and any evidence they contained was unreliable. The

trial court denied the motion, ruling that the argument went to the weight of the evidence and not its admissibility.

> I am satisfied that the pill bottles as medication is packaged these days are readily identifiable pieces of evidence. It contains the name of the person for whom it's prescribed and they have other information concerning the medication itself, etcetera.
>
> I am satisfied that this is sufficiently documented by the photos and the fact that these are items that clearly contain information as to what they are. There are photos in the residence showing bottles present of the medication prescribed to Mr. McCune. I am satisfied it goes to the weight of the evidence as the trier of fact might give weight to this particular evidence.
>
> . . . .
>
> I am satisfied that there is sufficient chain of custody in terms of this readily identifiable item in the photos, that the arguments I think the Defense has they need to place to the jury either in cross or through witnesses. So the motion to suppress is denied.

"Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 206 S. Ct. 2169, 85 L. Ed. 2d 526 (1985). "Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be." State v. Roche, 114 Wn. App. 424, 436, 59 P.3d 682 (2002), citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE § 402.31 (1999). "However, where evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired." Roche, 114 Wn. App. at 436. "The trial court is necessarily

vested with a wide latitude of discretion in determining admissibility." Campbell, 103 Wn.2d at 21.

Gamache contends the evidence at issue was inadmissible because of the high risk that it was contaminated. But as the State argues, the pill bottle "could have been contaminated in hundreds of ways between the 2nd and the 5th, but there is scant chance it was contaminated in the only way relevant to this case, i.e., with Gamache's DNA. Gamache was nowhere near the bottle between August 2 and August 5." Gamache's argument that the prosecutor committed misconduct by offering the evidence is not persuasive.

Characterization of the DNA Evidence

Gamache contends the prosecutor prejudicially overstated the strength of the State's DNA evidence.

The Maryland Supreme Court confronted a similar question in Whack v. State, 433 Md. 728, 732, 73 A.3d 186 (2013). In Whack, DNA evidence was taken from the scene of a murder. The chance of the DNA coming from an African-American individual other than the defendant was 1 in 172. Whack, 433 Md. at 737. In closing argument, the prosecutor asserted that the DNA established the defendant was at the scene, and claimed the 1 in 172 odds were essentially no different than 1 in 212 trillion odds. Whack, 433 Md. at 745-47. The trial court denied a defense motion for a mistrial. Whack, 433 Md. at 741. The Supreme Court reversed and remanded for a new trial, holding that the prosecutor's remarks "likely misled the jury to the prejudice of the accused." Whack, 433 Md. at 755.

In two similar cases cited by Gamache, prosecutors were found to have overstated the strength of DNA evidence. A one in three likelihood was ruled to be too statistically insignificant to support the prosecutor's assertion that the defendant's DNA was found in the victim's clothes in Duncan v. Commonwealth of Kentucky, 322 S.W.3d 81, 90 (Ky. 2010). When DNA evidence showed only that a defendant could not be excluded, it was reversible error for the prosecutor to claim the defendant's DNA was found at the scene. People v. Wright, 25 N.Y.3d 769, 776, 37 N.E.3d 1127 (2015).

Here, in opening statement, the prosecutor asserted that the DNA mixture taken from the pill bottle matched Gamache and McCune:

> And on one of those bottles, an empty bottle of Hydrocodone-Acetaminophen 10-325, on the lid, is a mixture of DNA. And that mixture of DNA matches a mixture of Wayne McCune and the defendant, Jason Gamache.

In closing, the prosecutor listed the DNA taken from the pill bottle as evidence against Gamache:

> You add all that up, his deception and lies, you add up the blood, the DNA on the shoes, the DNA on the mitt, DNA on the empty bottle, specific targeted robbery, the prior knowledge possessed by him. . . .
>
> So when you put that all together, who killed Wayne McCune?

The prosecutor further stated that the pill bottle contained a "mixture of DNA, Wayne McCune's and the Defendant's." In both the opening statement and closing argument, the prosecutor referred to the blood on the rag found in Gamache's vehicle as coming from McCune. The State's forensic expert testified that the blood on the rag "matches the DNA profile of Wayne McCune," with a 1 in 260,000 probability of selecting an unrelated individual at random with

a matching profile. For the DNA on the pill bottle, he said it was 230 times more likely than not to be from a mixture of McCune and Gamache than from McCune and an individual selected at random.

We agree with Gamache that the discussion of DNA evidence must be handled with care. "DNA is a powerful tool and its importance in the courtroom cannot be overstated." Whack, 433 Md. at 732. A prosecutor's statements must be considered within the larger context in which DNA evidence is treated by jurors. Whack, 433 Md. at 747. In this case, the prosecutor's description of the DNA evidence was not as overstated as in the cases cited by Gamache, but it did go beyond the expert testimony offered at trial because the prosecutor omitted the statistical probability stated by the expert. To say that the DNA evidence "matches" the defendant without addressing the statistical qualification stated by the expert is potentially misleading. But Gamache did not object to the alleged overstatement of the evidence. Because the prosecutor's alleged misstatements were neither flagrant nor incurable, the issue is waived. Fisher, 165 Wn.2d at 747.

Ineffective Assistance of Counsel

Gamache alleges that his trial counsel provided ineffective assistance by failing to object. A claim of ineffective assistance counsel requires a showing of deficient performance and prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "Courts engage in a strong presumption counsel's representation was effective." McFarland, 127 Wn.2d at 335.

Gamache claims defense counsel was ineffective by failing to object to Officer Lind's testimony about what McCune said on grounds that it violated the confrontation clause, by failing to object to the prosecutor's characterization of DNA evidence, and by failing to object that the prosecutor improperly bolstered Lubin's opinion testimony by eliciting her agreement that it was in line with the practice and policies of her office. As discussed above, Gamache has not shown that such objections would have been sustained. He fails to establish deficient performance.

Additionally, Gamache contends counsel was deficient by failing to request a limiting instruction when the court admitted evidence of his previous attempt to take McCune's pills. Failure to request a limiting instruction may be a legitimate tactical decision not to reemphasize damaging evidence. State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). That is the case here. The record shows that defense counsel considered requesting a limiting instruction before ultimately deciding not to offer one. We conclude counsel made a tactical decision and did not render deficient performance.

Polling of the Jury

The first trial transcript submitted to this court showed that only 11 jurors were polled as to whether the verdict was unanimous. Gamache argued in his opening brief that the absence of the twelfth juror required reversal. The State obtained and submitted a corrected transcript. Unable to determine which transcript was reliable, we asked the trial court to settle the record as permitted by RAP 9.5. The trial court reviewed the audio recording of the polling of the jury

and determined that the second transcript is correct. We accept that determination. There was no error in the polling of the jury.

Cumulative Error

The combined effect of an accumulation of errors not individually reversible may necessitate a new trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Gamache alleges but fails to establish the existence of multiple errors.

Affirmed.

Becker, J.

WE CONCUR:

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. 76005-0-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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MARIA ANA ARRANZA RILEY, Legal Assistant Date: November 16, 2018
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