SUPREME COURT NO. 98425-5

COA NO. 50474-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ANDREW FORREST,
Petitioner.

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

Kitsap County Cause No. 15-1-01324-4

The Honorable William C. Houser, , Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Andrew Forrest, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Andrew Forrest seeks review of the Court of Appeals unpublished opinion entered on March 17, 2020. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: A defense attorney provides ineffective assistance of counsel by failing to propose a jury instruction necessary to the defense. Did Mr. Forrest's attorney provide ineffective assistance by failing to propose the standard jury instruction on intervening or superseding causes in vehicular homicide cases when the entire defense theory was that the deceased's sudden acceleration before the collision had broken the causal chain?

ISSUE 2: Defense counsel provides ineffective assistance by failing to object to inadmissible, prejudicial evidence absent a valid tactical reason. Did Mr. Forrest's attorney provide ineffective assistance by failing to object to evidence that his client was a member of an online club for "Fast-and-the-Furious-type" cars when that evidence was protected by the First Amendment, was inadmissible under ER 404(b) and ER 403, and encouraged the jury to agree with the state's theory that Mr. Forrest had been recklessly racing another car down the highway?

ISSUE 3: Testimony providing an opinion of the credibility of another witness or of the accused is inadmissible because it invades the province of the jury. Did Mr. Forrest's attorney provide ineffective assistance of counsel by failing to object to

extensive officer testimony opining that Mr. Forrest was lying and that the state's witnesses were credible?

IV. STATEMENT OF THE CASE

Andrew Forrest was driving at night from rugby practice to the Navy barracks where he lived. Ex. 79A, p. 4. He encountered a motorcycle on the highway and the two vehicles paced each other for several miles, going about seventy miles per hour. Ex 79A, p. 3; Ex. 103; RP 136.[1]

At one point when Mr. Forrest was driving behind the motorcycle in the left lane, another car came from behind and started tailgating Mr. Forrest. Ex. 79A, p. 3; Ex. 103. Mr. Forrest moved over to the right lane and passed the motorcycle. Ex. 79A, p. 3; Ex. 103; RP 136. The other car followed Mr. Forrest to the right lane, and then switched back to the left lane and passed him. Ex. 79A, p. 3; Ex. 103.

Mr. Forrest started approaching a slower-moving car in the right lane, so he turned on his turn signal and prepared to move back to the left lane. Ex. 79A, p. 3-4; Ex. 103; RP 136. He did not see the motorcycle when he looked, so he switched lanes. Ex. 79A, p. 3; Ex. 103. As soon as

[1] Unless otherwise noted, all citations to the transcript refer to the consecutively-numbered volumes spanning 5/1/17 through 5/15/17.

he did so, he felt the motorcycle hit the rear portion of his car. Ex. 79A, p. 3; Ex. 103.

Mr. Forrest pulled over and called 911. Ex. 79A, p. 3. At the scene, he told the officers that the motorcycle had accelerated suddenly right before the collision, causing it to hit the car. Ex. 103; RP 137.

Jared Knight, who had been driving the motorcycle, died from his injuries. RP 317. Mr. Forrest's car sustained relatively minor damage to the left rear quarter panel. RP 402-04.

About a month later, the state charged Mr. Forrest with vehicular homicide. RP 530.

At trial, police witnesses testified that Mr. Knight's motorcycle had skidded for about seventy-five feet before the collision. RP 458.

Two eyewitnesses told the police that they saw Mr. Forrest pass Mr. Knight's motorcycle before they lost sight of the two vehicles as they went around a turn, shortly before the accident. RP 644-45. One of the witnesses also said that he heard the motorcycle make a revving sound right before the collision. RP 174.

Even so, the state's accident reconstructionist, Detective Green, concluded that Mr. Forrest ran into Mr. Knight from the side as he tried to pass him. RP 571. He said that Mr. Green was using an "evasive lane steer" to go around the slower car in the right lane when he collided with

Mr. Knight's motorcycle. RP 573. Green opined that Mr. Forrest and Mr. Knight had been going approximately the same speed when Mr. Knight slammed on his brakes. RP 573.

Green also told the jury that he suspected that Mr. Forrest may have known the driver of the car that had been tailgating him. RP 514. He said that Mr. Forrest was a member of online clubs for "Fast-and-the-Furious-type cars…souped up cars. That kind of culture." RP 512-13.

Based on Mr. Forrest's online memberships, Green told the jury that he disbelieved Mr. Forrest's inability to identify the make or model of the car, even though he gave the police a detailed description of the car. RP 512-14, 636. Green testified that he suspected that Mr. Forrest actually new the driver of the car that had been tailgating him and was not being honest with the police. RP 512-14.

Defense counsel did not object to any of Green's testimony about Mr. Forrest's online activity or about his opinions of whether Mr. Forrest was being truthful. RP 512-14.

Green also told the jury that he arrested Mr. Forrest based on probable cause. RP 530. He said that he believed that probable cause existed because the lay witnesses had given stories that were consistent with one another. RP 530. Green described at length the extent to which the lay witnesses' reports lined up. RP 530-31. He said that he concluded

that the witness statements supported the idea that Mr. Forrest had been driving with disregard for the safety of others and had been driving recklessly. RP 531. Mr. Forrest's defense attorney did not object to any of this testimony. RP 530-31.

Two eyewitnesses to the incident perceived the interaction between Mr. Forrest's car and the tailgating car to be the two of them "jockeying for position" or "chasing" one another. RP 151-55. A third witness said that the two cars were going faster than the motorcycle but that she did not think much of it. RP 199. She did not say anything about them chasing each other or jockeying for position. RP 198-204.

Mr. Forrest also called an accident reconstruction expert, Steve Harbinson, to testify. RP 650-54. Harbinson concluded that Mr. Knight had suddenly accelerated at the same time that Mr. Forrest changed lanes, causing his motorcycle to hit Mr. Forrest's car. RP 674.

Harbinson pointed out that the damage to Mr. Forrest's car could only be explained by the motorcycle hitting Mr. Forrest's car, not by Mr. Forrest hitting the motorcycle from the side. RP 675.

Finally, Harbinson concluded that Green had underestimated the motorcycle's speed because he used the wrong formula for Mr. Forrest's lane change and failed to account for the motorcycle's impact with the guardrail or the friction caused by its sliding in the dirt. RP 656-60.

Defense counsel's theory in closing was that Mr. Forrest was not the proximate cause of Mr. Knight's death because Mr. Knight's sudden acceleration actually caused the accident. RP 782.

But Mr. Forrest's defense attorney did not propose the standard jury instruction regarding intervening or superseding events in vehicular homicide cases. *See* CP *generally*; *See* RP *generally*. As a result, the jury was not instructed that Mr. Forrest was not criminally liable if an unforeseen action by Mr. Knight had also been a proximate cause of his death. CP 57-75.

The jury found Mr. Forrest guilty of vehicular homicide. CP 76. Mr. Forrest timely appealed. CP 77. The Court of Appeals affirmed his conviction in an unpublished opinion. (See Appendix).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review and hold that Mr. Forrest received ineffective assistance of counsel at trial because his defense attorney failed to propose a critical jury instruction and unreasonably failed to object to highly prejudicial inadmissible evidence. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). In order to demonstrate ineffective assistance of counsel, the

accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that counsel's mistakes affected the outcome of the proceedings. *Id.*

A. Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to propose a jury instruction informing the jury that Mr. Forrest was not criminally liable if Mr. Knight's sudden acceleration was an intervening event, causing his death.

In order to convict Mr. Forrest of vehicular homicide, the state was required to prove beyond a reasonable doubt that his actions were the proximate cause of Mr. Knight's death. RCW 46.61.520(1).

To that end, defense counsel called an expert witness whose accident reconstruction supported Mr. Forrest's statements that the collision happened because Mr. Knight suddenly accelerated and hit the rear of Mr. Forrest's car. RP 674-75.

If the jury believed this defense theory, then Mr. Knight's acceleration would have been an intervening or superseding cause, meaning that Mr. Forrest's actions were not the proximate cause of the accident. *State v. Souther*, 100 Wn. App. 701, 708, 998 P.2d 350 (2000); *State v. McAllister*, 60 Wn. App. 654, 661, 806 P.2d 772 (1991), *overruled*

on other grounds by State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005).

But Mr. Forrest's defense attorney failed to propose a jury instruction informing the jury of the legal significance of Mr. Knight's acceleration. *See* CP *generally*; *See* RP *generally*. Accordingly, even if the jury believed Mr. Forrest's version of events, they likely also believed that they were obligated to convict him anyway. *See* CP 57-75. Mr. Forrest's attorney provided ineffective assistance of counsel.

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). A defense attorney also provides unreasonable representation by failing to research the law relevant to the case. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The bounds of proximate cause are different -- and narrower -- in criminal cases than in tort cases in. *State v. Bauer*, 180 Wn.2d 929, 940, 329 P.3d 67 (2014). This is because of the "extreme penalties" attached to criminal cases and the different rationales underlying criminal and tort law. *Id*. at 937. Actions by the deceased (or by a third party) my break the causal chain if they constitute a superseding or intervening event, without

which the actions of the accused would not have caused an accident. *Id.*at 709; *See also McAllister*, 60 Wn. App. 654.[2]

There is a pattern jury instruction designed to make this rule clear to the jury in a vehicular homicide case. *See* WPIC 25.03. But Mr. Forrest's defense attorney never proposed that instruction at trial. *See* RP *generally*.

This is true even though the entire theory of Mr. Forrest's defense was that Mr. Knight's sudden acceleration was an intervening or superseding event, which Mr. Forrest could not have anticipated. Defense counsel called an expert witness to establish exactly those facts. RP 650-75. But that same attorney failed to propose WPIC 25.03, which was necessary to give legal significance to those facts.

Absent the instruction on intervening acts, the jury in Mr. Forrest's case was left only with the instruction defining probable cause, which informed them that he was guilty so long as Mr. Knight's death would not have happened absent Mr. Forrest's conduct, regardless of any action on the part of Mr. Knight. CP 73. Without WPIC 25.03, none of the defense evidence had any legal significance to the jury.

[2] Because such an intervening event would negate the element of proximate cause, the burden is on the state to prove beyond a reasonable doubt that such an event did not supersede the accused's actions. *See State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014); *See also* Comment to WPIC 25.03.

The Court of Appeals agrees that Mr. Forrest's attorney provided deficient performance by failing to propose that instruction. Opinion, p. 7. Even so, the court affirms Mr. Forrest's conviction based on the conclusion that he has failed to establish prejudice. Opinion, p. 7.

At the same time, the Court of Appeals acknowledges that, had the jury believed the testimony of the defense expert, it would have established that Knight's sudden acceleration constituted a superseding intervening cause. Opinion, p. 7. Accordingly, if the jury believed Harbinson's reconstruction of the accident over Green's, it would have been *required to acquit* Mr. Forrest based on a proper instruction on the rule regarding intervening events. *Bauer*, 180 Wn.2d at 940.

The Court of Appeals' reasoning in establishing a lack of prejudice is based on the general conclusion that the state had a strong case against Mr. Forrest. Opinion, pp. 7-8. The court points out, specifically, that the state's expert (Green) testified in a manner that contradicted the theory of the defense expert (Harbinson). Opinion, p. 8. In effect, the court engages in a sufficiency analysis, finding that the jury *could have* properly convicted Mr. Forrest even if it had been properly instructed on the rule regarding intervening cause. Opinion, p. 8. The Court of Appeal errs by affirming Mr. Forrest's conviction on this basis.

A "reasonable probability" under the prejudice standard for ineffective assistance of counsel is not a mere replication of a sufficiency analysis. Rather, a showing of "reasonable probability" that the outcome of a trial would have been different absent counsel's mistakes requires a less, even, than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). It is "a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Jones*, 183 Wn.2d at 339.

Notably, the Court of Appeals does not conclude in Mr. Forrest's case that no reasonable jury could have believed Harbinson's reconstruction of the accident or that the jury would have been required to convict even if it had found Harbinson's testimony more compelling. In fact, the court could have believed Harbinson's theory, but they would also have thought that they were obligated to convict Mr. Forrest anyway based on the instructions they were given. *See* CP 57-75. The risk that this is, in fact, what occurred at Mr. Forrest's trial constitutes a "probability sufficient to undermine confidence in the outcome." *Estes*, 188 Wn.2d at 458.

There is a reasonable probability that defense counsel's deficient performance (in failing to propose the instruction regarding intervening events) affected the outcome of Mr. Forrest's trial. *Jones*, 183 Wn.2d at

339. The Court of Appeals should have reversed Mr. Forrest's conviction. *Id.*

The question of whether defense counsel's deficient performance in failing to propose a jury instruction that was critical to Mr. Forrest's case requires reversal raises a significant issue of constitutional law, which is of substantial public interest. This Court should accept review and reverse the Court of Appeals. RAP 13.4(b)(3)-(4).

B. Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to object to inadmissible evidence that prejudiced the defense.

Defense counsel provides ineffective assistance by waiving objection to inadmissible evidence that prejudices his/her client, absent a valid tactical reason. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd,* 165 Wn.2d 474, 198 P.3d 1029 (2009).

1. Defense counsel provided ineffective assistance by failing to object to testimony that Mr. Forrest was a member of an online club for "Fast-and-the-Furious-type cars," which encouraged the jury to convict based on an improper propensity inference.

The evidence that Mr. Forrest associated with an online club for "Fast-and-the-Furious-type cars"[3] was inadmissible because it was

[3] *The Fast and the Furious* is a blockbuster movie franchise about an illegal "underground racing world." *The Fast and the Furious*, IMDb. http://www.imdb.com/title/tt0232500 (last visited Jan. 19, 2018); *See also* http://www.fastandfurious.com/about (last visited Jan 19, 2018).

protected by the First Amendment freedom of association, encouraged the jury to make an improper propensity inference, and had virtually no probative value but carried a very high risk of unfair prejudice.

Even so, defense counsel did nothing to have the evidence excluded. Mr. Forrest's attorney provided ineffective assistance of counsel.

Because it is protected by the First Amendment guarantee of freedom of association, evidence of membership in a social club is not admissible in a criminal trial unless there is some connection between the crime and the organization. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (*citing Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992)); U.S. Const. Amend. I. Such evidence is not admissible when offered merely to prove the associations of the accused. *Id.*

Here, the online car club of which Mr. Forrest is a member was not connected to the accident in any way. Accordingly, his association with the club is protected by the First Amendment and was not admissible as evidence of his guilt. *Scott*, 151 Wn. App. at 526.

Additionally, under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b) must be read in

conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.[4] *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

For example, evidence that the accused is a member of a gang is generally inadmissible under ER 404(b) and ER 403. *State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012); *Scott*, 151 Wn. App. at 526. This is because gang membership evidence is not usually relevant to prove any element of an offense but invites the jury to make the "forbidden inference" that the accused is more likely guilty because s/he is a "criminal-type" person with a propensity to commit crimes. *Mee*, 168 Wn. App. at 159 (*quoting State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)); *See also Scott*, 151 Wn. App. at 529.

[4] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Similarly, the evidence that Mr. Forrest was a member of an online club that may have encouraged illegal racing was not relevant to prove any element of vehicular homicide but strongly encouraged the jury to draw an impermissible propensity inference. As with gang membership, the only reasonable purpose of the evidence to the jury was likely that it demonstrated that Mr. Forrest was interested in illegal car racing so he must have been engaging in illegal car racing on the night of the accident. *See Scott*, 151 Wn. App. at 529.

Mr. Forrest's defense attorney provided deficient performance by failing to object to the inadmissible evidence that he was a member of a "Fast-and-the-Furious-type" club. *Hendrickson*, 138 Wn. App. at 833. Counsel had no valid tactical reason for waiving objection to the inadmissible evidence.

There is a reasonable probability that defense counsel's unreasonable failure to object affected the outcome of Mr. Forrest's trial. The state's entire theory was that Mr. Forrest had been driving recklessly and in disregard for the safety of others because he had been racing another car down the highway. RP 752-55. The evidence that he was a member of an online club seeking to emulate the illegal behavior in *The Fast and the Furious* encouraged the jury to make an improper propensity

inference that directly supported that theory. Mr. Forrest was prejudiced by his attorney's deficient performance. *Jones*, 183 Wn.2d at 339.

Mr. Forrest's defense attorney provided ineffective assistance of counsel by unreasonably failing to object to evidence that Mr. Forrest was a member of an online club for "Fast-and-the-Furious-type" cars. *Id*.; *Hendrickson*, 138 Wn. App. at 833. Mr. Forrest's conviction must be reversed. *Id.*

This significant constitutional question is of substantial public interest. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

2. Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to object to improper officer testimony, which offered an opinion of the veracity of Mr. Forrest and of the state's lay witnesses.

Detective Green told the jury that – based on Mr. Forrest's online membership in a "Fast-and-the-Furious-type" car club, he suspected that Mr. Forrest was not being truthful when he said that he did not know the make and model of the car that had been tailgating him. RP 512-14. Based on this opinion, Green speculated to the jury that Mr. Forrest also knew the driver of that car, which he denied to the police. RP 512-14.

Shortly thereafter, Green informed the jury that he believed the eyewitness accounts of the events established probable cause to arrest Mr.

Forrest because they were consistent with each other. RP 530. Then he described those consistencies at length and told the jury that he believed the eyewitness' statements established that Mr. Forrest had been driving recklessly and had disregarded the safety of others. RP 531.

None of this evidence was admissible: it all constituted improper opinion testimony regarding the veracity of the accused or of another witness. *State v. Kirkman*, 159 Wn.2d 918, 927–28, 155 P.3d 125 (2007). But Mr. Forrest's attorney did not object to any of it. RP 512-14; 530-31. Defense counsel provided ineffective assistance.

No witness may offer testimony providing an opinion of the veracity of the accused or of any other witness. *Id.* Such testimony improperly invades the exclusive province of the jury. *Id.* Improper opinion testimony from a law enforcement officer regarding another witness's veracity can be particularly prejudicial because it "carries a special aura of reliability." *Id*. at 928-29.

Courts apply a five-factor test to determine whether a statement qualifies as improper opinion testimony, looking to: (1) "the type of witness involved, (2) the nature of the testimony, (3) the nature of the charge, (4) the type of defense, and (5) the other evidence before the jury. *Id.* at 928 (*citing State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

As to the first factor, Green's status as a law enforcement officer and as the lead detective on the case gave his testimony a "special aura of reliability," making it more likely that the jury would lend more credence to his assessment of the veracity of the other witnesses than to their own. *Kirkman,* 159 Wn.2d at 928-29.

Turning to the second factor, the nature of Green's testimony directly accused Mr. Forrest of being dishonest about whether he knew the make, model, and driver of the car that had been tailgating him. RP 512-14. This was a critical issue in the case because it spoke directly to whether Mr. Forrest and the other car had been racing on the highway.

Shortly thereafter, Green provided contrasting testimony opining that the stories eyewitnesses who thought Mr. Forrest had been driving unsafely were consistent with one another and were sufficient to establish probable cause of his guilt. RP 530-31. Green went on to explain why he felt that way and even went so far as to tell the jury that he believed that specific elements of the charges against Mr. Forrest had been proved. RP 531.[5]

[5] Analogously, in the prosecutorial misconduct context, an argument to the jury pointing out that probable cause has already been established in a case is tantamount to an opinion of guilt because it implies that the accused's guilt has already been determined. *See State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). Likewise, here, Green's extensive testimony about the determination of probable cause and its basis constituted an opinion of Mr. Forrest's guilt. *Id.*

As to factors four and five, the nature of the charge against Mr. Forrest and the nature of his defense made his case a matter of his word against the what two of the eyewitnesses thought they saw. Green's testimony opining that Mr. Forrest was lying but that the eyewitnesses who believed he had been driving unsafely were credible went right to the heart of this primary factual issue.

Finally, under the fifth factor, Mr. Forrest exercised his right not to testify at trial. Accordingly, the jury did not have an independent opportunity to assess his credibility and likely lent extra weight to Green's opinion that he had been lying.

Even so, the Court of Appeals holds that Green's testimony "is proper opinion or inference testimony," without any analysis into the factors laid out by this Court in *Kirkland* and *Demery*. Opinion, p. 10. The Court of Appeals errs by failing to apply Supreme Court precedent directly applicable to this case.

Defense counsel had no valid tactical reason for waiving objection to Green's inadmissible opinion testimony. Defense counsel provided deficient performance. *Hendrickson,* 138 Wn. App. at 833.

There is a substantial probability that defense counsel's unreasonable failure to object affected the outcome of Mr. Forrest's trial As detailed above, Green's improper opinion testimony placed the "aura

of reliability" of the primary detective on the case behind the opinion that Mr. Forrest was lying and the lay witnesses who thought he had been driving unsafely were telling the truth. *Kirkman*, 159 Wn.2d at 928-29. Green's testimony that the witness accounts were sufficient to establish probable cause also encouraged the jury to conclude that Mr. Forrest's guilt had already been established. *See Stith*, 71 Wn. App. at 22. Mr. Forrest was prejudiced by his attorney's deficient performance. *Jones*, 183 Wn.2d at 339.

The Court of Appeals should have reversed Mr. Forrest's conviction based on extensive ineffective assistance of counsel. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State Constitution. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted April 16, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Andrew Forrest
54358 Fortner Road
Darrington, WA 98241

and I sent an electronic copy to

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 16, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

March 17, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW RAYMOND FORREST, Appellant.	No. 50474-0-II UNPUBLISHED OPINION

MELNICK, J. — This case stems from an accident where Andrew Forrest's vehicle struck a motorcycle driven by Jared Knight, causing Knight to sustain life-ending injuries. The jury found Forrest guilty of two counts of vehicular homicide. Count one is based on the jury's finding that Forrest was driving his vehicle in a reckless manner (RCW 46.61.520(1)(b)) and count two is based on the jury's finding that Forrest was driving his vehicle with disregard for the safety of others (RCW 46.61.520(1)(c)). Forrest appeals, alleging (1) ineffective assistance of counsel, (2) prosecutorial misconduct, (3) cumulative error, (4) improper forfeiture, and (5) double jeopardy violation for the two counts of vehicular homicide. In his statement of additional grounds for review (SAG), Forrest also alleges ineffective assistance of counsel, prosecutorial misconduct, and double jeopardy violation. And in his supplemental brief, Forrest alleges the sentencing court improperly imposed a $200 filing fee as part of his legal financial obligations (LFOs).

The State concedes error on both the double jeopardy and LFO issues. We accept the State's concessions, and remand for the trial court to amend the judgment and sentence to vacate count two of vehicular homicide, correct the forfeiture section, and strike the criminal filing fee; we affirm all other aspects of Forrest's conviction.

FACTS

While driving on Highway 3 near Silverdale, multiple witnesses observed a motorcycle, driven by Knight travelling in the left lane. Witnesses observed two sports cars quickly approach from the rear. Forrest drove one of the cars, a Dodge Stealth. The other driver is unknown. The two cars were "kind of jockeying for position and trying to pass." 2 Report of Proceedings (RP) at 152.

They passed the witnesses' vehicles at a "very high rate of speed." 2 RP at 152. The two vehicles then closed in on the motorcycle. They moved into the right lane to pass the motorcycle. The motorcycle and two vehicles then went around a curve and the witnesses could not see them. One of the witnesses heard an engine revving and thought it was the motorcycle's; the witness then turned the corner and saw sparks as the motorcycle was spinning across the roadway. Knight was airlifted to the hospital where he later died from injuries received in the accident.

Forrest stopped at the accident; the other driver did not. Forrest told the investigating officer that after he passed the motorcycle, he moved back into the motorcycle's lane. The motorcycle then sped up and hit the back of Forrest's vehicle.

The State charged Forrest with two counts of vehicle homicide: count one was based on reckless driving and count two was based on driving in disregard to the safety of others.

During trial, John Huntington, a senior investigator analyst for the Attorney General's Office's Environmental Crime Section, testified to his investigation results of the accident. Huntington did not think Knight ran into Forrest's bumper from behind because there was no damage to the back of Forrest's car and there was a large gouge on the side of one of Forrest's car's tires. These facts would be inconsistent with a rear-end collision caused by Knight.

Washington State Patrol Trooper Alisha Gruszewski also testified. When asked why she was at the scene, she stated that she was responding to "a report of racing vehicles." 4 RP at 350. The State also offered exhibit 47, which is a photograph of what you see when looking in Forrest's vehicle's side view mirror. Forrest did not object.

Washington State Patrol Detective Rodney Green testified that while investigating the accident he observed a long straight skid mark caused by Knight's braking. Green opined that this skid mark was inconsistent with Forrest's claim that Knight sped up and hit the back of Forrest's vehicle; he also opined that Knight would have been able to stop in an upright position if he had not been hit from the side.

Regarding the mystery driver, Green testified that police attempted to locate the driver without success and that he suspected Forrest knew the driver. He based his suspicion on several factors, including that Forrest was part of a car club and that sports car owners tend to be in the same car clubs like a club for "the Fast-and-the-Furious-type cars." 5 RP at 512. Green continued by testifying that there are many different types of car clubs and that he looked for "[s]ouped up cars. That kind of culture" during his investigation. 5 RP at 513.

Green testified that based on his investigation, Forrest ran into Knight from the side as Forrest made an "evasive lane [change]." 5 RP at 572. Green testified that the engine revving sound that one of the witnesses testified to could have been one of the other vehicles or could have been the motorcycle going down and the motorcycle's throttle being partially stuck open.

Green also testified that he believed he had probable cause to arrest Forrest based on the witnesses' accounts of what happened. Green testified that he concluded that the witnesses' statements supported the idea that Forrest had been driving with disregard for the safety of others and had been driving recklessly. Defense Counsel did not object.

In his defense, Forrest called one witness, Steve Harbinson, an accident reconstruction expert. Harbinson concluded that Knight suddenly accelerated at the same time that Forrest changed lanes, causing his motorcycle to hit Forrest's car. Harbinson concluded that Green had underestimated the motorcycle's speed because he used the wrong formula for Forrest's lane change.

During closing remarks, the State argued "[Forrest] does not get to shrug his shoulders and point the blame at [Knight]. Outrageous. He does not get to do that. He has to be held accountable for the choices that he made. The choice he made to completely ignore the risk to [Knight] on the road that night." 6 RP at 803-04. Defense counsel did not object.

Defense counsel did not propose a jury instruction that conduct is not the proximate cause of death if death is caused by a superseding, intervening event.

The jury found Forrest guilty of both counts of vehicular homicide. During sentencing, the court stated, "First of all, we need to explain some things . . . it is only one count that is being convicted—or being sentenced today because there was one crime that occurred under two alternative theories, but the two alternative theories moved together for one count as was being

convicted . . . as a sentence is concerned being carried forward, which is the reckless manner, which is Count I." RP (May 26, 2017) at 32-33. However, on the judgment and sentence the court listed both counts of vehicular homicide under "Current Offense(s)." Clerk's Papers (CP) at 97. Based on an offender score of 0, the court sentenced Forrest to 26 months for count one.

The court also checked the box on Forrest's judgment and sentence that stated "**FORFEITURE**—Forfeit all seized property subject to forfeiture under RCW 9.41.098 or RCW 69.50.505." CP at 103. The court also ordered Forrest to pay a $200 filing fee. The court entered orders of indigency both before trial and after sentencing. Forrest appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Forrest first claims that he received ineffective assistance of counsel because his attorney failed to request a jury instruction that conduct is not the proximate cause of death if death is caused by a superseding intervening event and failed to object to certain testimony from Green. We disagree.

A. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). We review ineffective assistance of counsel claims de novo. *Estes*, 188 Wn.2d at 457.

To prevail on a claim of ineffective assistance of counsel, the defendant must show both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). There is a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892

P.2d 29 (1995). Representation is deficient if, after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Prejudice exists if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Estes*, 188 Wn.2d at 458.

B. Jury Instruction

Forrest argues that since evidence existed that Knight accelerated and struck Forrest's car, causing his own death, then defense counsel's performance was deficient for not proposing a superseding, intervening act instruction. We disagree.

To show that a defendant received ineffective assistance of counsel based on counsel's failure to request a particular jury instruction, the defendant must show both that he was entitled to the instruction and that the result of the proceedings would have been different. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 718, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2016). A party is entitled to an instruction when evidence exists in the record to support the party's theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

Here, the State charged Forrest with vehicular homicide under RCW 46.61.520. Under this statute, a person is guilty of vehicular homicide when a person dies "as a proximate result of injury proximately caused by the driving of any vehicle by any person." RCW 46.61.520(1). "[A] defendant's conduct will not be considered a proximate cause of the harm if a superseding cause

intervenes." *State v. Frahm*, 3 Wn. App. 2d 812, 819, 418 P.3d 215 (2018), *aff'd*, 193 Wn.2d 590, 444 P.3d 595 (2019).

Applicable to vehicular assault, 11A WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL 90.08, at 261 (4th ed. 2016) states:

> If you are satisfied beyond a reasonable doubt that the [[act] [or] [omissions]] [driving] of the defendant was a proximate cause of [the death] . . . it is not a defense that the [conduct] [driving] of [the deceased] . . . may also have been a proximate cause of the death.
>
> [However, if a proximate cause of [the death] . . .was a new independent intervening act of [the deceased] . . . [or] [another] which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. . . . An intervening cause is an action that actively operates to produce harm to another after the defendant's [acts] [or] [omission] has been committed [or begun].]

This instruction "defines the interplay of proximate cause and superseding intervening cause." *State v. Imokawa*, 194 Wn.2d 391, 395, 450 P.3d 159 (2019).

Here, one of the witnesses heard an engine revving and thought it was the motorcycle's, prior to the witness turning a corner and seeing the motorcycle spinning across the roadway. Forrest's expert testified that based on his investigation, Knight suddenly accelerated at the same time that Forrest changed lanes, causing his motorcycle to hit Forrest's car.

Assuming this evidence is enough to show Forrest was entitled to a superseding intervening act instruction and defense counsel was deficient for not requesting it, Forrest still cannot show ineffective assistance of counsel because he cannot show that the result of the proceedings would have been different.

During trial, Huntington testified to his investigation results. In Huntington's opinion, Knight did not run into Forrest's bumper from behind because there was no damage to the back of Forrest's car and there was a large gouge on the side of one of Forrest's car's tires. These facts would be inconsistent with a rear-end collision caused by Knight. Additionally, Green testified that based on his investigation, Forrest ran into Knight from the side as Forrest made an "evasive lane [change]." 5 RP at 572. Green came to this conclusion based in part on his observation of a long skid mark showing Knight was braking not accelerating. Green also testified that the engine revving sound that one of the witnesses testified to could have been one of the other vehicles or could have been the motorcycle going down and the motorcycle's throttle being partially stuck open.

Based on the strength of the State's case, it is unlikely the outcome of the trial would have been any different if counsel requested a superseding intervening act instruction. For this reason, Forrest fails to show the prejudice prong of his ineffective assistance of counsel claim; therefore, his claim fails.

C. Green's Testimony

Forrest next argues he received ineffective assistant of counsel because defense counsel did not object to Green's testimony regarding membership in clubs for "'the Fast-and-the-Furious-type cars'" and Green's testimony regarding the veracity of others. Br. of Appellant at 15 (quoting 5 RP at 512). We disagree.

Where a claim of ineffective assistance of counsel is based on defense counsel's failure to object, the defendant must show that the objection likely would have been sustained. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). Further, the "decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to

object constitute ineffective assistance of counsel." *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008).

1. Car Club Testimony

Forrest argues defense counsel should have objected to Green's testimony that Forrest was a member of a car club under the First Amendment, ER 404(b), and ER 403. We disagree.

The First Amendment protects freedom of association; ER 404(b) relates to the inadmissibility of prior bad acts, and ER 403 relates to the inadmissibility of an event where the probative value is outweighed by the danger of unfair prejudice.

Here, the State asked Green about investigative efforts to find the mystery car. During Green's investigation, he learned that Forrest belonged to a car club. The detective explained that the club involved a certain kind of cars which he described as "Fast-and-the-Furious-type cars." 5 RP at 512.

Even assuming a basis existed for defense counsel to object to this testimony under the First Amendment, ER 404(b), or ER 403, defense counsel's decision not to object would be a classic example of trial tactic. *Kolesnik*, 146 Wn. App. at 801. Defense counsel clearly did not want to call any further attention to Forrest's membership in this car club.

Moreover, even assuming counsel's performance was deficient, Forrest cannot show prejudice given the strength of the State's evidence. Multiple witnesses testified that Forrest and the mystery car appeared to be racing; they were passing the motorcycle on the right when they went around a corner, and Huntington's and Green's investigation reports, which were admitted at trial, support vehicular homicide. It is unlikely the trial outcome would be any different. For this reason, Forrest's ineffective assistance of counsel claim regarding counsel's failure to object to the State's evidence that Forrest belonged to a car club fails.

2. Opinion on Veracity

Forrest next argues defense counsel should have objected to Green's testimony that he believed probable cause existed to arrest Forrest for vehicular homicide based on the witnesses' accounts of the accident and Green's testimony that he did not believe that Forrest did not know the driver of the other vehicle. We disagree.

Under ER 701, a witness may testify "in the form of opinions or inferences" that is "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Nonetheless, "there are some areas that are clearly inappropriate for opinion testimony in criminal trials." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). "Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." *Montgomery*, 163 Wn.2d at 591.

Here, Green testified to his investigation of the accident. He interviewed multiple witnesses. He testified that the consistency of the witnesses' statements was a factor in deciding whether there was probable cause to arrest Forrest. He also testified that he thought it was odd that Forrest, who was a member of a car club, would not be able to identify the other sports car, and that his unwillingness to describe the vehicle might have meant he knew the driver. This testimony is proper opinion or inference testimony. Moreover, defense counsel's decision to not object to this testimony would be clearly tactical as to not call attention to these facts.

Nevertheless, even if counsel was deficient for not objecting, Forrest cannot establish prejudice. As discussed above, multiple witnesses testified that Forrest and the mystery car appeared to be racing; they were passing the motorcycle on the right when they went around a corner, and the investigation reports support vehicular homicide. It is unlikely the trial outcome

would be any different. For this reason, Forrest's ineffective assistance of counsel claim regarding counsel's failure to object to Green's testimony fails.

II. PROSECUTORIAL MISCONDUCT

Forrest argues that the prosecutor committed misconduct by misstating the law and the State's burden of proof. We disagree.

A. Standard of Review

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). An appellant claiming prosecutorial misconduct must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). When a defendant fails to object to the improper comments at trial, the defendant must also show that the comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61.

It is misconduct for a prosecutor to misstate the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Similarly, it is misconduct for the prosecutor to misstate the State's burden of proof. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). However, the prosecutor "has wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 458, 406 P.3d 658 (2017), *review denied*, 190 Wn.2d 1013 (2018).

B. Misstatement of Law and Burden of Proof

Forrest argues that the prosecutor misstated the law and relieved the State of its burden of proof by stating, "[Forrest] does not get to shrug his shoulders and point the blame at [Knight]. Outrageous. He does not get to do that. He has to be held accountable for the choices that he

made. The choice he made to completely ignore the risk to [Knight] on the road that night." 6 RP at 803-04.

This comment is based on the overwhelming evidence that Forrest drove recklessly on the night of the accident and is not an improper misstatement of the law. Moreover, the prosecutor did not relieve the State of its burden of proof by arguing that the jury should hold him accountable. It is not improper for a prosecutor to state "that the defendant will be set free or held to account by a jury's decision; that is indeed the jury's responsibility and function." *State v. McNallie*, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), *aff'd*, 120 Wn.2d 925, 846 P.2d 1358 (1993). Thus, Forrest fails to demonstrate improper argument. For these reasons, Forrest's prosecutorial misconduct argument fails.

III. CUMULATIVE ERROR

Forrest next argues that the alleged multiple instances of ineffective assistance of counsel and prosecutorial misconduct constituted cumulative error, which requires a new trial. Under the cumulative error doctrine, reversals is required where the combined effect of several nonreversible errors denied the defendant of a fair trial. *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012), *abrogated on other grounds by Gregory*, 192 Wn.2d 1. Because we conclude that no ineffective assistance of counsel or prosecutorial misconduct occurred, we reject Forrest's argument.

IV. FORFEITURE

Forrest next contends that the sentencing court erred by marking the box on Forrest's judgment and sentence that states "**FORFEITURE**—Forfeit all seized property subject to forfeiture under RCW 9.41.098 or RCW 69.50.505." CP at 103. We agree.

A sentencing court must have statutory authority before ordering forfeiture on a defendant's judgment and sentence. *State v. Roberts*, 185 Wn. App. 94, 96, 339 P.3d 995 (2014).

Forrest's judgment and sentence references two statutes: RCW 9.41.098 refers to weapons and RCW 69.50.505 refers to all monies, negotiable instruments, and/or other proceeds or assets acquired from proceeds of sales of controlled substances. But, there is nothing in our record to show there was any property seized or the sentencing court's intent to order forfeiture. Therefore, we conclude the checked box on the judgment and sentence is a clerical error. The remedy for a clerical error in a judgment and sentence is to remand to the trial court for correction. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). We, therefore, remand for correction of the judgment and sentence.

V. DOUBLE JEOPARDY

Forrest next argues that his two vehicular homicide convictions violate double jeopardy. The State concedes that the offenses were charged in the alternative and count two should be stricken from the judgment and sentence. We accept the State's concession.

Washington's double jeopardy clause offers the same scope of protection as that provided by the federal double jeopardy clause. *State v. Muhammad*, 194 Wn.2d 577, 615-16, 451 P.3d 1060 (2019). Both prohibit "multiple punishments for the same offense imposed in the same proceeding." *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003). We review double jeopardy claims de novo. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). The appropriate remedy for a double jeopardy violation is to vacate the offending convictions. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008).

The jury found Forrest guilty of both counts of vehicular homicide. The court then sentenced Forrest to 26 months solely on count one, but on the judgment and sentence the court listed both counts of vehicular homicide under "Current Offense(s)." CP at 97.

Although the trial court merged the two convictions for sentencing purposes and expressly sentenced Forrest for only one conviction, a conviction carries an onus that, in and of itself, constitutes punishment for purposes of double jeopardy analysis. *State v. Womac*, 160 Wn.2d 643, 656-61, 160 P.3d 40 (2007); *State v. Turner*, 169 Wn.2d 448, 455, 238 P.3d 461 (2010). Accordingly, we accept the concession of error and remand for vacation of count two.

VI. LFOs

Forrest argues, and the State agrees, that due to the 2018 amendments to the LFO statutes, we should strike the $200 criminal filing fee on his judgment and sentence.

Legislative amendments to the LFO statutes in 2018 prohibit sentencing courts from imposing a criminal filing fee on indigent defendants. RCW 36.18.020(2)(h); *State v. Ramirez*, 191 Wn.2d 732, 746-747, 426 P.3d 714 (2018). There is no dispute that Forrest is indigent. Therefore, we accept the State's concession and remand for the trial court to strike the criminal filing fee.

VII. SAG Issues

In his SAG, Forrest alleges ineffective assistance of counsel, prosecutorial misconduct, and double jeopardy violation. Other than his double jeopardy argument, which we have already addressed, we are unpersuaded by Forrest's arguments.

A. Ineffective Assistance of Counsel

Forrest first argues he was denied effective assistance of counsel because counsel only called one witness and there are several other witnesses, including Forrest, who would have testified for the defense. He also alleges counsel only called one witness so the trial would end sooner. Forrest relies on matters outside our record. We do not know what these witnesses would have testified to or why they were not called. If Forrest has evidence outside the record regarding these witnesses, his remedy is to file a personal restraint petition (PRP) with the supporting evidence. *State v. Turner*, 167 Wn. App. 871, 881, 275 P.3d 356 (2012).

Forrest next argues that counsel rendered ineffective assistance by not objecting to Gruszewski's testimony that she was at the scene based on "a report of racing vehicles." 4 RP at 350. Forrest argues this testimony violated a motion in limine but does not direct this court to which motion in limine he is referring to. Our record shows a motion in limine to exclude the word "racing" when referring to the victim's driving. Nevertheless, even assuming it was error for defense counsel to not object to this testimony, Forrest still cannot show ineffective assistance of counsel because he cannot show that the result of the proceedings would have been different given the strength of the State's evidence as we discussed previously.

Forrest also alleges Gruszewski wrongly testified that Forrest was "jockeying for position." SAG at 2. However, there is no such testimony from Gruszewski in our record. We, therefore, decline to address this issue further.

Forrest next argues that counsel rendered ineffective assistance by not objecting to exhibit 47. The State offered exhibit 47, which is a photograph of Forrest's vehicle's side view mirror. Again, even assuming it was error to not object to the photograph, Forrest still cannot show

ineffective assistance of counsel because he cannot show that the result of the proceedings would have been different given the strength of the State's evidence.

Forrest next argues that defense counsel rendered ineffective assistance by not objecting to Green's testimony regarding the truthfulness of witnesses and a club for "Fast-and-the-Furious-type cars." 5 RP at 512. These issues were adequately addressed by counsel and will not be reviewed further. *See* RAP 10.10(a); *State v. Thompson*, 169 Wn. App. 436, 492-93, 290 P.3d 996 (2012) (allegations of error that have been adequately addressed by counsel are not proper matters for an SAG).

B. Prosecutorial Misconduct

Forrest next argues that the prosecutor committed misconduct by comparing him to a dog. Our record does not contain any reference to the prosecutor calling Forrest a dog. Forrest references the prosecutor mentioning "Oakley," but does not explain how that amounts to prosecutorial misconduct. SAG at 3. If Forrest has evidence outside our record that would establish prosecutorial misconduct, his remedy is to file a PRP with the supporting evidence. *Turner*, 167 Wn. App. at 881. Without more, we decline to address this issue further.

C. Double Jeopardy

Forrest lastly contends his judgment and sentence wrongly lists both convictions in violation of double jeopardy principles. Because this argument has been adequately addressed by counsel, we decline to address it further. RAP 10.10; *Thompson*, 169 Wn. App. at 492-93.

We affirm Forrest's conviction on count one for vehicular homicide and remand for the trial court to amend the judgment and sentence to vacant count two of vehicular homicide, correct the forfeiture section, and strike the criminal filing fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Lee, A.C.J.

LAW OFFICE OF SKYLAR BRETT

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