

FILED
Court of Appeals
Division III
State of Washington
11/21/2018 4:11 PM

96597-8

Supreme Court No.: _____
Court of Appeals No.: 34872-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER RAMIREZ,

Petitioner.

PETITION FOR REVIEW

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

Gregory C. Link
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

Marla L. Zink
The Law Office of Marla Zink, PLLC
1037 NE 65th Street #80840
Seattle, WA 98115
(360) 726-3130

Attorneys for Petitioner

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 3

 1. The Gallegos brothers die without witnesses..... 3

 2. Two blocks from the apartment complex, Carlton Hritsco
 converses in the dark with a man he describes as ‘Indian or
 Hispanic looking’ 3

 3. Within hours, police present Hritsco a photographic array that
 includes Ramirez, but Hritsco does not identify the man with
 whom he spoke 3

 4. The next day, police show Hritsco a second array that includes
 Ramirez, but Hritsco still does not identify the man with whom
 he spoke 4

 5. Hritsco saw Ramirez on television, identified as the suspect 4

 6. At trial two years after the conversation, the prosecutor asked
 Hritsco to identify the defendant..... 5

D. ARGUMENT 6

 1. **The Court should grant review to adopt one of three cures
 to the leading cause of wrongful convictions: witness
 misidentification evidence** 6

 a. Misidentification evidence is the leading cause of wrongful
 convictions 6

 b. Hritsco’s identification bears the hallmarks of
 misidentification evidence 7

 c. The federal constitution prohibits admission of the
 misidentification evidence at issue here 8

d. Our state constitution prohibits admission of the misidentification evidence here	10
e. The rules of evidence prohibit admission of the misidentification evidence in Ramirez’s case.....	12
e. The record is sufficient for review.....	13
2. The Court should accept review because the opinion conflicts with this Court’s case law holding evidence of premeditation requires more than an opportunity to deliberate	15
a. Juan’s killing was spontaneous, not premeditated.....	15
b. Only speculation supports the theory that Arturo’s killing was premeditated	16
3. The Court should accept review because the opinion rejects the majority holding in <i>State v. Siers</i> and adopts the concurring view without explanation.....	19
4. The Court should accept review to determine the admissibility of proprietary cell-site methodology that is neither generally accepted by the scientific community nor helpful to the jury.....	21
5. The Court should accept review because the Court of Appeals adopted a unique prejudice analysis that conflicts with <i>State v. Guloy</i>	22
6. The Court should accept review of additional trial errors	24
7. The Court should accept review because the opinion below conflicts with <i>In re Personal Restraint of Mullholland</i> and <i>State v. McFarland</i>.....	27
E. CONCLUSION	28

TABLE OF AUTHORITIES

United States Supreme Court Decisions

<i>Neil v. Biggers</i> , 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).....	9, 10
<i>Perry v. New Hampshire</i> , 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).....	8, 11
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).....	14
<i>Watkins v. Sowders</i> , 449 U.S. 341, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981).....	6

Washington State Supreme Court Decisions

<i>City of Auburn v. Hedlund</i> , 165 Wn.2d 645, 201 P.3d 315 (2009).....	24
<i>In re Dependency of E.H.</i> , ___ Wn.2d ___, 427 P.3d 587 (Oct. 4, 2018)	11
<i>In re Marriage of Pape</i> , 139 Wn.2d 694, 989 P.2d 1120 (1999).....	14
<i>In re Pers. Restraint of Mulholland</i> , 161 Wn.2d 322, 166 P.3d 677 (2007).....	3, 27
<i>Marriage of King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007).....	11
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	14
<i>State v. Baker</i> , 150 Wash. 82, 272 P. 80 (1928)	17
<i>State v. Bartholomew</i> , 101 Wn.2d 631, 683 P.2d 1079 (1984).....	11, 12
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986).....	1, 15, 16, 19
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	14
<i>State v. Bolen</i> , 142 Wash. 653, 254 P. 445 (1927)	18
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	24
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995)).....	15, 22

<i>State v. Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	26
<i>State v. Gower</i> , 179 Wn.2d 851, 321 P.3d 1178 (2014).	26
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	2, 23
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).	12
<i>State v. McFarland</i> , 189 Wn.2d 47, 399 P.3d 1106 (2017).....	3, 27
<i>State v. Ollens</i> , 107 Wn.2d 848, 733 P.2d 984 (1987).....	17
<i>State v. Ortiz</i> , 119 Wn.2d 294, 312-13, 831 P.2d 1060 (1992).....	17, 18
<i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 265 P.3d 853 (2011).....	25
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	15, 16, 17
<i>State v. Powell</i> , 167 Wn.2d 672, 223 P.3d 493 (2009)).....	20
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 309 P.3d 326 (2013)	14
<i>State v. Siers</i> , 174 Wn.2d 269, 274 P.3d 358 (2012)	1, 20, 21
<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	25
<i>State v. Townsend</i> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	17
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	15, 17

Washington State Court of Appeals Decisions

<i>State v. Davis</i> , 38 Wn. App. 600, 686 P.2d 1143 (1984).....	12
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	26
<i>State v. Hummel</i> , 196 Wn. App. 329 (2016), <i>review denied</i> 187 Wn.2d 1021 (2017);.....	17
<i>State v. Luoma</i> , 88 Wn.2d 28, 558 P.2d 756 (1977).....	17
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012).....	26
<i>State v. Sherrill</i> , 145 Wn. App. 473, 186 P.3d 1157 (2008).....	18

Decisions of Other Courts

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). 21

Kansas v. Hunt, 69 P.3d 571 (Kan. 2003) 11

Massachusetts v. Johnson, 650 N.E.2d 1257 (Mass. 1995)..... 11

New York v. Adams, 423 N.E.2d 379 (N.Y. 1981) 11

Oregon v. Lawson, 352 Or. 724, 291 P.3d 673 (2012)..... 8, 10, 13

State v. Dickson, 322 Conn. 410, 141 A.3d 810 (2016). 9

State v. Harris, 330 Conn. 91, 191 A.3d 119 (2018)..... 10

State v. Chen, 208 N.J. 307, 27 A.3d 930 (2011) 7, 10, 12, 13

State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011). 6, 7, 10

State v. Hibl, 290 Wis.2d 595, 714 N.W.2d 194 (2006)..... 7, 12

United States v. Evans, 892 F. Supp. 2d 949 (N.D. Ill. 2012) 22

Utah v. Ramirez, 817 P.2d 774 (Utah 1991)..... 11

Wisconsin v. Dubose, 699 N.W.2d 582 (Wis. 2005) 11

Young v. Conway, 698 F.3d 69 (2d Cir. 2012) 9

Young v. State, 374 P.3d 395 (Alaska 2016)..... 10

Constitutional Provisions

Const. art. I, § 3..... 10, 11, 12, 15, 20, 27

Const. art. I, § 22..... 20, 26

U.S. Const. amend. VI 20, 26

U.S. Const. amend. XIV 8, 15, 20, 26, 27

Statutes

RCW 9.41.040 4

RCW 9.94A.589.....	27
RCW 9A.32.020.....	15
RCW 9A.32.030.....	4
RCW 10.95.020	19, 20

Rules

ER 403	2, 13, 24
ER 404	2, 24
ER 801	25
RAP 13.4.....	1, 2, 3, 10, 12, 14, 19, 21, 22, 24, 28

Other Authorities

Br. of <i>Amici Curiae</i> , No. 34872-5-III (filed Mar. 19, 2018).....	6, 8, 14
Merriam-Webster, “rest in peace,” https://www.merriam-webster.com/dictionary/rest %20in%20peace (Nov. 19, 2018)	18
National Academy of Sciences, <i>Identifying the Culprit: Assessing Eyewitness Identification</i> (2014), https://www.nap.edu/read/18891/chapter/8#110	7
Ryan D. Godfrey & Steven E. Clark, <i>Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value</i> , 34 <i>Law & Hum. Behav.</i> 241 (2010)	7
Steven Clark, et al., <i>Regularities in Eyewitness Identification</i> , 32 <i>Law & Hum. Behav.</i> 187, 211 (2008).	9
The Free Dictionary, “Rest in peace,” http://idioms.thefreedictionary.com/rest+in+peace (Nov. 19, 2018)....	18
Wikipedia, “Rest in peace,” https://en.wikipedia.org/wiki/Rest_in_peace (Nov. 19, 2018).....	18

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Christopher Ramirez, petitioner here and appellant below, asks this Court to grant review pursuant to RAP 13.4(b) of the partially published decision in *State v. Ramirez*, No. 34872-5-III, filed October 23, 2018. *See* Appendix. The opinion reflects the partial granting of Ramirez’s motion to reconsider, but only to correct a scrivener’s error.

B. ISSUES PRESENTED FOR REVIEW

1. Where misidentification evidence is the leading cause of wrongful convictions, should the Court grant review to consider three bases for excluding unreliable witness identification testimony: the federal constitution, our state constitution, and the evidence rules, which the court addressed in the published portion of the opinion? RAP 13.4(b)(3), (4).

2. Should the Court accept review where the opinion found premeditation from the mere “opportunity to deliberate,” without requiring evidence the defendant actually deliberated, in conflict with *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986)? RAP 13.4(b)(1), (3), (4).

3. Whether the Court should grant review where the opinion conflicts with *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012), by holding the lack of notice of aggravating circumstances found by the jury was not error because Ramirez was not sentenced to aggravated murder under Chapter 10.95 RCW? RAP 13.4(b)(1), (3), (4).

4. Whether the Court should accept review of the novel issue regarding historical cellular tracking analysis that has not been tested or accepted outside the law enforcement community and that is not helpful to the jury because it overpromises and underdelivers, which was affirmed in the published portion of the opinion? RAP 13.4(b)(1), (4).

5. Whether the Court should grant review where the Court of Appeals adopted a unique prejudice analysis, examining whether improperly admitted evidence of the victims' sympathetic traits "offset" properly admitted defense theory evidence rather than the reasonable possibility of an effect on the verdict test from *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)? RAP 13.4(b)(1).

6. Whether the Court should grant review of additional trial errors: the admission of a minimally relevant and highly prejudicial text message under ER 403 and 404(b); prosecutorial misconduct by relying on evidence outside the record, using arguments calculated to inflame the passions or prejudices of the jury, and stepping into the victim and defendant's shoes; and cumulative trial error? RAP 13.4(b).

7. Whether the Court should accept review because, in finding the trial court did not show the possibility of sentencing leniency despite its interest in mitigating theories, the opinion below conflicts with *In re Pers.*

Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), and *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017)? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

1. The Gallegos brothers die without witnesses.

Arturo Gallegos was killed in his bedroom by one gunshot wound to the head; then, his brother, Juan, was killed by ten or more bullets fired in quick succession. *E.g.*, RP 369, 450-56, 544, 848-88, 895-96. Juan died outside the brothers' apartment. RP 451-52. No one witnessed their deaths or saw the assailants. The murder weapon was never discovered.

2. Two blocks from the apartment complex, Carlton Hritsco converses in the dark with a man he describes as 'Indian or Hispanic looking.'

That night, Carlton Hritsco, who lived two blocks from the brothers' apartment complex, conversed for 15 or 20 minutes with a person described as "Indian or Hispanic looking," 5'8" tall, and 180 pounds, and who called himself "Demon." RP 475-76, 516-18, 522.

3. Within hours, police present Hritsco a photographic array that includes Ramirez, but Hritsco does not identify the man with whom he spoke.

A couple hours after the conversation, the police showed Hritsco photographs of five individuals identified in a database as "Demon," including Christopher Ramirez. RP 476-78, 486, 518. Hritsco did not

identify anyone. RP 476-78. Later, Hritsco could not recall being shown photographs that night. RP 519-20.

4. The next day, police show Hritsco a second array that includes Ramirez, but Hritsco still does not identify the man with whom he spoke.

Within 24 hours, the police presented Hritsco with a second photographic lineup that again included Ramirez. RP 949, 1053-56. Hritsco again did not identify Ramirez or any other individual. RP 519.

5. Hritsco saw Ramirez on television, identified as the suspect.

Months later, Hritsco saw Ramirez on the news as the suspect. RP 519, 1163-64. Ramirez was charged with two counts of premeditated murder in the first degree, RCW 9A.32.030, and one count unlawful possession of a firearm, RCW 9A.41.040. CP 1-2, 232-33. Months before the brothers were murdered, their nephew, Ramirez, had sent a text message to family members that stated, “13 or we all die RIP fuck you all if that’s how it is!!!” Exs. 141-42.

Just days before trial but two years after the conversation, the lead detective and the prosecutor visited Hritsco, who told them he had seen the defendant on television and believed him to be the “Indian or Hispanic looking” man he failed to identify in 2014. RP 62; CP 224-26.

6. At trial two years after the conversation, the prosecutor asked Hritsco to identify the defendant.

In court, at trial, and over Ramirez's objection, the State again asked Hritsco if he could identify the person he spoke with on November 1, 2014. RP 47, 48-69, 513-15; CP 66-74, 145-62, 193-96, 218-26. Hritsco then identified the person sitting in the defendant's chair, Ramirez. RP 515, 519-20. Hritsco tried to explain that he recognized Ramirez from television because that image was "updated," but the second photographic array also contained an updated image of Ramirez. RP 519-20, 1153-56.

DNA evidence showed that at an unknown prior time, Ramirez, who had lived with Arturo, wore a hat and glove found in Arturo's bedroom; there was another unidentified contributor of DNA. RP 801-15, 822-27, 833. Over Ramirez's objection, the court admitted the July 2014 text message. CP 106-10, 299; RP 164-89, 220-21.

Over objection, a member of the FBI's Cellular Analysis Survey Team testified she used proprietary software to pinpoint Ramirez's cell phone to an area near the apartment complex around the time the brothers were killed. RP 919, 921, 927-29; Exs. 165-167.

D. ARGUMENT

1. The Court should grant review to adopt one of three cures to the leading cause of wrongful convictions: witness misidentification evidence.

a. Misidentification evidence is the leading cause of wrongful convictions.

Eight persons convicted largely due to witness identification testimony have been exonerated in Washington alone. Br. of *Amici Curiae*, No. 34872-5-III, p.2 (filed Mar. 19, 2018). Eyewitness misidentification is the leading cause of wrongful convictions and a factor in 70 percent of post-conviction DNA exoneration cases. *Id.*, pp.1-2.

Witness identification testimony causes wrongful convictions because it is compelling to jurors despite its frequent inaccuracy. To a jury “there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981). Jurors particularly inflate the value of identification testimony where other evidence in the case is weak, such as confessions, forensic science, or informants. *State v. Henderson*, 208 N.J. 208, 236-37, 27 A.3d 872 (2011).

Recent research reveals “the suggestive effect that private actors can have on eyewitness’ recollection of events.” *State v. Chen*, 208 N.J.

307, 310, 320-21, 27 A.3d 930 (2011). New information and recent studies confirm witness identification testimony is “often hopelessly unreliable.” *State v. Hibel*, 290 Wis.2d 595, 611, 714 N.W.2d 194 (2006) (internal quotations omitted); National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification, pp.31-37 (2014), <https://www.nap.edu/read/18891/chapter/8#110>.

b. Hritsco’s identification bears the hallmarks of misidentification evidence.

Successive identification procedures, like the two photographic arrays and in-court identification used here, increase the likelihood of misidentification by creating memory source confusion. *E.g.*, *Henderson*, 208 N.J. at 255-56; Ryan D. Godfrey & Steven E. Clark, Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value, 34 Law & Hum. Behav. 241, 241, 256 (2010).

The risks of misidentification increase when police fail to use procedures that blind, or double blind, the administrator—that also occurred here. NAS Report at 104, 106-07; RP 1054-55.

A lapse in time, such as the nearly two years that passed in this case, further increases the risk of misidentification. *Henderson*, 208 N.J. at 267. Scientists generally agree that memory never improves, in fact it decays with time. *Id.*

Hritsco's identification also was not corroborated by the description he provided. Hritsco reported he spoke with a 5'8" Indian or Hispanic-looking man, who called himself "Demon," had long, slicked-back hair, scars or acne, and weighed 180 pounds. RP 476, 516-18, 522. Ramirez, on the other hand, is 6' tall and weighs 220 pounds; he does not have scars, acne, or long, slicked-back hair. RP 463-64, 469, 1069; Ex. 115. And Ramirez was one of many local men who used the nickname "Demon." RP 51, 385, 441.

Additionally, Hritsco exhibited inflated confidence in his identification of Ramirez, another factor in misidentifications. *E.g.*, *Oregon v. Lawson*, 352 Or. 724, 744-45, 777-78, 788-89, 291 P.3d 673 (2012); Amici Br. at 11, 19-20.

c. The federal constitution prohibits admission of the misidentification evidence at issue here.

Federal due process limits admission of identifications infected by improper government action. U.S. Const. amend. XIV; *Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

State action irreparably marred Hritsco's misidentification. First, the police presented two photographic lineups to Hritsco within 24 hours, both of which included photographs of Ramirez, and Hritsco did not

identify Ramirez.¹ See *Young v. Conway*, 698 F.3d 69, 82-84 (2d Cir. 2012) (citing and describing research on repeated exposure). Law enforcement also failed to use a double-blind, or even blind, procedure.

Next, the State asked Hritsco to identify Ramirez in court, while Ramirez was seated as the defendant at trial almost two years after Hritsco's conversation and following Hritsco's exposure to Ramirez as a suspect in the media. Research shows that out-of-court identification procedures can irreparably taint the reliability of an in-court identification, even where (1) the out-of-court identifications resulted in no identification or a misidentification of a filler and (2) the out-of-court identifications are admissible under *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). See *Young*, 698 F.3d at 82-84.

As the Connecticut Supreme Court recently found, there could hardly be a more "suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." *State v. Dickson*, 322 Conn. 410, 423-24, 141 A.3d 810 (2016).

¹ Research shows nonidentifications, like the two here, correlate with a suspect's innocence, not his guilt. Steven Clark, et al., *Regularities in Eyewitness Identification*, 32 Law & Hum. Behav. 187, 211 (2008).

The Court should grant review and reverse under the federal constitution. RAP 13.4(b)(3), (4).

- d. Our state constitution prohibits admission of the misidentification evidence here.

This Court should grant review to adopt a totality of the circumstances test under article I, section 3 that includes government and non-government actors, the *Biggers* factors² as well as those factors determined to be relevant to reliability and accuracy in scientific studies and court decisions since *Biggers*. In doing so, this Court would join many other states whose highest courts have updated their standards in light of current scientific data. *See, e.g., State v. Harris*, 330 Conn. 91, 191 A.3d 119 (2018) (modifying *Biggers* under state constitution to conform to recent developments in social science and the law); *Young v. State*, 374 P.3d 395 (Alaska 2016) (identifying factors to discern reliability commensurate with state constitutional due process requirements); *Lawson*, 352 Or. 724 (departing from federal due process analysis to hold under state law reliability of identification does not depend on state action); *Henderson*, 208 N. J. 208 (adopting new test); *Chen*, 208 N.J. 307

² *Biggers*, 409 U.S. at 199-200 (opportunity of witness to view defendant at the time; witness' degree of attention; accuracy of witness' prior description; level of certainty demonstrated by witness at time of confrontation; and length of time between crime and confrontation).

(reliability of eyewitness identification must be examined before trial even when suggestiveness derives from private actor); *Wisconsin v. Dubose*, 699 N.W.2d 582 (Wis. 2005) (adopting state constitutional approach to determining reliability); *Kansas v. Hunt*, 69 P.3d 571 (Kan. 2003) (adopting new test); *Utah v. Ramirez*, 817 P.2d 774 (Utah 1991) (same); *Massachusetts v. Johnson*, 650 N.E.2d 1257 (Mass. 1995) (adopting more protective rule under state constitution); *New York v. Adams*, 423 N.E.2d 379 (N.Y. 1981) (same).

While deterring law enforcement from “rigging identification procedures” is a primary aim of federal due process, Washington’s due process right to a fair trial guarantees more. Reliability is the primary concern under article I, section 3. *Compare Perry*, 565 U.S. at 232-33 with *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984).

Moreover, while the Court recently rejected an independent interpretation with regard to the provision of counsel to children in parental termination cases, the unique circumstance of unreliable identifications supports a different result here. *See In re Dependency of E.H.*, ___ Wn.2d ___, 427 P.3d 587, 593 (Oct. 4, 2018). A lack of reliable evidence “particularly” offends “the concept of fairness” in Washington. *Bartholomew*, 101 Wn.2d at 639-40; *Marriage of King*, 162 Wn.2d 378, 414, 174 P.3d 659 (2007) (Madsen, J., dissenting) (recognizing Court

found broader state constitutional due process protection in *Bartholomew* and others and has never retreated from this holding); *accord State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984) (holding article I, section 3 required reversal even where federal constitution did not).

An independent state constitutional analysis is also compelled because the reliability and admissibility of identifications in state court proceedings are inherently matters of local concern for which there is no need for national uniformity. *Bartholomew*, 101 Wn.2d at 643-44; *State v. Young*, 123 Wn.2d 173, 180-81, 867 P.2d 593 (1994).³

The Court should grant review to examine the reliability of Hritsco's identification under article I, section 3. RAP 13.4(b)(3), (4).

e. The rules of evidence prohibit admission of the misidentification evidence in Ramirez's case.

The Court should grant review to consider whether our evidentiary rules compel exclusion of Hritsco's tainted identification. *See Chen*, 208 N.J. 307 (New Jersey courts must test reliability of identifications tainted by non-government action under state evidentiary rules); *Hibl*, 290 Wis.2d 595 (remanding to consider whether identification made after viewing

³ The briefing below contains a more complete analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). App'ts Corrected Op. Br., No. 34872-5, pp.23-29 (filed Aug. 30, 2017); App'ts Reply Br., No. 34872-5, pp.11-17 (filed Mar. 14, 2018).

defendant in courthouse should be suppressed under state evidence rules); *Lawson*, 352 Or. at 751-63 (adopting new test incorporating evidence rules to govern admissibility of eyewitness identification evidence).

Ramirez moved to exclude Hritsco's identification under ER 403. RP 47, 48-69; CP 66-74, 145-62, 193-96, 218-26. Juries give undue weight to eyewitness identification. Thus, the prejudicial force of an unreliable identification is plain. The unreliability of the identification also renders the evidence less probative. A false identification is not at all relevant to a fair fact-finding process. In balancing the ER 403 factors, therefore, the probative value of Hritsco's tainted identification is outweighed by the substantial risk of undue prejudice.

e. The record is sufficient for review.

This Court has "a gatekeeping role to ensure that unreliable, misleading evidence is not admitted" in criminal trials. *Chen*, 208 N.J. at 318. And the Court has all it needs to resolve the matter. The record conclusively indicates Hritsco viewed the subject in the dark for 15 to 20 minutes, he was subject to multiple identification procedures just hours apart, Ramirez was included in both photographic arrays, blind administration was not used, the initial array contained all suspects and no fillers, Hritsco was exposed to pretrial publicity that identified Ramirez, Hritsco exhibited confidence inflation, Hritsco's description of the person

he spoke with does not closely match Ramirez, and Hritsco was subject to an in-court identification two years after the initial event.

The studies presented on appeal show not only that Hritsco's identification was tainted but that juries overly believe witness identification testimony. *E.g.*, Amici Br., pp.15-16. The State does not contest the validity of these reports and studies.⁴

Even if the Court believes exclusion under the evidentiary rules may not have been adequately preserved below, *see* Slip Op. at 13, this Court should exercise its RAP 2.5(a) discretion to review the claimed error. *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015). The risk of more wrongful convictions is too great if the Court fails to act. RAP 13.4(b)(4).

⁴ This Court regularly reviews such social science even if the trial court did not. *E.g.*, *Blazina*, 182 Wn.2d at 835 (relying on various); *State v. Saintcalle*, 178 Wn.2d 34, 45-50, 309 P.3d 326 (2013) (relying on secondary sources); *State v. A.N.J.*, 168 Wn.2d 91, 109-10, 225 P.3d 956 (2010) (relying on standards for public defense in analyzing whether defense counsel acted ineffectively); *In re Marriage of Pape*, 139 Wn.2d 694, 706-09, 713, 989 P.2d 1120 (1999) (discussing commentaries, research, and reports); *accord Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (relying on social science studies and reports).

2. The Court should accept review because the opinion conflicts with this Court’s case law holding evidence of premeditation requires more than an opportunity to deliberate.

Premeditated intent means “the deliberate formation of and reflection upon the intent to take a human life” and involves “the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995)). Premeditation “must involve more than a moment in point of time.” RCW 9A.32.020(1).

The simple “opportunity to deliberate is not sufficient.” *Bingham*, 105 Wn.2d at 827; *see* U.S. Const. amend. XIV; Const. art. I, § 3. Premeditated intent “may not be inferred from conduct that is ‘patently equivocal.’” *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

a. Juan’s killing was spontaneous, not premeditated.

As to the count concerning Juan Gallegos, the opinion holds “the evidence from the scene indicated Mr. Ramirez deliberately engaged in a plan to continue shooting Juan Gallegos until his uncle died.” Slip Op. at 28. Division Three points to no evidence indicating the multiple shots fired at Juan constitute sufficient evidence the shooter engaged in “a plan to continue” or any plan at all. There is no evidence of “the deliberate

formation of and reflection upon the intent to take a human life.” *Pirtle*, 127 Wn.2d at 644.

The evidence affirmatively shows Juan was killed spontaneously. Slip Op. at 2-3 (Juan “was initially shot [when he surprised the shooter by] attempting to open the door to his brother’s bedroom after hearing the gunshot that killed Arturo.”); RP 1155-56, 1166 (prosecutor’s closing argument); RP 446-47, 449, 532-33, 537-38, 542-43, 550-53 (shots fired in quick succession without report of a struggle and before anyone had the opportunity to call 911 or discover Juan’s body). There was no evidence indicating how the gun appeared at the scene.

Premeditation is not proven by showing the act causing death occurred over an appreciable amount of time, because to do so “obliterates the distinction between first and second degree murder.” *Bingham*, 105 Wn.2d at 826. “Having the opportunity to deliberate is not evidence the defendant did deliberate, which is necessary for a finding of premeditation.” *Id.*

- b. Only speculation supports the theory that Arturo’s killing was premeditated.

The opinion also fails to square the evidence related to Arturo with this Court’s case law requiring more than a mere opportunity to

deliberate.⁵ The State claimed Ramirez brought a gun to Arturo’s home, but there was no evidence how or where the murder weapon was procured, no one saw the weapon before or during the murders, and it was never recovered. RP 1164. Such speculation is insufficient. *E.g.*, *State v. Hummel*, 196 Wn. App. 329, 357 (2016), *review denied* 187 Wn.2d 1021 (2017); *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

A single shot at Arturo’s head from 18 to 24 inches away might have proved intent, but did not prove premeditation. *See* RP 1164; *State v. Luoma*, 88 Wn.2d 28, 34, 558 P.2d 756 (1977) (impulsive or spontaneous acts causing death are not premeditated); *State v. Bolen*, 142 Wash. 653,

⁵ *E.g.*, *State v. Baker*, 150 Wash. 82, 94-96, 272 P. 80 (1928) (reversing conviction; mere transport of gun from home to scene is insufficient to show premeditation); *State v. Ollens*, 107 Wn.2d 848, 853, 733 P.2d 984 (1987) (sufficient evidence of premeditation where a weapon was used, multiple non-lethal wounds were inflicted, victim’s throat was cut after infliction of the other wounds, victim was struck from behind, and there was evidence of robbery motive); *Pirtle*, 127 Wn.2d at 628, 644 (sufficient evidence of premeditation where State proved two motives and planning, all of which supported a method of killing that suggested premeditation); *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992) (sufficient evidence of premeditation where murder weapon was taken from place of procurement to scene, multiple wounds inflicted, victim was struck in face with another object, and defensive wounds suggested a prolonged struggle); *State v. Townsend*, 142 Wn.2d 838, 48-49, 15 P.3d 145 (2001) (sufficient evidence of premeditation where defendant offered to “take care of” the problem a friend was having with the victim, procured gun and brought to confront victim, fired one non-fatal shot but would not seek aid, then asked for “God’s forgiveness” before firing fatal shot).

666, 254 P. 445 (1927) (killing that occurs in heat of passion may be intentional but not premeditated).

The State also argued the lack of defensive wounds on Arturo proved premeditation. RP 1166. But case law proves the opposite is true: defensive wounds correlate with premeditation. *Ortiz*, 119 Wn.2d at 312-13 (defensive wounds on victim coupled with transportation of murder weapon from one room to another, infliction of multiple wounds and signs of prolonged struggle sufficient to prove premeditation); *State v. Sherrill*, 145 Wn. App. 473, 485, 186 P.3d 1157 (2008) (defensive marks on victim coupled with history of domestic violence and course of attack that occurred over 42 hours sufficient to prove premeditation).

Finally, a text message from Ramirez to multiple recipients, including Juan and Arturo, nearly four months before the murder did not prove premeditation. The text message simply acknowledged “we all die” followed by “RIP,” which, in the light most favorable to the State, could mean rest in peace, a common comfort for a natural death.⁶ Exs. 141, 142.⁷ The message contains foul language, but it does not indicate an

⁶ Merriam-Webster, “rest in peace,” [https://www.merriam-webster.com/dictionary/rest %20in%20peace](https://www.merriam-webster.com/dictionary/rest%20in%20peace) (Nov. 19, 2018); Wikipedia, “Rest in peace,” https://en.wikipedia.org/wiki/Rest_in_peace (Nov. 19, 2018); The Free Dictionary, “Rest in peace,” <http://idioms.thefreedictionary.com/rest+in+peace> (Nov. 19, 2018).

⁷ Ramirez explained the text message differently. RP 378.

intent to harm, let alone kill. *Id.* Moreover, Ramirez and Arturo communicated and saw each other in the interim, including when Ramirez helped Arturo move. Ex. 39; RP 399, 1013-29.

The lower court's finding of premeditation conflicts with *Bingham*, where this Court found no evidence from which the jury might have inferred Bingham actually deliberated on the killing. 105 Wn.2d at 827. An opportunity to form premeditated intent is insufficient to sustain premeditation absent evidence that the defendant did in fact deliberate. *Id.* at 822, 826. Because "no evidence was presented of deliberation or reflection before or during the strangulation, only the strangulation" itself, Bingham's conviction was reversed. *Id.* at 827. The Court should grant review to resolve the conflict. RAP 13.4(b).⁸

3. The Court should accept review because the opinion rejects the majority holding in *State v. Siers* and adopts the concurring view without explanation.

The State did not charge an aggravating circumstance, but Ramirez was convicted of two. The information does not contain the citation or language of any of the aggravating circumstances listed at RCW 10.95.020. CP 232-33 (amended information, citing only Ch. 9.94A

⁸ The State only proved Ramirez unlawfully possessed a firearm, if it proved he perpetrated the murders. Because the evidence on the murder counts is insufficient, the possession count fails as well. *See* App'ts Op. Br. at 21-22.

RCW); *see* CP 1-2 (information, same). Moreover, no one seemed aware the State would seek conviction under Chapter 10.95 RCW: Ramirez was not represented by death-penalty qualified counsel; the words “aggravated murder” were never used; the prosecution did not seek a sentence under Chapter 10.95 RCW, and the court did not discuss one. Yet, the jury was instructed on, and found, an aggravating circumstance at RCW 10.95.020(10) for each count. CP 271-72, 276, 278.

Without deciding whether Ramirez received adequate notice, the Court of Appeals holds there was no error. Slip Op. at 35. The court holds the verdicts had “no impact on the outcome of Mr. Ramirez’s case” because he was not sentenced to death or life without parole. Slip Op. at 35. This holding is contrary to *Siers*, 174 Wn.2d 269. *Accord* Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV.

In *Siers*, the majority reversed precedent to hold notice of an aggravator need not occur in the charging document, but there must be notice. 174 Wn.2d at 276-77, 281-83 (overruling *State v. Powell*, 167 Wn.2d 672, 689-90, 223 P.3d 493 (2009)). Because the State provided notice of the aggravator prior to trial, albeit not in the information, no error occurred. *Id.* at 272, 277, 281 (upholding verdicts).

The four concurring justices in *Siers* found notice irrelevant if the aggravator was not relied on to obtain an enhanced sentence. 174 Wn.2d at

283-87 (Stephens, J. concurring). The *Siers* concurrence would have held no error occurred because no change in sentencing resulted. *Id.* at 283-84.

Without citation or analysis, Division Three adopted the concurrence in *Siers* to hold here that no error occurred because Ramirez was not sentenced to death or life without parole. Slip Op. at 34.⁹ The Court should grant review. RAP 13.4(b)(1), (3), (4).

4. The Court should accept review to determine the admissibility of proprietary cell-site methodology that is neither generally accepted by the scientific community nor helpful to the jury.

While other jurisdictions have addressed the admissibility of historical cell-site tracking, this Court has not. The trial court here admitted the testimony of an FBI agent who relied on proprietary methodology that overpromised and under-delivered.

The erroneously admitted evidence relied on insular methodology, which by definition does not satisfy *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). It was not peer reviewed or generally accepted by the greater scientific community, but was the FBI's intellectual property. RP 107. Moreover, the agent's work was reviewed only by another FBI agent.

⁹ The opinion also ignores Ramirez's argument that he was prejudiced by the unnoticed aggravating circumstance, although he was not sentenced under Chapter 10.95 RCW. Reply Br. at 37 (Ramirez did not receive the counsel to which he was entitled for a prosecution under Ch. 10.95 RCW).

RP 107-09, 113-14. The software program could only be validated by the FBI or the software company that created it. RP 113-14. The FBI had not developed “best standards” for this program. RP 98, 111-12. This insular process necessarily runs contrary to *Frye*. See *Gentry*, 125 Wn.2d at 585 (scientific evidence must achieve general acceptance in relevant scientific community to be admissible); see also *United States v. Evans*, 892 F. Supp. 2d 949, 956-57 (N.D. Ill. 2012) (FBI agents’ historical cell-site analysis testimony should have been excluded as unreliable and “wholly untested by the scientific community”).

The Court should grant review to provide guidance to the lower courts on this novel issue and the trial court’s misapplication of precedent and evidentiary rules, which appears in the published portion. RAP 13.4(b)(1), (4); Slip Op. at 21-24.

5. The Court should accept review because the Court of Appeals adopted a unique prejudice analysis that conflicts with *State v. Guloy*.

Over Ramirez’s objection, the trial court allowed the prosecutor to question a family member as to what she “miss[ed] the most” about her father, Arturo, and uncle, Juan. RP439-40. Rosemary Valerio told the jury she missed her dad’s “sense of humor. . . . [He was] a funny guy. He liked life. He loved life. Always trying to find ways to make us laugh. He was always joking around.” *Id.* The prosecutor then asked Valerio what she

missed most about her uncle, to which Valerio responded Juan “was very kind-hearted” and “religious, strong believer in God.” RP 440.

The Court of Appeals agreed with Ramirez that the court should have excluded testimony about the victims’ “sympathetic traits.” Slip Op. at 33. However, the court used a novel test to evaluate prejudice, reasoning the improperly admitted evidence was not prejudicial because it “offset” properly admitted evidence that the brothers had drugs in their system when they were killed and other “damaging character evidence” submitted by the defense. *Id.* at 33-34; *see* RP 715-19 (trial court admits evidence of brother’s drug use and Arturo’s relationships to support defense theory).¹⁰

Division Three did not follow this Court’s test to assess prejudice: whether there is a reasonable possibility that the inadmissible evidence was used to reach the guilty verdict. *Guloy*, 104 Wn.2d at 426. If the court had used the proper test, it would have been compelled to reverse. The evidence as to the victims’ sympathetic character traits—loving life, joking around, being a “strong believer in God” and kind-hearted—was highly emotional testimony. *See City of Auburn v. Hedlund*, 165 Wn.2d

¹⁰ Contrary to the opinion, the drug use evidence was admitted and introduced well after the sympathetic traits evidence. *Compare* Slip Op. at 34 *with* RP 715-19, 896-99, 1056-59, 1085-86.

645, 654, 201 P.3d 315 (2009) (evidence is unfairly prejudicial if it is more likely to cause emotional response than a rational decision).

Moreover, the trial court overruled Ramirez's objection, which indicated to the jury the evidence was relevant to the charged offenses. *See State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984) (overruling of objection lends aura of legitimacy).

There is at least a reasonable possibility the jury used this evidence to find Ramirez guilty of the murders particularly where the remaining evidence was weak. For example, no murder weapon was located, no one saw Ramirez at the apartment complex or with the deceased that night, and one witness's belated identification of Ramirez as someone he spoke to that night was tainted by media exposure and an ill-matched description of the speaker. The Court should grant review. RAP 13.4(b)(1).

6. The Court should accept review of additional trial errors.

The Court should accept review of additional trial errors under RAP 13.4(b).

First, the trial court abused its discretion by admitting a July 2014 group text message that was attenuated from the crime, no more than minimally relevant, and substantially more prejudicial than probative. ER 403; ER 404(b); *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159

(2002). The text did not indicate an intent to harm, let alone to commit murders. It was sent almost four months before Juan and Arturo died. *See State v. Perez-Valdez*, 172 Wn.2d 808, 816, 265 P.3d 853 (2011) (evidence of subsequent arson was too removed from false accusation of charged rape to necessarily be probative of a motive). It was sent to multiple recipients, who were not subsequently killed. And, it caused prejudice because it might have been used to make a prohibited gang-affiliation inference, it showed Ramirez using foul language toward his relatives, and it led to admission of Ramirez's nonsensical explanation that he sent the message to throw off any secret service government agents who were following him. RP 183 (possible gang-related interpretations); RP 379 (how Ramirez explained the message); *see* CP 13-16, 61-65 (competency concerns resolved pretrial).

Second, the trial court erred in admitting Valerio's testimony that she had heard from other people that Ramirez goes by the name "Demon." RP 441; App'ts Op. Br. at 38-39. The hearsay declarants were not subject to cross-examination and the testimony that people say Ramirez refers to himself as Demon is not a statement of identification of a person made after perceiving the person. Therefore, ER 801(d)'s hearsay exception does not apply. The testimony was not cumulative because Valerio was the only witness who claimed other people knew Ramirez as "Demon."

Compare RP 441 *with* RP 385. The thrice-repeated testimony could have reasonably been used by the jury to reach its verdict because Hritsco's identification was subject to reproach yet he testified the conversant identified himself as "Demon." *See State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

Third, the prosecutor committed misconduct. Although a prosecutor cannot rely on evidence outside the record, use arguments calculated to inflame the passions or prejudices of the jury, or step into the victim or defendant's shoes, the trial prosecutor asked the jury to consider what Juan felt like "in the last thirty seconds . . . [he] must have been absolutely miserable" and speculated on Ramirez's thought process. RP 1167; U.S. Const. amends. VI, XIV; Const. art. I, § 22; *State v. Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The prosecutor also committed misconduct in his opening statement. *See* Statement of Add'l Grounds (filed Sept. 26, 2017); U.S. Const. amends. VI, XIV. These emotional appeals to the jurors' passions and sympathies could not have been cured through an instruction. *State v. Emery*, 174 Wn.2d 741, 762-63, 278 P.3d 653 (2012).

The Court should accept review and hold that the trial errors, standing alone or cumulatively, denied Ramirez a fair trial. *See* App'ts Op. Br. at 51-52; U.S. Const. amend. XIV; Const. art. I, § 3.

7. The Court should accept review because the opinion below conflicts with *In re Personal Restraint of Mulholland* and *State v. McFarland*.

Where a sentencing court imposes consecutive sentences under RCW 9.94A.589(1)(b) or (c) but indicates a “possibility” it “would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option,” the matter should be remanded for resentencing. *Mulholland*, 161 Wn.2d at 331; *McFarland*, 189 Wn.2d at 51, 53-59.

Contrary to the opinion below, the sentencing court indicated its openness to imposing a lesser sentence. *Compare* Slip Op. at 36 *with* RP 1222 (court shows openness to relative’s testimony), 1226 (court notes Ramirez can argue for a lesser sentence), 1231-32 (court notes sentence is “stunning” to him and reaching decision weighed heavily on him); *McFarland*, 189 Wn.2d at 58-59 (remand appropriate if court indicates some discomfort with standard range sentence); *Mulholland*, 161 Wn.2d at 333 (remand appropriate if some statements indicate openness to mitigated sentence). However, the court mistakenly believed it lacked the discretion to consider a mitigated concurrent sentence. RP 1230, 1231 (“required” to impose consecutive sentences); *accord* CP 316 (noting consecutive

sentences were “mandatory”). The Court should grant review, adhere to *McFarland* and *Mulholland*, and remand for resentencing. RAP 13.4(b)(1), (4).

E. CONCLUSION

The Court should accept review of these important issues.

Respectfully submitted this 20th day of November, 2018.

s/ Gregory Link
Gregory Link, WSBA #25228
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
greg@washapp.org
Office ID #91052



Marla L. Zink, WSBA 39042
The Law Office of Marla Zink, PLLC
1037 NE 65th St #80840
Seattle, WA 98115
(360) 726-3130
marla@marlazink.com

APPENDIX

FILED
OCTOBER 23, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

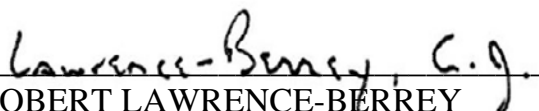
STATE OF WASHINGTON,)	
)	No. 34872-5-III
Respondent,)	
)	ORDER (1) GRANTING IN PART
v.)	AND DENYING IN PART MOTION
)	FOR RECONSIDERATION AND
CHRISTOPHER B. RAMIREZ,)	(2) AMENDING OPINION
)	
Appellant.)	

THE COURT has considered appellant Christopher Ramirez’s motion for reconsideration of our August 30, 2018, opinion and the record and file herein.

IT IS ORDERED that the motion for reconsideration is granted in part to correct a scrivener’s error. The second sentence in the second paragraph on page 25 shall be replaced by the following: “There was no dispute that the July 15 text message had been sent by Mr. Ramirez to his uncles.” The appellant’s motion for reconsideration is otherwise denied.

PANEL: Judges Pennell, Siddoway and Fearing

FOR THE COURT:



ROBERT LAWRENCE-BERREY
Chief Judge

FILED
AUGUST 30, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 34872-5-III
)	
Respondent,)	
)	
v.)	OPINION PUBLISHED IN PART
)	
CHRISTOPHER B. RAMIREZ,)	
)	
Appellant.)	

PENNELL, A.C.J. — Christopher Ramirez appeals his convictions and sentence for two counts of premeditated first degree murder and one count of first degree unlawful possession of a firearm. We affirm.

FACTS¹

On November 1, 2014, at approximately 9:34 p.m., law enforcement received reports of gunfire from Spokane Valley’s Broadway Square Apartments. When officers arrived at the scene, they connected the gunfire to apartment four of the complex, which had been occupied by brothers Arturo and Juan Gallegos. Juan Gallegos’s deceased body was outside the apartment. He had sustained multiple gunshot wounds. Arturo Gallegos was discovered inside a bedroom to apartment four with a single, fatal gunshot wound to the head.

¹ The following facts are taken from the trial testimony.

The evidence indicated Arturo Gallegos had been shot while sitting inside his room, on top of his bed. There did not appear to have been a precipitating struggle or any sort of theft or ransacking of his room or apartment. Gunpowder stippling left on Arturo Gallegos's face indicated he had been shot at close range. A bloodstained hat and glove were located on the bed.

A further review of the scene suggested Juan Gallegos was shot and killed after Arturo Gallegos. Although Arturo Gallegos had been shot only once, his bedroom contained three shell casings. The door from Arturo Gallegos's bedroom into the apartment hallway was marked with two bullet holes. Door fibers surrounding the holes indicated the bullets had traveled from inside the bedroom into the hallway. No bullet fragments or markings were found in the hallway. Instead, the hallway wall was smeared with blood, which was later identified as belonging to Juan Gallegos. On the floor of the hallway were a pair of flip flops that had been discarded in an irregular fashion. Next to the flip flops was another blood stain from Juan Gallegos. Juan Gallegos's body was found outside the main door, in front of apartment three. He was barefoot and had suffered 11 gunshot wounds.

Officers theorized that Juan Gallegos was initially shot while attempting to open the door to his brother's bedroom after hearing the gunshot that killed Arturo Gallegos.

Once Juan Gallegos was shot through the door, he tried to escape down the apartment hallway, losing his flip flops along the way. Juan Gallegos was able to escape from the apartment, only to be shot and killed outside.

As part of the investigation, officers talked to residents of the Broadway Square Apartments. No one saw the shooting or an apparent assailant. However, one of the residents reported hearing something near the fence behind the apartment complex around the time of the shootings. A K-9 handler investigated the area and picked up a track that went south from the complex for about two blocks to an address on East Valleyway Avenue in Spokane Valley.

Once at the East Valleyway address, officers were approached by a man named Carlton Hritsco. Mr. Hritsco asked if the officers were looking for a “‘Mexican guy.’” 3 Report of Proceedings (RP) (Oct. 6, 2016) at 476. Mr. Hritsco explained that he had been outside of his house and smoking a cigarette when he heard someone approach. The individual told Mr. Hritsco his name was “Demon.” *Id.* at 514. The individual made Mr. Hritsco nervous, so Mr. Hritsco texted a friend, asking the friend to come over. The text went through at 9:41 p.m. Mr. Hritsco told law enforcement he felt certain he would be able to recognize the individual who had identified himself as Demon. A sheriff’s deputy showed Mr. Hritsco photographs of five individuals from the Spokane area who were

known to use the moniker Demon. The photographs were pulled up, one-by-one, on the computer screen inside the deputy's vehicle. Although one of the five photographs depicted Christopher Ramirez, Mr. Hritsco was not able to make a positive identification. Mr. Hritsco did say that Demon had been using his cell phone during their interaction. He also added that Demon was looking for a ride and had asked for directions to the bus.

The morning after the murders, law enforcement contacted Arturo Gallegos's daughter, Rosemary Valerio, and her husband, Angel Valerio. Mr. Valerio identified Mr. Ramirez as someone who had problems with Arturo and Juan Gallegos.² Mr. Ramirez is Rosemary Valerio's cousin and the nephew of Arturo and Juan Gallegos. Mr. Valerio disclosed that on July 15, 2014, Mr. Ramirez had sent a text message to his uncles, Arturo and Juan, along with several others, that read, "'Tio.^[3] We all die. Rest in peace. Fuck you all if that's how it is.'" 2 RP (Oct. 6, 2016) at 376. Mr. Ramirez had also previously acknowledged pulling out a knife on Arturo Gallegos. Mr. Valerio disclosed that Mr. Ramirez went by the nickname Demon.

² Mr. Valerio also indicated that a jealous husband could have been responsible for the murders, since Arturo Gallegos had numerous romantic encounters with "tweaker girls." 2 RP (Oct. 6, 2016) at 394-96.

³ "Tio" is Spanish for "uncle."

Mr. Ramirez was arrested on November 2, 2014. Officers obtained a sample of Mr. Ramirez's DNA⁴ and it was discovered Mr. Ramirez was the major contributor to DNA found on the interior portions of the bloodstained hat and glove found on Arturo Gallegos's bed. The blood was determined to have come from Arturo Gallegos. A search of Arturo Gallegos's cell phone revealed Mr. Ramirez had made plans to meet up with Arturo Gallegos on the evening of the murders. Telephone records also indicated Mr. Ramirez had placed a call at 9:59 p.m. on November 1 to the Spokane Transit Authority's bus schedule hotline.

After Mr. Ramirez's arrest, a sheriff's detective used Mr. Ramirez's booking photo to prepare a new photomontage to present to Mr. Hritsco. The montage contained six photos. Each photo was shown to Mr. Hritsco, one at a time. Mr. Hritsco again was unable to make an identification.

No firearm was ever recovered in connection with the murders of Arturo and Juan Gallegos.

PRETRIAL PROCEDURE

Mr. Ramirez was charged with two counts of premeditated first degree murder for the deaths of Arturo and Juan Gallegos, and one count of unlawful possession of a

⁴ Deoxyribonucleic acid.

firearm. Mr. Ramirez's case was delayed for several months to allow for competency evaluations. After he was deemed competent, Mr. Ramirez's trial was scheduled to start on October 3, 2016.

Approximately two weeks before trial, Mr. Ramirez's attorneys filed a motion to exclude Mr. Hritsco's testimony regarding the conversation he had with the man named Demon. The motion claimed the State lacked sufficient evidence to connect Mr. Ramirez with the man who spoke to Mr. Hritsco. Defense counsel argued that, given the lack of connection, Demon's statements were not statements of a party opponent, but inadmissible hearsay. The defense argued that testimony regarding Demon's statements would be irrelevant, in violation of ER 401, and more prejudicial than probative in violation of ER 403. The defense also claimed that introducing statements by an unknown, out-of-court witness would violate Mr. Ramirez's constitutional right of confrontation.⁵ No other constitutional objections were raised regarding Mr. Hritsco's testimony.

The defense also filed a motion to exclude a report and testimony from FBI⁶ Special Agent Jennifer Banks. The State had proffered Special Agent Banks as an expert

⁵ U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

⁶ Federal Bureau of Investigation.

witness on historical cell site analysis. According to the report prepared by Special Agent Banks, records obtained from Mr. Ramirez's cell phone provider placed him near the Broadway Square Apartments 10 minutes before the first 911 call was placed on November 1, 2014. The defense argued that Special Agent Banks's testimony should be struck based on late disclosure and because it failed to meet both the *Frye*⁷ standard for admissibility and the criteria for expert testimony under ER 702.

Three days before trial, the State informed Mr. Ramirez's attorneys that it had received additional information from Mr. Hritsco. During an interview on September 30, 2016, Mr. Hritsco disclosed that he had seen photographs of Mr. Ramirez in the media. Based on those photos, Mr. Hritsco said he was absolutely sure Mr. Ramirez was the individual he had talked to the night of the murders. Mr. Hritsco claimed the hair in the photos shown to him by law enforcement had prevented him from previously making a positive identification.

The parties argued the pending pretrial motions on the morning set for trial. The defense continued to claim Mr. Hritsco's testimony should be excluded because the individual named Demon who talked to Mr. Hritsco was an unknown hearsay declarant. Apparently recognizing that the recent information obtained from Mr. Hritsco undercut

⁷ *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

this argument, the defense argued the most recent statement should “not be considered for purposes” of the pretrial motions hearing because the statement “wasn’t submitted timely.” 1 RP (Oct. 3, 2016) at 57. No constitutional concerns were raised regarding Mr. Hritsco’s testimony. Nor did the defense question Mr. Hritsco’s reliability. However, the defense noted that if Mr. Hritsco’s most recent information had been disclosed at an earlier date, the defense would have “looked into an expert witness who could have testified about cross-racial identification as well as generally the ability of people to recall things better or worse over time.” *Id.* at 65. Although the State indicated it would not object to a continuance, Mr. Ramirez’s attorneys specifically refused to ask for more time. After taking the matter under advisement, the trial court ruled Mr. Hritsco’s testimony admissible.

Prior to jury selection, the trial court also held a *Frye* hearing to determine the admissibility of Special Agent Banks’s testimony. Special Agent Banks testified that she is part of the FBI’s Cellular Analysis Survey Team (CAST). CAST members receive training in engineering and in deciphering cell phone records. Special Agent Banks described two components to her work. First, she interprets historic call detail records from cellular telephone providers in order to discern the location of cell towers activated by a particular voice call or text message. Second, Special Agent Banks performs field

tests of geographic areas to determine the strength of various cell towers. The field test involves driving through a location with a scanning device. The FBI's scanning device uploads cellular frequencies in a given area to a computer program, which plots signal strengths on an area map. Agent Banks testified that CAST agents had testified in approximately 400 courts throughout the country and that the CAST methodology is more widely accepted in the law enforcement community than any other cellular location method.

Defense counsel argued that Special Agent Banks's testimony should be struck because her expert report was untimely and because the FBI's mapping software had not been validated. The State made clear that it would not object to a continuance if Mr. Ramirez wanted more time to evaluate Agent Banks's report. However, Mr. Ramirez insisted on moving forward with trial as scheduled. The trial court ultimately permitted the State to go forward with Agent Banks's testimony, finding that the substance of the testimony was not novel.

TRIAL

The State's trial evidence was consistent with the above factual summary. During cross-examination of the State's witnesses, the defense elicited information indicating the Broadway Square Apartments was a hub for illegal activity. Over the State's objections,

the defense also procured testimony that drug paraphernalia was found in the Gallegoses' apartment and that both brothers had methamphetamine in their systems at the time of death.

Mr. Hristco testified at trial and identified Mr. Ramirez as the man who identified himself as Demon the night of the murders. No objection was made to Mr. Hristco's in-court identification. The defense's examination of Mr. Hristco was brief.⁸ Mr. Hristco was not asked about his media exposure, the pretrial identification procedures used by law enforcement, or the reliability of his in-court identification.

Testimony regarding the general nature of pretrial attempts to obtain identifications from Mr. Hristco was elicited from law enforcement. The direct testimony and cross-examination was brief. No questions were raised regarding whether the law enforcement procedures comported with standard policies or whether the procedures raised concerns regarding eyewitness reliability.

During her testimony, Special Agent Banks explained how her CAST analysis applied to Mr. Ramirez's case. According to Special Agent Banks, Mr. Ramirez's call detail records included not only a code for each cell site antenna activated by Mr. Ramirez's phone calls and texts, but also the 120-degree angle that the antenna had been

⁸ Only 13 questions were posed to Mr. Hristco on cross-examination.

pointed at the time of connection. By plotting the call detail data onto a map, Special Agent Banks determined Mr. Ramirez's cell phone was in the area of the Broadway Square Apartments at 9:24 p.m. on November 1, 2014. This was approximately 10 minutes before the first 911 calls. The call records also indicated the phone had moved south of the Broadway Square Apartments by the time of Demon's interaction with Mr. Hritsco.

In addition to interpreting the call detail records, Special Agent Banks explained the field test she performed in connection to Mr. Ramirez's case. To perform the test, Special Agent Banks drove through Spokane Valley, collecting cell tower frequencies with an FBI scanner. The FBI's scanning software was then able to generate a map, showing the coverage strength area for each of the cell towers activated by Mr. Ramirez's cell phone. The maps developed from the drive-through process largely corroborated the information indicated from the maps developed solely from the call detail records.

The defense called one witness during its case in chief. The witness was a resident of the Broadway Square Apartments. The witness stated he knew an individual named Maceo Williams, but he did not know Mr. Ramirez. Mr. Williams was one of the five individuals with the alias "Demon" whose photographs had been shown to Mr. Hristco on the night of the murders.

The jury found Mr. Ramirez guilty as charged. At sentencing, the State argued the sentences for the two murders with firearm enhancements were required to run consecutively under the serious violent offense provision of RCW 9.94A.589(1)(b). The trial court agreed it was “required” to impose consecutive sentences, 7 RP (Oct. 28, 2016) at 1231, and sentenced Mr. Ramirez to 608 months for count one and 380 months for count two, for a total of 988 months, with the unlawful possession of a firearm count running concurrently to the first two counts.

Mr. Ramirez appeals.

ANALYSIS

Errors associated with pretrial rulings

1. Eyewitness identification

In his arguments on appeal, Mr. Ramirez claims Mr. Hritsco’s identification testimony should have been excluded from trial. Unlike the basis for exclusion raised at trial, Mr. Ramirez now argues that Mr. Hritsco’s identification testimony was patently unreliable. As such, Mr. Ramirez claims it should have been excluded under ER 403 and the federal and state constitutions.

a. ER 403

Under ER 403, a trial court may exclude relevant evidence if the prejudicial effect

substantially outweighs the probative value. During the trial court proceedings, Mr. Ramirez's attorney argued Mr. Hritsco's testimony was more prejudicial than probative because the State lacked evidence linking Mr. Ramirez to the individual who identified himself as Demon to Mr. Hritsco on November 1, 2014. Defense counsel never argued that Mr. Hritsco's testimony was more prejudicial than probative because his identification of Mr. Ramirez was unreliable. In fact, counsel specifically asked the trial court to disregard Mr. Hritsco's ability to identify Mr. Ramirez in assessing the admissibility of his testimony. Because ER 403 is not a constitutional rule, defense counsel's failure to preserve an objection to the reliability of Mr. Hritsco's testimony precludes appellate review. RAP 2.5(a).

b. Federal constitutional safeguards

The United States Constitution protects against the use of unreliable evidence, not by prohibiting introduction of the evidence, but “‘by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.’” *State v. Allen*, 176 Wn.2d 611, 622, 294 P.3d 679 (2013) (quoting *Perry v. New Hampshire*, 565 U.S. 228, 237, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012)). Unreliable eyewitness testimony is subject to exclusion under the federal constitution only if law enforcement had a hand in causing the unreliability through use of unnecessarily suggestive

identification procedures. *Perry*, 565 U.S. at 238; *Manson v. Brathwaite*, 432 U.S. 98, 107, 109, 112-13, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The federal standard requires a trial court to find two things prior to excluding eyewitness testimony: (1) law enforcement’s pretrial identification procedure was unnecessarily suggestive, and (2) the improper police procedure “created a substantial likelihood of irreparable misidentification.” *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

As previously noted, Mr. Ramirez never argued at trial that Mr. Hritsco’s identification testimony was unreliable. He therefore failed to preserve an argument that the State violated his federal constitutional rights introducing tainted eyewitness testimony. Based on the lack of preservation, our review of Mr. Ramirez’s arguments turns on whether he can establish that introduction of Mr. Hritsco’s identification testimony amounted to a manifest constitutional error. RAP 2.5(a)(3).⁹

“RAP 2.5(a)(3) does not permit *all* asserted constitutional claims to be raised for the first time on appeal, but only certain questions of ‘manifest’ constitutional

⁹ The State contends the trial court did consider the reliability of Mr. Hritsco’s identification testimony as part of the defense’s motion to suppress. Br. of Resp’t at 23. However, the portions of the record cited by the State do not support this representation. Nor does any other portion of the report of proceedings or clerk’s papers. One might argue that the State has waived the issue of lack of error preservation. However, because Mr. Ramirez’s failure to develop a factual record on this issue hinders meaningful review, we find RAP 2.5(a)(3) applicable.

magnitude.” *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). “It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). “If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted.” *Kirkman*, 159 Wn.2d at 935.

Mr. Ramirez claims the pretrial identification procedures used by law enforcement were suggestive, in violation of the federal due process clause, because Mr. Hritsco was repeatedly exposed to photos of Mr. Ramirez. Amicus from the Innocence Project add that the pretrial identification procedures were also improper because they were not administered in a double-blind fashion, i.e., the officer conducting the pretrial identification procedure was aware of the identity of the suspect or suspects. In support of their claims regarding suggestiveness, Mr. Ramirez and amicus point to empirical studies on memory and factors that can decrease reliability of eyewitness testimony. Amicus also refers to policies promulgated by the Washington Association of Sheriffs & Police Chiefs and the International Association of Chiefs of Police that recommend avoiding multiple identification procedures and nonblind administration.

The trial court was never privy to the empirical studies or law enforcement policies proffered by Mr. Ramirez and amicus. The State's witnesses were never asked about what policies governed their pretrial identification procedures. Nor was a record made regarding what steps may have been taken to protect against suggestiveness or misidentification. This lack of record precludes appellate review.

Because law enforcement was never questioned about their reasoning for engaging in two pretrial identification interviews and for not using a double-blind procedure, the record leaves unclear whether the procedures used by law enforcement were more suggestive than necessary under the circumstances. *Perry*, 565 U.S. at 238 (necessity can justify the use of suggestive identification procedures).

In addition, and perhaps more importantly, there are outstanding factual questions about whether the procedures used by law enforcement created a substantial likelihood that Mr. Hritsco would misidentify Mr. Ramirez. Mr. Hritsco has claimed that he was able to identify Mr. Ramirez as the man he knew as Demon not based on the police procedures, but because of press exposure. While it is possible that, after an evidentiary hearing, the trial court might have found Mr. Hritsco's testimony was influenced both by improper procedures and press exposure, this is far from a foregone conclusion. The fact that law enforcement utilized an identification procedure that was less than ideal does not

No. 34872-5-III
State v. Ramirez

require suppression. *State v. Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984); *Manson*, 432 U.S. at 112-13. If an eyewitness's testimony is tainted not by improper law enforcement procedures, but instead press exposure, suppression is not a proper remedy under the federal due process clause. *Perry*, 565 U.S. at 244. Instead, a defendant's recourse is vigorous cross-examination and other rights of trial procedure. *Id.* at 232-33. Under the current record, the trial court easily could have found that any problems with Mr. Hritsco's reliability were caused by press exposure, not law enforcement techniques. Such a finding would preclude relief under the federal constitution.

When it comes to the factual predicate for relief, the manifest error standard is exacting. The record must contain "nearly explicit" facts demonstrating a constitutional violation. *Kirkman*, 159 Wn.2d at 936. Here, that requirement is not met. It is far from clear that the "trial court would have granted [a constitutional suppression] motion" had one been filed. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Accordingly, review of Mr. Ramirez's unpreserved federal constitutional claim is inappropriate under RAP 2.5(a)(3).

c. Article I, Section 3 of the Washington Constitution

Mr. Ramirez claims that even if he cannot establish Mr. Hritsco's testimony violated his federal due process rights, the Washington Constitution provides additional

protections. Mr. Ramirez cites no controlling authority for his state constitutional claim. This lack of authority again poses an obstacle for review under RAP 2.5(a)(3)'s manifest constitutional error standard.

The reason error preservation is important is that it gives the trial court the opportunity to “prevent or cure the error” by either striking the testimony or issuing a curative jury instruction. *Kirkman*, 159 Wn.2d at 935. Permitting retrial based on a potentially strategic decision not to raise an objection in the trial court is “wasteful of the limited resources of prosecutors, public defenders and courts.” *McFarland*, 127 Wn.2d at 333 (quoting *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992)). Appellate review under the manifest constitutional error standard is only appropriate for “obvious” errors that could have been “foreseen” by the trial court. *O’Hara*, 167 Wn.2d at 99-100.

Here, it was neither obvious nor foreseeable that Mr. Hritsco’s testimony should have been excluded on independent state constitutional grounds. The Washington Supreme Court has repeatedly refused to recognize constitutional safeguards regarding eyewitness testimony beyond those set by the federal constitution. For example, in *Vaughn*, 101 Wn.2d at 605, the Supreme Court ruled that where “there is no allegation that impermissibly suggestive identification procedures were utilized, the due process

clause does not condition the admissibility of identification testimony upon proof of its reliability.” Nine years before *Vaughn*, the court held that a problem with eyewitness testimony “affects only the weight of the testimony and not its admissibility.” *State v. Gosby*, 85 Wn.2d 758, 760, 539 P.2d 680 (1975). *Gosby* refused to adopt a “‘base line’ of reliability below which evidence must not fall in order to be admitted.” *Id.* Instead, the court held that a defendant’s protections lie in the constitutional right to proof beyond a reasonable doubt and the test for sufficient evidence. *Id.* at 761.

Our Supreme Court has, admittedly, never engaged in a *Gunwall*¹⁰ analysis to discern whether the Washington Constitution provides greater protections than the federal constitution in the eyewitness identification context. However, the trial court would have been pushing against a great weight of authority had it excluded Mr. Hritsco’s testimony purely on state constitutional grounds. Indeed, we have previously held in an unpublished decision that the state constitution does not provide greater protection against unreliable eyewitness testimony than the federal constitution. *State v. Haff*, No. 70296-3-I, slip op. at 14-24 (Wash. Ct. App. Feb. 23, 2015) (unpublished), <https://www.courts.wa.gov/opinions/pdf/702963.pdf>. Given the state of our case law, there is no basis for concluding that the trial court’s failure to exclude Mr. Hritsco’s

¹⁰ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

identification testimony on state constitutional grounds was obvious error. Review is therefore unwarranted under RAP 2.5(a)(3).

It should be noted that the absence of a viable constitutional challenge to unreliable eyewitness testimony does not leave a criminal defendant without recourse. In *Vaughn*, the Supreme Court recognized that a patently unreliable identification can be challenged under ER 602, which requires that testimony be within a witness's firsthand knowledge. 101 Wn.2d at 611-12. This approach is consistent with the analysis of the Oregon Supreme Court in *State v. Lawson*, 352 Or. 724, 746-48, 291 P.3d 673 (2012), which held that unreliable eyewitness testimony can be meaningfully challenged under Oregon's evidentiary code without having to make an underlying showing of suggestive police procedures. But Mr. Ramirez never challenged the reliability of Mr. Hritsco's testimony under the rules of evidence. Accordingly, his evidentiary avenue for attacking Mr. Hritsco's testimony was waived.¹¹

¹¹ Had Mr. Hritsco's identification testimony been excluded, he still would have been able to testify and provide the jury with significant information. Even without specifically identifying Mr. Ramirez as the individual he knew as Demon, Mr. Hritsco would have been able to describe his interactions with Demon on the night of November 1, 2014. As recognized by the trial court, there was sufficient evidence apart from Mr. Hritsco's identification to connect Mr. Ramirez with Demon. Thus, the statements would have still been admissible as admissions by a party opponent. In addition much, if not all, of the statements made by Demon to Mr. Hritsco were not offered for the truth of the matter asserted. Thus, they would not have been subject to exclusion as hearsay.

2. *FBI historical cell site analysis*

Mr. Ramirez argues the trial court erred when it found Special Agent Banks's cell site analysis admissible under *Frye* and ER 702. Mr. Ramirez's complaint is that the software program used by the FBI is proprietary, and thus has not been subject to independent peer review. He also claims Special Agent Banks's testimony was unhelpful to the jury because the FBI cell site location methodology fails to account for imperfections in the cell transmission process, such as weather, obstructions, and network traffic.

Washington uses the *Frye* standard for determining the admissibility of novel scientific evidence. *State v. Copeland*, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996). The standard has two parts. It asks (1) whether the underlying theory is generally accepted in the scientific community, and (2) whether there are techniques utilizing the theory that are capable of producing reliable results. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). Evidence not involving "new methods of proof or new scientific principles" is not subject to examination under *Frye*. *State v. Baity*, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000). We review a trial court's *Frye* determination de novo. *Copeland*, 130 Wn.2d at 255-56.

If scientific testimony passes the *Frye* test, “the trial court must then determine whether the expert testimony should be admitted under the two-part test of ER 702.” *Id.* Under ER 702, the admissibility of expert testimony turns on whether the witness qualifies as an expert and whether the expert’s testimony would be helpful to the jury. A trial court’s decision to admit testimony under ER 702 is reviewed for abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993).

With respect to the *Frye* standard, cell site location testimony is not novel; it is widely accepted throughout the country. Ryan W. Dumm, *The Admissibility of Cell Site Location Information in Washington Courts*, 36 Seattle U. L. Rev. 1473, 1501-02 (2013) (“With respect to reliability, a *Frye* inquiry is unnecessary.”); *see also United States v. Hill*, 818 F.3d 289, 298 (7th Cir. 2016) (“Historical cell-site analysis can show with sufficient reliability that a phone was in a general area, especially in a well-populated one. It shows the cell sites with which the person’s cell phone connected, and the science is well understood.”); *People v. Fountain*, 2016 IL App (1st) 131474, ¶ 61, 62 N.E.3d 1107, 407 Ill. Dec. 185; *Stevenson v. State*, 222 Md. App. 118, 134, 112 A.3d 959 (Md. Ct. Spec. App. 2015); *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1204 n.5 (8th Cir. 2015); *Pullin v. State*, 272 Ga. 747, 749, 534 S.E.2d 69 (2000) (Historical cell site analysis technology “has reached a scientific stage of verifiable certainty to be admissible.”).

While there is controversy over the ability of a cell site analyst to pinpoint the location of a cell phone at a given point in time, *Hill*, 818 F.3d at 298, that sort of testimony was not introduced in Mr. Ramirez’s case. FBI Special Agent Banks was careful to explain that her testimony only provided information of the approximate area of Mr. Ramirez’s cell phone. In addition, Agent Banks bolstered the reliability of her historical analysis by performing a drive-through analysis of the signal strength of the cell towers activated by Mr. Ramirez’s cell phone and evaluating the “particular characteristics of the cell tower with which [Mr. Ramirez’s] phone connected, [at 9:24 p.m.] including its power [and] the direction its antennae were facing.” *Id.*

The fact that Special Agent Banks used proprietary software to map out cell tower strengths within Spokane Valley did not cause her testimony to fall outside of *Frye*. The theories behind the drive-through test/cell tower strength testimony were sound. It is not novel or uncommon to measure the strength of cell tower or radio frequencies. *See State v. Vermillion*, 112 Wn. App. 844, 862, 51 P.3d 188 (2002). In addition, computer programs routinely generate maps that correspond to real-world data. *Dumm*, 36 Seattle U. L. Rev. at 1494. While the FBI has not shared its proprietary software for external validation, the assumptions on which the software operated were transparent and readily capable of testing and replication. Mr. Ramirez was fully equipped to challenge the FBI’s

computer program through cross-examination or by hiring a defense expert. *See Copeland*, 130 Wn.2d at 271. Concerns about the FBI's software program did not present a reason for excluding Special Agent Banks's testimony under *Frye*.

The trial court also did not abuse its discretion in admitting Special Agent Banks's testimony under ER 702. It is undisputed that Agent Banks qualifies as an expert in historical cell site analysis. Her testimony was also helpful to the jury. Agent Banks did not overestimate the quality of her cell site analysis. Throughout her testimony, she made the jury aware of the imprecision of cell site location information. *Hill*, 818 F.3d at 299. She cross tested the information obtained from the cell location records with information from her drive-through signal strength test. Mr. Ramirez cannot identify any realistic risk that the jury would have been confused by the nature of this testimony. The evidence was therefore properly admitted.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

3. *Admission of the July 15, 2014, text message*

Mr. Ramirez argues the trial court abused its discretion by admitting the July 15, 2014, text message as trial evidence. According to Mr. Ramirez, the text message was too remote in time to have any significant evidentiary value. He also contends the content of the text was confusing and could cause undue prejudice. Mr. Ramirez claims the text message should have been excluded under ER 404(b) and ER 403.

Reviewing the trial court's decision to admit the text message evidence for abuse of discretion, *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 1193 (2003), we find no error. There was no dispute that the July 15 text message had been sent by Mr. Rodriguez to his uncles. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (first element of the ER 404(b) analysis is to discern whether the prior bad act occurred). Although the meaning of the message could be debatable, it was reasonable to interpret the message as a threat to kill. The existence of a prior threat was evidence of motive and was relevant to the State's burden of proving intent and premeditation. *Id.* (second and third elements of ER 404(b) analysis involve identifying the purpose of the prior act evidence and discerning whether it is relevant to prove the crime charged). The trial court offset any undue prejudice that might be caused when admitting the July 15 text message by allowing the defense to introduce subsequent messages, suggesting the relationship

between Mr. Ramirez and his uncles had been repaired. *Id.* (final component of the ER 404(b) analysis is to weigh probative value against prejudicial effect). There was, therefore, no abuse of discretion in admitting the evidence.

Alleged errors during trial

1. Sufficiency of the evidence

Mr. Ramirez challenges the sufficiency of the State's evidence as to premeditation (an element of the charge of first degree murder) and as to possession of a firearm (an element of the charge of unlawful possession of a firearm).

When reviewing a sufficiency challenge, we review the trial evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.*

a. Premeditated intent

Premeditation, for purposes of first degree murder, is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of

thinking beforehand, deliberating on, or weighing the contemplated act for a period of time, however short. *State v. Allen*, 159 Wn.2d 1, 7-8, 147 P.3d 581 (2006); *State v. Ra*, 144 Wn. App. 688, 703, 175 P.3d 609 (2008). Premeditation requires more than a moment in time. RCW 9A.32.020(1). Examples of evidence supporting a finding of premeditation include: motive, prior threats, multiple wounds inflicted or multiple shots, striking the victim from behind, generally the manner or method of killing, assault with numerous means or a weapon not readily available, and the planned presence of a weapon at the scene. *State v. Hoffman*, 116 Wn.2d 51, 83, 804 P.2d 577 (1991); *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986); *Ra*, 144 Wn. App. at 703-04; *State v. Rehak*, 67 Wn. App. 157, 164, 834 P.2d 651 (1992).

With respect to Arturo Gallegos, the State presented a variety of evidence in support of premeditation. There was evidence of two prior threats, including not only the July 15 text but also the incident where Mr. Ramirez pulled a knife out on Arturo Gallegos. Call and text record evidence indicated Mr. Ramirez deliberately planned to go see Arturo Gallegos on the day of the murders. In addition, evidence from Arturo Gallegos's bedroom indicates Mr. Ramirez deliberately deployed a kill shot against Arturo Gallegos, without a precipitating fight or struggle. While much of the State's evidence might have been subject to interpretation, construing the evidence in the light

most favorable to the State, there was evidence Mr. Ramirez had long harbored a plan to kill his uncle and that he deliberately executed that plan on November 1, 2014.

As to Juan Gallegos, the State's evidence of premeditation was even stronger. Not only was there the threatening July 15 text message sent from Mr. Ramirez to both his uncles, but the evidence from the scene indicated Mr. Ramirez deliberately engaged in a plan to continue shooting Juan Gallegos until his uncle died. As previously noted, evidence from the scene suggested Mr. Ramirez twice shot Juan Gallegos through a closed door. As Juan Gallegos tried to escape down the hallway, Mr. Ramirez opened the door and continued shooting. The assault then continued through the apartment and out to the exterior portion of the apartment building. The evidence made it apparent that Mr. Ramirez kept up his lethal pursuit until Juan Gallegos died. This was more than a momentary incident. The manner of shooting was sufficient to indicate premeditated intent.

b. Unlawful possession of a firearm

Mr. Ramirez contends the evidence was insufficient to support his conviction for unlawful possession of a firearm because no firearm was ever recovered. We are unpersuaded. The State presented irrefutable evidence that the Gallegos brothers died from gunshot wounds. Mr. Ramirez was the person linked to both men's deaths. This

link was sufficient to establish that Mr. Ramirez must have possessed a firearm. The fact that the firearm was never recovered does not undercut the sufficiency of the State's proof.

2. Hearsay testimony regarding Mr. Ramirez's use of the name Demon

Mr. Ramirez claims the trial court erred in overruling his hearsay objection to Rosemary Valerio's testimony that Mr. Ramirez went by the name Demon. Although Ms. Valerio's testimony was hearsay and should have been excluded, this evidentiary error was harmless. Ms. Valerio's testimony was cumulative of other uncontested evidence that Mr. Ramirez used the nickname Demon. Such evidence included Angel Valerio's testimony, the testimony that Mr. Ramirez was in a law enforcement database of individuals named Demon, as well as the note in Arturo Gallegos's bedroom that contained the words "'nephew'" and "'Demon.'" 4 RP (Oct. 7, 2016) at 687.

3. Prosecutorial misconduct during closing argument

Mr. Ramirez argues the prosecutor committed misconduct in closing argument by arguing facts not in evidence regarding Juan Gallegos's suffering and Mr. Ramirez's thought processes. Because no objection was made to the prosecutor's comments at trial, Mr. Ramirez must establish that the prosecutor's comments were so flagrant and ill intentioned that they caused an enduring prejudice that could not be neutralized by a

curative instruction. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). A prosecutor's misconduct in closing argument will only qualify as flagrant and ill intentioned in a "narrow set of cases" raising concerns that a jury will draw "improper influences from the evidence, such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner." *Id.* at 170.

The portions of the prosecutor's argument at issue are as follows:

Now . . . Juan probably opened up that bedroom door or maybe yelled from the other side, but Christopher Ramirez knew who Arturo lived with, so he shoots two times through the door. *That's not enough for him. He doesn't want any witnesses. He does want to get away with this*, after all, right? I mean, every sign that you've seen up until now, talking to Hritsco was stupid, but he was blocks away. Whoever would have thought that somebody would have heard him go over the chain-link fence and then a dog track and Carlton Hritsco could have still been outside when he was smoking another cigarette at the same time deputies came through. It was a really bad coincidence for Mr. Ramirez, right, for all of that to happen. He thought he was getting away with it.

And he didn't want Juan Gallegos to see him and be a witness either, so he shoots him two times through the door. And he probably can't give [sic] a good bead on him as he's going through the apartment, because it's so small and twisting and turning. But as soon as they get outside, Christopher Ramirez is right behind him, just right behind him. And Juan Gallegos doesn't stand a chance, because now Chris has line of sight and he has the gun. And he has a decision. Is it the first shot? Is it the second? Is it the third, the fourth, the fifth, sixth, seventh, eighth, the ninth, tenth? It's premeditation. It's cold. *It's coming up from behind somebody and putting so many bullets into them that the end of their life must have been absolutely miserable.*

Think about all those wounds that Juan Gallegos had. Think about what he felt like in the last 30 seconds, maybe? That's premeditation.

6 RP (Oct. 13, 2016) at 1166-67 (emphasis added).

Chances are [Juan] didn't know Christopher Ramirez was there . . . because if [Juan] was in his bedroom and he hears a gunshot from Arturo's room, he's not going to open the door and see what Christopher Ramirez is doing in there. He's not knocking on the door to see what Christopher Ramirez is doing in there. He would have immediately gone for the front door.

Juan Gallegos didn't know Christopher Ramirez was there because he made the mistake of opening up that door to find out what had just happened in his brother's room. And oh, dear God, it was Christopher Ramirez with a gun in his hand standing over the body of his brother.

7 RP (Oct. 13, 2016) at 1195-96 (emphasis added).

To the extent the prosecutor's comments were improper, they do not rise to the level of flagrant and ill intentioned conduct that threatened Mr. Ramirez's right to a fair trial. The prosecutor's comments regarding Mr. Ramirez's thought processes were clearly designed to provide the jury a narrative of the State's theory of the case, based on inferences from the evidence. There was no apparent attempt to demean Mr. Ramirez or appeal to prejudice. *Cf. State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (evoking Wounded Knee and calling a Native American group to which the defendant was affiliated "a group of madmen" and "butchers"); *State v. Pierce*, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012) (improper to attribute "repugnant and amoral thoughts" to the defendant). In addition, the prosecutor's reference to Juan Gallegos's end of life

misery was made in an attempt to argue that, by watching Juan Gallegos's prolonged suffering, and yet continuing to deploy shots, Mr. Ramirez must have harbored premeditation. While different wording might have been preferable, the prosecutor's comments were neither prolonged nor overly emotive. *Cf. State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984) (“[T]he use of a poem utilizing vivid and highly inflammatory imagery in describing rape's emotional effect on its victims was nothing but an appeal to the jury's passion and prejudice.”); *Hawthorne v. United States*, 476 A.2d 164 (D.C. 1984) (reversal warranted when half of the prosecutor's closing argument was delivered from the first-person perspective of the victim).

Had trial counsel been concerned that the prosecutor was appealing to the passions of the jury, an objection could have been made, along with a request for a curative instruction. Mr. Ramirez has not established that a curative instruction would have been insufficient to offset any potential prejudice caused by the prosecutor's statements. Given these circumstances, there is no reversible error.

4. Testimony regarding the victims' human characteristics

Mr. Ramirez argues the trial court abused its discretion in overruling his objection to emotional testimony from Rosemary Valerio about what she missed most about her father and uncle. Ms. Valerio testified that her father was “a funny guy, you know. He

liked life. He loved life. Always trying to find ways to make us laugh. He was always joking around.” 3 RP (Oct. 6, 2016) at 440. Ms. Valerio described her uncle as “very kind-hearted and, you know, he was religious, strong believer in God, so he was always trying to get us to go to church . [sic] and every chance he got he would like preach to us, you could say, about God.” *Id.* The prosecutor claimed Ms. Valerio’s comments were relevant to show the Gallegos brothers were human, which was an element of the offense. The trial court permitted the testimony, simply noting the prosecution should be “judicious about it.” *Id.*

We agree with Mr. Ramirez that it was improper for the prosecutor to elicit sympathetic traits about Arturo and Juan Gallegos. While the State was tasked with proving that both men were human, this was not an onerous task. Simply by identifying the Gallegos brothers as her father and uncle, Ms. Valerio established that the two men were human. This was further confirmed by the testimony of the State’s medical examiners. Additional testimony regarding the sympathetic human traits of the Gallegos brothers was unnecessary to prove their status as humans and, given the potential for prejudice, should have been excluded under ER 403.

Although Ms. Valerio’s testimony should have been excluded, there was no prejudice. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)

(Nonconstitutional “error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”). The State elicited Ms. Valerio’s testimony shortly after the defense questioned Mr. Valerio about drug use by the Gallegos brothers and Arturo Gallegos’s proclivity to associate himself with “tweaker girls” and multiple sex partners. 2 RP (Oct. 6, 2016) at 394-96. Although the trial court sustained multiple objections to the defense questioning, some questions were answered and the trial court permitted the introduction of evidence that the Gallegos brothers had methamphetamine in their systems at the time of death. The State voiced its concern that the defense was trying to attack the character of the two deceased men. Sympathetic testimony from Ms. Valerio appears to have merely offset the damaging character evidence suggested by the defense. It did not tip the scales toward an unjust trial or verdict.

5. Cumulative error

Mr. Ramirez contends that even if no single error in his case merits reversal, relief is warranted based on the cumulative effect of multiple errors. We disagree. Mr. Ramirez has identified only two errors during the trial process, both pertaining to Ms. Valerio’s testimony. Neither error compounded the other. Thus, the combined force of the two errors does not warrant reversal.

Alleged errors associated with sentencing

1. Aggravating circumstance not present in the information

Mr. Ramirez argues that he did not receive notice of the aggravating circumstance, from RCW 10.95.020(10), that the jury was instructed on and found by special verdict. In the alternative, Mr. Ramirez contends the aggravating circumstance must be struck because alternative means were submitted to the jury even though they were not set forth in the charging document, and insufficient evidence supports each aggravating circumstance.

Mr. Ramirez cannot show prejudice from his alleged errors. Although Mr. Ramirez's information referenced aggravating circumstances and the question of aggravating circumstances was submitted to the jury, Mr. Ramirez did not receive an aggravated sentence. *See* RCW 10.95.030(1)-(2) (aggravated sentence would have been the death penalty or life without parole). He received standard range sentences under RCW 9.94A.589(1)(b). Accordingly, even if there had been a problem with notice or the State's manner of proof, there was no impact on the outcome of Mr. Ramirez's case.

2. Concurrent sentences

Mr. Ramirez argues that because the trial court failed to recognize it had discretion to impose a mitigated concurrent sentence under RCW 9.94A.535 and instead believed it

was required to impose consecutive sentences under RCW 9.94A.589(1)(b), this matter should be remanded for resentencing to allow the court to consider a mitigated concurrent sentence.

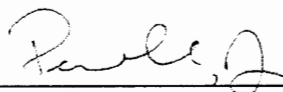
Mr. Ramirez is correct that, despite statutory language to the contrary, a sentencing judge has discretion to run multiple sentences for serious violent offenses concurrently as an exceptional sentence. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 329-31, 166 P.3d 677 (2007). However, Mr. Ramirez has not shown he was prejudiced by any mistaken belief that concurrent sentences were unavailable. While the trial judge recognized the significance of imposing a sentence on Mr. Ramirez and allowed Mr. Ramirez to allocute on the issue of leniency, the court never expressed any misgivings about imposing consecutive sentences or Mr. Ramirez's overall sentence length. To the contrary, the court imposed high end sentences for each of the two murder counts, something it would not have done had it thought consecutive sentences excessive. Because the record does not contain any possible indication that the trial court would have imposed concurrent sentences had it been alerted of the ability to do so, resentencing is unwarranted. *Id.* at 334; *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

Statement of Additional Grounds for Review

Mr. Ramirez claims the prosecutor committed misconduct in opening statement by misstating the facts of the case. While it is true that some of the trial testimony differed from what was outlined in opening statement, Mr. Ramirez has not shown that the prosecutor knowingly misrepresented the evidence. Instead, it simply appears that the witnesses testified differently than anticipated. This did not amount to misconduct. In fact, it provided Mr. Ramirez fodder for attacking the State's case in closing argument. The prosecutor's opening statement does not provide grounds for reversing Mr. Ramirez's conviction.

CONCLUSION

The judgment and sentence is affirmed.

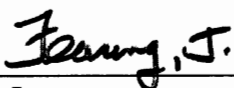


Pennell, A.C.J.

WE CONCUR:



Siddoway, J.



Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

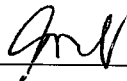
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 34872-5-III
)	
CHRISTOPHER RAMIREZ,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF NOVEMBER, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE COURT OF APPEALS – DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|-------------------|--|
| <input checked="" type="checkbox"/> LARRY STEINMETZ
[SCPAappeals@spokanecounty.org]
SPOKANE COUNTY PROSECUTOR'S OFFICE
1100 W. MALLON AVENUE
SPOKANE, WA 99260 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> LENELL NUSSBAUM
[lenell@nussbaumdefense.com]
BOAZ COHEN
[bcohen@kramerlevin.com]
DAVID FRANKEL
[dfrankel@kramerlevin.com]
AARON WEBMAN
[awebman@kramerlevin.com]
ATTORNEYS FOR AMICUS | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> CHRISTOPHER RAMIREZ
865044
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF NOVEMBER, 2018.

X _____ 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

November 21, 2018 - 4:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34872-5
Appellate Court Case Title: State of Washington v. Christopher Brian Ramirez
Superior Court Case Number: 14-1-04287-7

The following documents have been uploaded:

- 348725_Motion_20181121161028D3979723_1710.pdf
This File Contains:
Motion 1 - Waive - Page Limitation
The Original File Name was washapp.112118-03.pdf
- 348725_Petition_for_Review_20181121161028D3979723_2232.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.112118-04.pdf

A copy of the uploaded files will be sent to:

- awebman@kramerlevin.com
- bcohen@kramerlevin.com
- bobrien@spokanecounty.org
- dfrankel@kramerlevin.com
- gverhoef@spokanecounty.org
- lenell@nussbaumdefense.com
- lsteinmetz@spokanecounty.org
- marla@marlazink.com
- scpaappeals@spokanecounty.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Gregory Charles Link - Email: greg@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20181121161028D3979723