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Division I
State of Washington

72734-6

NO. 72734-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

YUSUF SHIRE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY M. RAMSDELL, JUDGE
THE HONORABLE WILLIAM L. DOWNING, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. FACTS OF THE CRIMES	3
C. <u>ARGUMENT</u>	12
1. THE TRIAL COURT PROPERLY DENIED SHIRE'S REQUEST FOR A MATERIAL WITNESS WARRANT FOR BERKET KEBEDE	12
a. Relevant Facts	13
b. The Trial Court Properly Denied The Request For A Material Witness Warrant	21
c. Counsel Was Not Ineffective	30
2. SHIRE'S STATEMENT WAS NOT THE PRODUCT OF INTERROGATION, AND WAS PROPERLY ADMITTED	32
a. Relevant Facts	33
b. The Statement Was Properly Admitted	35
c. Any Error Was Harmless	41
3. THE SCRIVENER'S ERROR IN THE STATUTORY CITATION ON THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED	43
D. <u>CONCLUSION</u>	43

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arizona v. Fulminante, 499 U.S. 279,
111 S. Ct. 1246, 113 L. Ed.2d 302 (1991)..... 42

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)..... 33-38, 42

Rhode Island v. Innis, 446 U.S. 291,
100 S. Ct. 1682, 64 L. Ed.2d 297 (1980)..... 34, 35, 37, 40

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)..... 30, 31

United States v. Moudy, 462 F.2d 694
(5th Cir. 1972) 29

Washington State:

City of Bellevue v. Vigil, 66 Wn. App. 891,
833 P.2d 445 (1992)..... 22

In re Personal Restraint of Cross, 180 Wn.2d 664,
327 P.3d 660 (2014)..... 36

In re Personal Restraint of Pirtle, 136 Wn.2d 467,
965 P.2d 593 (1998)..... 39

State v. Denney, 152 Wn. App. 665,
218 P.3d 633 (2009)..... 36, 37

State v. Derum, 76 Wn.2d 26,
454 P.2d 424 (1969)..... 23

State v. Downing, 151 Wn.2d 265,
87 P.3d 1169 (2004)..... 22

<u>State v. Edwards</u> , 68 Wn.2d 246, 412 P.2d 747 (1966).....	25, 27, 29
<u>State v. Eller</u> , 84 Wn.2d 90, 524 P.2d 242 (1974).....	23, 24, 25, 26
<u>State v. Garcia</u> , 57 Wn. App. 927, 791 P.2d 244, <i>rev. denied</i> , 115 Wn.2d 1010 (1990).....	30
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	30
<u>State v. Hartley</u> , 51 Wn. App. 442, 754 P.2d 131 (1988).....	23, 29
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	41
<u>State v. Lane</u> , 56 Wn. App. 286, 786 P.2d 277 (1989).....	26, 27
<u>State v. McCabe</u> , 161 Wn. App. 781, 251 P.3d 264, <i>rev. denied</i> , 172 Wn.2d 1016 (2011).....	22
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	30
<u>State v. Peters</u> , 47 Wn. App. 854, 737 P.2d 693, <i>rev. denied</i> , 108 Wn.2d 1032 (1987).....	23
<u>State v. Sadler</u> , 147 Wn. App. 97, 193 P.3d 1108 (2008), <i>rev. denied</i> , 176 Wn.2d 1032 (2013).....	38, 39
<u>State v. Shuffelen</u> , 150 Wn. App. 244, 208 P.3d 1167, <i>rev. denied</i> , 220 P.3d 210 (2009).....	36, 37

<u>State v. Tatum</u> , 74 Wn. App. 81, 871 P.2d 1123, <i>rev. denied</i> , 125 Wn.2d 1002 (1994).....	23, 24
--	--------

<u>State v. Wilson</u> , 144 Wn. App. 166, 181 P.3d 887 (2008).....	40
--	----

Other Jurisdictions:

<u>United States v. Alexander</u> , 428 A.2d 42 (D.C. 1981).....	40
---	----

Constitutional Provisions

Federal:

U.S. CONST. amend. V	35
----------------------------	----

U.S. CONST. amend. VI	21
-----------------------------	----

Washington State:

CONST. art. I, § 9.....	35
-------------------------	----

CONST. art. I, § 22.....	21
--------------------------	----

Statutes

Washington State:

RCW 2.28.010.....	21
-------------------	----

RCW 9A.36.011	43
---------------------	----

RCW 9A.36.021	43
---------------------	----

RCW 10.52.040.....	22
--------------------	----

Rules and Regulations

Washington State:

CrR 4.10..... 22

Other Authorities

Black's Law Dictionary (8th ed. 2004)..... 25

A. ISSUES

1. Whether it was a proper exercise of the trial court's discretion to deny Shire's last-minute request for a material witness warrant for Berket Kebede.

2. Whether Shire has failed to show that his trial counsel was ineffective in not requesting a material witness warrant at an earlier point, where the record indicates that counsel's actions were likely tactical, and Shire cannot show prejudice.

3. Whether the trial court properly concluded that a police officer's brief explanation of the reason for the stop was not "interrogation."

4. Whether this case should be remanded solely for correction of a scrivener's error as to the statutory citation on Shire's judgment and sentence.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Yusuf Shire was charged by Information and Amended Information, together with codefendant Mohamed Ibrahim, with three counts of Assault in the First Degree, each with a firearm allegation, and one count of Unlawful Possession of a

Firearm in the First Degree.¹ CP 1-7, 10-15, 56-58, 64-66. The State alleged that, in the early morning hours of May 18, 2013, Shire and Ibrahim opened fire on Mardillo Barnes, Vincent Williams, and Berket Kebede, wounding Barnes in the hand. Id.

The defendants proceeded by way of a joint jury trial. RP 274-1503.² The first trial ended with the trial court declaring a mistrial due to a late-disclosed defense witness. CP 40; RP 1494, 1500.

At a second trial, the jury found Shire guilty of the lesser included crime of Assault in the Second Degree, including the firearm allegation, as to all three victims. CP 89-92. The jury also found him guilty of Unlawful Possession of a Firearm in the First Degree. CP 89.

The trial court imposed concurrent standard-range sentences of 72 months for each of the assault convictions and 75 months for the firearm conviction; in addition, the court imposed three consecutive 36-month firearm enhancements. CP 97-103;

¹ Ibrahim has separately appealed (No. 72753-2-I), and the two appeals have been linked for consideration by this Court.

² The verbatim report of proceedings is numbered consecutively throughout, and will be referred to herein as "RP."

RP 2832-33. The total term imposed was thus 183 months (75 months plus 108 months). CP 127-29.

2. FACTS OF THE CRIMES.

Mardillo Barnes, Vincent Williams and Berket Kebede were partying. On the evening of May 17, 2013, the three were riding around with a couple of female friends; they stopped in a bar to drink and shoot some pool, and they smoked some marijuana. RP 1950-52, 2296-98.

By the early morning hours of May 18th, the party was winding down, and the group ended up just north of the intersection of 85th and Fremont Avenue North, near the homes of both Barnes and Williams. RP 1949, 1953-54, 2295, 2299-2300. The three men were standing around near a fenced field adjacent to the housing development where Barnes and Williams lived, eating takeout food, talking, and generally getting ready to call it a night. RP 1954, 1959, 2299-2300.

As the trio stood there, two African-American men approached.³ RP 2307. One was short and wore dark clothing; the other was taller and wore a sweater with blue or purple stripes,

³ The description that follows, of the two men and of the shooting, was provided by Vincent Williams. Mardillo Barnes claimed that he noticed nothing before the shooting started, and that he had no idea who shot him. RP 1969-72. Berket Kebede did not testify at the trial.

gloves, and a baseball cap. RP 2309-10. The shorter man, whom others referred to as "Louie," engaged in a brief and seemingly friendly conversation with Kebede, and asked Barnes something like where he was from. RP 2312, 2315-17. Williams had seen the shorter man around before. RP 2311-12, 2318. Williams identified him the next day in a photo montage as Yusuf Shire, and identified him again in court during the trial. RP 2311-13, 2348-49, 2573.

The taller man was a stranger to Williams prior to this incident. RP 2313, 2319. Williams identified Mohamed Ibrahim on the day after the shooting in a separate photo montage, and identified him again in court. RP 2313, 2348-49.

Shire and Ibrahim had backpedaled about four or five steps, still facing the group, when Shire suddenly fired a gun into the air, saying something like "I do this." RP 2324-26. From the sound, Williams thought the gun was a revolver. RP 2329-30. Shire then leveled the gun, aimed it at Williams and his friends, and fired about five shots. RP 2326-28. Ibrahim then pulled out what appeared to be a 9mm semi-automatic pistol and fired about six shots. RP 2329-31.

Although all three were in the line of fire when the shooting began, it appeared to Williams that the shooters were focused on

Mardillo Barnes. RP 2332-33. As Barnes ran across the street, the bullets seemed to follow him. RP 2333. Both Williams and Kebede hid behind cars. RP 2333, 2341. Shire and Ibrahim disappeared into the same apartment complex from which they had emerged moments before. RP 2334-35.

When the shooting stopped, Williams began screaming Barnes's name. RP 2342-43. Williams followed a trail of blood across the street and located Barnes in a back yard with a "puddle of blood" beneath him. RP 2336-37. Barnes had been shot in the hand, and he was "freaking out." RP 2337. Williams hung around long enough to make sure that Barnes got into an ambulance. RP 2345. Williams did not talk to the police that night. RP 2345.

Several additional witnesses saw parts of the incident unfold. Thomas English lived in a townhouse at 8549 Fremont Avenue North. RP 1684. He was smoking a cigarette on his patio around 1:00 a.m. when he saw two African-American men run through the courtyard of his apartment complex toward Fremont. RP 1685-86. One was "pretty short,"⁴ while the other was taller; English did not pay attention to what they were wearing. RP 1686-87.

⁴ Shire is five feet three inches tall. RP 2557; CP 8.

Within minutes, English heard nine or ten gunshots. RP 1690. They came in quick succession, in two groups separated by a "brief hesitation" measured in seconds. RP 1691. The shots sounded "very close" – "[n]ot even a block away," and they came from the direction in which the two men had run. RP 1691-92.

Shortly thereafter, two African-American men with the same height differential ran back through the well-lit courtyard, passing within 20 feet of English. RP 1687, 1694-96. This time, English paid more attention to their appearance, noting that the shorter man, who passed by first, was wearing a dark "hoodie" and dark pants. RP 1687. He was crouched down, running fast, and holding a gun in his hand. RP 1701-02. The taller man ran by next, 10 or 15 seconds behind the first; he was wearing a blue-and-white striped hoodie and baggy pants. RP 1688, 1702-03. This man was running clumsily, stumbling, with his hands down his pants. RP 1688, 1701.

English went inside briefly, and then decided to go back out and see if anyone needed assistance. RP 1704. He saw an African-American man who had an injury to his hand. RP 1704. When police and paramedics showed up, English gave the police his name and address and returned home. RP 1704, 1706.

David Bentler also lived near the intersection of 85th and Fremont. RP 1632. Late in the evening on May 18, 2013, Bentler heard a series of gunshots; after pausing the music he was listening to, he heard another series of shots. RP 1632, 1640. They sounded very close. RP 1639. After waiting about 30-45 seconds, Bentler went to his window to see what was going on. RP 1641.

Bentler saw a white, late '90s model Toyota Camry parked in a driveway, with two people outside the car. RP 1635, 1638-39, 1642. A very tall African-American man dressed in dark clothing jumped into the back seat directly behind the driver. RP 1632, 1642, 1647. Bentler did not recall what seat the second man got into, although he knew it was not the driver's seat. RP 1642. As soon as the two men were in the car, it sped off down the road. RP 1632, 1635, 1643. Bentler immediately called 911. RP 1632.

Mardillo Arnold and his wife Carolyn Barnes-Arnold lived with their four sons, the oldest of whom was 27-year-old Mardillo Barnes, at 8521 Fremont Avenue North. RP 2002-03, 2423-24. On the night in question, Arnold was awakened by a loud explosion, followed by several more. RP 2426-27. He knew right away that he was hearing gunshots, and they sounded like they

were right outside his bedroom window. RP 2427. There was a brief pause after the first shot, then he heard about seven more. RP 2428.

Arnold ran to the window and looked out. RP 2427. He saw a young black man wearing dark clothing run past, in what looked like a jogging top with a hood. RP 2431-32. Arnold jumped into his pants and ran downstairs and out the door. RP 2431. Outside, he encountered Vincent Williams, who looked very scared. RP 2434. Hearing from Williams that his son Mardillo (Barnes) had been shot, Arnold ran into the street and screamed his son's name. RP 2435. Barnes came running from behind a house, holding his arm and bleeding heavily. RP 2436-37. Arnold used his own belt for a tourniquet, called 911, and waited with Barnes until an aid car came. RP 2437-41.

Like her husband, Carolyn Barnes-Arnold was awakened by a loud boom, which was quickly followed by five or six additional gunshots. RP 2011. As she got up to go to the window, her husband passed her on his way back from the window and out the bedroom door. RP 2013-14. Upon reaching the window, she saw someone run by. RP 2014. He had on a black shirt or hoodie, and his head was covered. RP 2014. By this time, her husband was on

his way down the stairs. RP 2014. The running man cut through the building along a walkway that leads into the courtyard. RP 2015-16.

Barnes-Arnold ran down the stairs and out the door. RP 2017. Vincent Williams and "Kit"⁵ were there, looking scared and panicked. RP 2018-19. Williams was screaming that he thought Barnes had been shot. RP 2020. Williams told Barnes-Arnold that "Louie" was one of the two shooters.⁶ RP 2020, 2033. She could not recall the second name that Williams gave her. RP 2033.

Police responding to the 911 calls stopped a white 1996 Toyota Camry four-door sedan in the 7700 block of Third Avenue Northwest. RP 1762-63, 1766, 1827-31, 1850, 1870-71, 2077-78. David Bentler drove to the scene and identified the car as the one he had seen earlier. RP 1653-56.

There were five people in the car, two in the front and three in the back. RP 1834, 1853. Although most of the occupants put their hands up when told to do so, the passenger sitting behind the driver's seat, who proved to be Mohamed Ibrahim, kept bending

⁵ Berket Kebede, also referred to at various times as "Ket" or "Kip." RP 1448, 1452-53.

⁶ Barnes-Arnold had seen someone who went by "Louie" around the neighborhood. RP 2020-21. She identified Shire in court as "Louie." RP 2021.

down and moving around. RP 1905, 2547. The passenger seated on the rear passenger-side seat, who turned out to be Yusuf Shire, was also seen reaching down. RP 2553-54, 2557.

Police removed all five from the car and conducted a show-up identification procedure.⁷ RP 1794-1805, 1833-34, 2079-82. Thomas English identified Shire and Ibrahim as the two men he had seen running through his building's courtyard earlier. RP 1707-08, 1720, 1801, 2079, 2541-43. His identifications, which he made with certainty, were based primarily on clothing, height and ethnicity. RP 1720.

Vincent Williams also identified the defendants. Detective Janes spoke with Vincent Williams at the scene on the afternoon following the shooting. RP 2567-68. Williams gave Janes the street names of the two individuals who had done the shooting, and Janes was able to link these names to Shire and Ibrahim. RP 2570. Janes prepared two separate six-person photo montages, one containing Shire's photo and the other containing Ibrahim's. RP 2569-73. Williams identified both defendants with 100% certainty. RP 2348-50, 2573-74.

⁷ The removal and the show-up procedure were captured on several in-car videos, which were played for the jury. RP 1834-37, 1875-79.

Other evidence supported the identifications. Police recovered a 9mm semi-automatic pistol from the floor underneath the driver's seat of the Camry, directly in front of the spot in the car where Ibrahim had been seated. RP 1907, 2078, 2547, 2255, 2558. A glove was found on the floorboard in that area. RP 2547. While the capacity of the gun was 16 cartridges, only one bullet remained in the gun. RP 2108-09, 2227-29. Six shell casings recovered from the scene of the shooting had been fired from this gun. RP 2139-40, 2146, 2166, 2186-87, 2232-36, 2547.

Police recovered a second gun, a .38 caliber revolver, from under the front passenger seat of the Camry. RP 2092-93. This gun was directly in front of where Shire had been seated. RP 2557-58. Fingerprints from Shire's left thumb and left middle finger were found on the cylinder. RP 2271-73. The revolver had a capacity of five or six cartridges; when found by police, it contained three unfired rounds and one expended round. RP 2096-99, 2236.

The jury also heard a portion of a letter that Shire had written from jail to a friend:

[M]y case is looking kind of bad right now that they pushed it back 'til October. And they got my prints on the gun. But really, my case relies on the victims. If the victims don't come, I will get charged with the gun.

That's why I'm stressing really. So far they can't get a hold of none of the victims or the witness.

But yeah, I need you give [sic] to take Oh Boy out of town to Cali and give him like one thousand a month to live until my shit is over with 'cause if they find him and he comes, I'm cooked. Bad. That's why I need you to do that, because with him I shouldn't – should be good. 'Cause they are – are looking for him.

RP 2598.

Shire did not testify at his trial.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED SHIRE'S REQUEST FOR A MATERIAL WITNESS WARRANT FOR BERKET KEBEDE.

Shire contends that the trial court erred in refusing to issue a material witness warrant for Berket Kebede on the morning that both parties were scheduled to rest. Given the timing, and the history of Kebede's last-minute appearances and disappearances, the trial court acted within its discretion in denying the request. In any event, given the abundant evidence of Shire's guilt, the cumulative nature of Kebede's proposed testimony, and the fact that his testimony would have been subject to extensive and damaging impeachment, Shire cannot show prejudice.

Shire further argues that his attorney was ineffective in not asking for a material witness warrant at an earlier point in the trial. Given that Kebede was under subpoena, and had not refused to comply with his subpoena, it is doubtful that counsel would have had a basis for such a request at an earlier date. Moreover, it appears from the record that counsel likely made a tactical decision not to request a material witness warrant for Kebede until the last day of trial. Finally, Shire cannot show prejudice as a result of counsel's actions.

a. Relevant Facts.

The identity of the third victim was a mystery from the outset. Based on a statement that Vincent Williams gave to police, the State believed that the third victim's name was "Kip" or "Barquet." CP 139-40, 297. Williams either could not or would not provide any further information to help in identifying this person. CP 140. Believing that "Kip" might be a member of the Barquet⁸ family, which was "fairly well known" to Seattle police, the State directed its

⁸ While the transcriptionist transcribed this name as "Berket," it is clear that the State believed that the name of the mystery victim was "Barquet." CP 139-40, 297.

efforts toward "scouring records looking for someone in the family that was either in that area or the same age."⁹ RP 1524.

Vincent Williams testified at the first trial that someone named Berket (whom Williams also referred to as "Ket") had been present at the time of the shooting. RP 467, 471. Williams said that Berket had been standing right next to himself and Mardillo Barnes when "Louie" started firing at the group. RP 478-79. Barnes acknowledged knowing someone named "Berket" or "Kip" or "Kit," but insisted that he had "no idea" what the man's real name was. RP 946-47.

Despite his best efforts, Detective Janes was not able to locate "Berket." Mardillo Arnold did not know who Berket was. RP 1206. Mardillo Barnes refused to give police any information. RP 1206. Vincent Williams told Janes that he knew the man only as "Berket," and didn't know where he could be found. RP 1206. Janes was left with little to go on.¹⁰ RP 1206-07.

⁹ The confusion is understandable. Brief research reveals criminal cases against a number of members of the Barquet family. See 2008 WL 434879 (Gregory Barquet); 2003 WL 23019949 (Michael Barquet); 1995 WL 917004 (Robert Barquet); 1995 WL 1054133 (Derrick Barquet); 1993 WL 13142319 (Christopher Barquet); 1993 WL 13142320 (Ronald Barquet).

¹⁰ Like the prosecutors, Janes was apparently under the impression that he was looking for a member of the Barquet family. RP 1206.

Nearing the end of the first trial, at the end of the day on December 16, 2013, the State announced that it had one more witness, whose testimony would take five or ten minutes. RP 1390. The court informed jurors that they would hear closing arguments the following morning. RP 1392.

The next morning, December 17, 2013, the State announced that its final witness was present. RP 1431. The court and the parties then spent a few moments finalizing the jury instructions. RP 1432-47.

Shire's attorney then abruptly informed the court that he had interviewed "State's missing witness, Berket Kebede." RP 1448. Counsel elaborated that "Berket Kebede will testify that he knows all the parties in the case, that he was present at the shooting, that he did see the shooters, and that the shooters are not Mr. Shire or Mr. Ibrahim." RP 1449. Counsel represented that Kebede was present in the hallway outside the courtroom.¹¹ RP 1452.

The State scrambled to interview Kebede, which was accomplished by detectives with all counsel present. CP 175, 183-84. Kebede admitted that Shire had called him from jail on multiple occasions, that he had visited Shire in jail four or five times,

¹¹ Not surprisingly, the court's response was, "Who is Mr. Kebede again?" followed by "I thought he was Kip Berket." RP 1452.

and that Shire had given him mail to pass on to someone else.

CP 211, 235-36, 245, 247. Kebede gave police his personal phone number.¹² CP 217-18, 236.

Kebede also revealed that he had been present in court for a portion of Vincent Williams's testimony.¹³ CP 227. Kebede said that he had encountered Shire's attorney, Ned Jursek, on the day after Williams's testimony. CP 227. Kebede and Jursek had talked for about ten minutes on a bench outside the courtroom. CP 229. Kebede had told Jursek that he was a witness to the events in question, and had given Jursek his phone number. CP 228-29.

Jursek told the court that he first had contact with Kebede on December 10th, in the hallway outside the courtroom during an afternoon break. RP 1474. Jursek had used the intervening week to investigate Kebede's potential testimony, discuss it with his client, and weigh how to proceed. RP 1474-75. Jursek nevertheless insisted that Kebede should be allowed to testify on that very day (December 17th), leaving the State no time to prepare to cross-examine Kebede or gather rebuttal evidence. RP 1476.

¹² Prosecutors subsequently reviewed more than 220 jail phone calls made by the defendants, and discovered multiple calls to Kebede's number from both defendants. The first call from Shire to Kebede was made on May 31, 2013; the first call from Ibrahim to Kebede came on June 8, 2013. CP 297.

¹³ Vincent Williams testified on December 5, 2013. RP 431, 457-610.

The court expressed considerable skepticism about Kebede's revelations. The court pointed out "the fact that [Kebede] was sitting in the courtroom for part of the testimony. And apparently both of the Defendants know him, and would have been aware that he's in the courtroom, and apparently if they think he's helpful to their defense, would have told somebody that that's the guy we need, and on and on it goes." RP 1472. The court added: "But [Kebede] knows this substantial injustice is being perpetrated on these two gentlemen for months on end, and he was there, and he knows that they didn't have any involvement. And yet he goes and visits them, but he doesn't do anything to lend a hand in getting these gentlemen vindicated, or out of custody, or the right guys arrested?" RP 1478.

The court also expressed frustration. "Well I know the defense doesn't have an obligation to put on evidence. But it always rankles me when I know that it's fairly obvious that people have continuing contact with other individuals who are supposedly helpful to them, and then it doesn't happen until you're talking about jury instructions. All of a sudden a miracle happens." RP 1476. The court nevertheless concluded that it could not exclude Kebede's testimony. RP 1472, 1485, 1490.

The lead prosecutor, Julie Kline, had given significant advance notice of her upcoming vacation, scheduled for December 17, 2013 through January 13, 2014. CP 296. During this time off, Kline was to get married and travel out of the country on a honeymoon. Id.

The State proposed that the court inquire of jurors whether they could return on January 14th to finish the trial. RP 1486. Both defendants objected. RP 1487-88. The court rejected the State's proposal, out of concern that jurors would feel coerced, that they would ultimately blame the defense for the delay, and that their notes would not be adequate to refresh their memories on the nuances of the testimony after such a long delay. RP 1496, 1500.

The court also refused to require the State to proceed on such short notice: "I wouldn't do it to the defense. I don't think it's appropriate for me to do it to the State either." RP 1499. The court ultimately found a manifest injustice and sua sponte declared a mistrial, noting that its action was necessitated by a late-disclosed defense witness. RP 1494, 1500.

The case proceeded to a second trial on September 3, 2014, before the Honorable William Downing.¹⁴ RP 1504. On September 16th, during a break in the cross-examination of the State's last witness, Detective Janes, the court asked defense for "an indication as to where we'll go next." RP 2628. Shire's attorney, Ned Jursek, told the court that he and his investigator had been trying to get in touch with Berket Kebede, and that Jursek had left a phone message for Kebede telling him that he would be needed in court the next morning. RP 2628-29.

Later that same day, following a discussion of jury instructions, the issue of Kebede's possible testimony arose again. The State indicated that it would call Kebede if he were to appear. RP 2686. The court left open the alternative that the State could rest and the defense could call Kebede. Id. Jursek said that he had had no contact with Kebede since the previous December, and he thought the odds of Kebede appearing were slim. RP 2690.

At this point, counsel for Ibrahim, Coleen St. Clair, notified the court that Kebede had called over the lunch hour that day, and had agreed to come to court the next morning at 8:30. RP 2690.

¹⁴ The Honorable Jeffrey Ramsdell presided over the first trial. RP 1.

The next morning, the State announced its intention to rest. RP 2707. Jursek told the court that he had received a call from Kebede earlier that morning, indicating that Kebede had received the defense subpoena and would be in court at 9:00. RP 2708.

Kebede failed to appear on schedule. RP 2708. The court asked Jursek whether he planned to rest if, after the brief testimony of the defense investigator was completed, Kebede still had not appeared. RP 2714. The following exchange ensued:

Jursek: I – I think the only other thing that I would have would be a motion for material witness warrant. Unfortunately the service information is, as I've described to the Court, and – and that's all that I can offer the Court in terms of a basis for that.

Court: Okay.

Jursek: But – but I – I think I would be obliged to ask.

Court: Okay. And I think I would probably, in light of the timing, be obliged to decline that –

Jursek: That's not a surprise.

Court: -- invitation. You know, I might have a week ago, which is, I think, what Detective Janes might have had the impression had occurred. There was not a warrant for Mr. Kebede?

[brief discussion of misdemeanor arrest warrant in effect for Kebede]

Court: Okay, all right. But there's no material witness warrant –

Jursek: Correct.

Court: -- at this point, okay.

Jursek: Also perhaps we – perhaps I could just then move for a material witness warrant at this point.

Court: Yeah. And the record will reflect, as I suggested a moment ago, that that would be denied, based on the timing. This is too much of a déjà vu all over again with the last trial with Mr. Kebede's possible appearance on the last day of a two week trial.

RP 2715-16.

The State rested. RP 2719. Following the very brief testimony of the defense investigator (RP 2720-22), both defendants rested. RP 2722. The court instructed the jury (RP 2727-45), and the parties proceeded to deliver closing arguments. RP 2745-2816.

b. The Trial Court Properly Denied The Request For A Material Witness Warrant.

Both the federal and the state constitutions guarantee a criminal defendant the right to compulsory process. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"); WASH. CONST. art. I, § 22 ("In criminal prosecutions the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf").

A trial court has the power to compel the attendance of witnesses. RCW 2.28.010. Courts may exercise this power through issuance of a material witness warrant. See RCW

10.52.040 (“the court *may* direct that such witness shall be detained in the custody of the sheriff until the hearing or trial in which the witness is to testify”) (italics added); CrR 4.10(a) (“the court *may* issue a warrant . . . for the arrest of a material witness”) (italics added). A material witness warrant will issue only on a showing that: 1) the witness has refused to submit to a court-ordered deposition; 2) the witness has refused to obey a lawfully issued subpoena; or 3) it may become impracticable to secure the witness’s presence by subpoena. CrR 4.10(a).

“A trial court’s decision to grant or deny a motion for issuance of a material witness warrant is reviewed for a manifest abuse of discretion.” City of Bellevue v. Vigil, 66 Wn. App. 891, 895, 833 P.2d 445 (1992). Similarly, the decision whether to grant or deny a motion for continuance to secure the presence of a witness “rests within the sound discretion of the trial court.” State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

The right to compulsory process is not absolute, but is subject to established rules of procedure and evidence designed to ensure fairness and reliability in the ascertainment of guilt or innocence. State v. McCabe, 161 Wn. App. 781, 787-88, 251 P.3d 264, *rev. denied*, 172 Wn.2d 1016 (2011). There are no

mechanical tests for determining whether denial of a continuance to secure the attendance of a witness deprived a defendant of a fair trial. State v. Hartley, 51 Wn. App. 442, 445, 754 P.2d 131 (1988); State v. Eller, 84 Wn.2d 90, 96, 524 P.2d 242 (1974). Rather, the totality of circumstances present in each particular case must be examined. Id.

The denial of a request for compulsory process will be disturbed on appeal only if the defendant shows that he has been prejudiced or that the result of the trial would likely have been different had the request been granted. State v. Derum, 76 Wn.2d 26, 28, 454 P.2d 424 (1969); Eller, 84 Wn.2d at 95; State v. Peters, 47 Wn. App. 854, 862, 737 P.2d 693, *rev. denied*, 108 Wn.2d 1032 (1987).

Whether denial of a continuance rises to the level of a constitutional violation requires a case-by-case inquiry. Id. at 275; Eller, 84 Wn.2d at 96. Even where a constitutional violation is alleged, the decision to deny a continuance will be reversed only on a showing that the defendant was prejudiced and/or that the result of the trial would likely have been different had the continuance been granted. State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123,

rev. denied, 125 Wn.2d 1002 (1994) (citing Eller, 84 Wn.2d at 95-96).

Shire finds significance in the fact that he did not explicitly request a continuance when he asked for a material witness warrant for Berket Kebede. Brief of Appellant (“BOA”) at 30. He argues that the record thus does not demonstrate that issuance of the warrant would have unnecessarily delayed the trial. Id.

This argument cannot withstand scrutiny. At the very beginning of the final day of trial, at 9:23 a.m., the State announced its intention to rest. RP 2707. Shire’s attorney immediately pointed out that, despite Kebede’s promise to appear at 9:00 a.m., he was not present. RP 2708. Counsel’s request for a material witness warrant was denied. RP 2715-16. The State rested at 9:36 a.m. Supp. CP ____ (sub #127A, Clerk’s Minutes) at 21. Both defendants rested at 9:39 a.m. Id. The court began to instruct the jury at 10:02 a.m. Id. Closing arguments commenced at 10:25 a.m. Id. at 22. The jury retired to deliberate at 2:21 p.m. Id.

Given the last-second timing of the motion for a material witness warrant, such a warrant could not possibly have been of any use to Shire absent a continuance. The fact that Shire did not specify how much time he would need to locate Kebede and get

him to court cannot change the fact that Shire's request for a material witness warrant necessarily included an implicit request for a continuance.

Factors to be considered in determining whether denial of a request for continuance was error include diligence, surprise, materiality, redundancy, due process, and the maintenance of orderly court procedures. State v. Edwards, 68 Wn.2d 246, 257, 412 P.2d 747 (1966); Eller, 84 Wn.2d at 95. Putting aside for the moment whether counsel was diligent in securing Kebede's presence at trial (given Kebede's elusiveness until the last day of the first trial) and whether, given the history, counsel was genuinely surprised when Kebede failed to appear as promised at the second trial, most of the remaining factors do not support a finding that the trial court abused its discretion here.

While Kebede's proposed testimony that Shire was not one of the shooters was material,¹⁵ its materiality was significantly undermined by its cumulative nature. While Mardillo Barnes claimed not to "really" know Shire, he knew who Shire was, and was able to identify Shire at trial. RP 1987. On cross-examination, Barnes confirmed that he did not recall seeing or talking to Shire on

¹⁵ "Material evidence" is "[e]vidence having some logical connection with the facts of consequence or the issues." Black's Law Dictionary (8th ed. 2004) at 598.

the night of the shooting. RP 1993. The message to jurors was clear – according to Barnes, Shire was not one of the shooters. Thus, even had Kebede testified as Shire believes he would have, the testimony would have been cumulative of Barnes's testimony.

The maintenance of orderly court procedures weighs heavily in favor of the trial court's exercise of discretion here. Kebede's late disclosure had disrupted the first trial, causing a mistrial after weeks of testimony. Faced with the prospect of further delay of the trial caused by Kebede's last-minute disappearing act, the trial court acted within its discretion in choosing to go forward.¹⁶

Moreover, when a defendant requests a continuance to locate a witness, he must show that the witness can probably be found if the continuance is granted. State v. Lane, 56 Wn. App. 286, 296, 786 P.2d 277 (1989). As recently as the week before the request, Detective Janes had not been able to locate Kebede despite expending considerable effort. RP 2595-96. On the day before the request, Shire's attorney recounted his own fruitless efforts. RP 2628-29. The mere fact that Kebede then called counsel and lied about his intention to obey his subpoena and

¹⁶ While the court in Eller also mentioned "due process" as a consideration, it is not clear how a due process analysis would be separate from consideration of the other listed factors. 84 Wn.2d at 95.

appear in court does not indicate that he would make himself available, or that he could be found. The opposite implication is the more logical – Kebede intended to continue his course of evading those who wanted to put him on the witness stand.

Good faith is also a consideration here, as an “essential ingredient to any application for a recess, postponement or continuance, and for the issuance of process.” Edwards, 68 Wn.2d at 258. If the request for a continuance appears to be “designed to delay, harry, or obstruct the orderly process of the trial, or to take the prosecution by surprise,” then denial is an appropriate exercise of discretion. Id. The apparent collusion between the defendants and Kebede, who had been in contact since shortly after the defendants’ arrest, indicates a lack of good faith, at least on the part of the defendants themselves. Both trial judges made comments that showed their skepticism in this regard. RP 1476 (“All of a sudden a miracle happens.”), 2716 (“This is too much of a déjà vu all over again with the last trial with Mr. Kebede’s possible appearance on the last day of a two week trial.”).

Finally, the “crucial question” is whether the defendant was denied a fair trial because he would not have been convicted had the witness testified. Lane, 56 Wn. App. at 296. This question

cannot be answered in Shire's favor. Vincent Williams positively identified Shire as one of the shooters – Williams told Carolyn Barnes-Arnold immediately after the shooting that "Louie" (Shire) had shot her son, he picked Shire out of a photo montage, and he identified Shire as "Louie" in court during trial. Shire was apprehended within minutes of the shooting in the car that had hurriedly left the scene. A revolver was found under the seat in front of Shire, with his prints on the gun and an expended round in the chamber. Vincent Williams described the gun Shire fired as a revolver. Thomas English identified Shire as one of the two men he had seen running away in the immediate aftermath of the shooting.

On the other side of the ledger is Kebede, an eminently impeachable witness. Had Kebede testified, jurors would have heard that he had not come forward with his exculpatory information until more than six months after the defendants were arrested, despite having been in constant contact with them. This, in combination with Shire's letter from jail in which he was apparently trying to keep witnesses from testifying against him, would undoubtedly have left jurors with strong doubts as to the truth of Kebede's testimony. *See also* CP 297-98 (additional impeachment material).

Thus, even had Kebede testified, the outcome would have been the same. See Hartley, 51 Wn. App. at 446 (pointing out that even if witness had testified she would have had little credibility in light of other evidence against defendant and the witness's association with him). The request for continuance was properly denied.

Shire's attempt to support his argument with the opinions in Edwards, supra, and United States v. Moudy, 462 F.2d 694 (5th Cir. 1972) is unavailing. In Moudy, the subpoena was requested on the day before trial began. 462 F.2d at 698. In concluding that denial of the subpoena was reversible error, the court noted that "the record does not demonstrate that in fact the trial would have been delayed." Id. In Edwards, counsel in late morning asked only until the end of the customary lunch hour to enforce subpoenas. 68 Wn.2d at 257. The court found that, under these circumstances, orderly court procedures would not have been seriously disturbed by granting the request. Id. Shire's request was made, not before trial began, but just before closing arguments were to start. Nor was his request explicitly limited to a time when court was in recess. Unlike in Moudy and Edwards, granting Shire's request would have delayed the trial, thus disrupting court procedures.

c. Counsel Was Not Ineffective.

Shire argues in the alternative that his attorney was ineffective in not requesting a material witness warrant at an earlier point. Shire has the burden of establishing this claim. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). To prevail, he must show that: (1) counsel's representation was deficient; and (2) there is a reasonable probability that the result of the proceeding would have been different. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either prong has not been met, the court need not address the other. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, *rev. denied*, 115 Wn.2d 1010 (1990).

There is a strong presumption of competence. Strickland, 466 U.S. at 689. This includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In addition to overcoming the strong presumption of competence and showing deficient performance, Shire must affirmatively show prejudice. Strickland, 466 U.S. at 693. This

means that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

Strickland, 466 U.S. at 694.

There is no clear showing of deficient performance here. Kebede was under subpoena. He had appeared for the first trial, and had submitted to an interview. On the day before he was to testify, he was in phone contact with defense counsel, assuring them that he would be there the next morning. Counsel had every reason to presume that he would be there, and little basis on which to request a material witness warrant.

Moreover, there is strong indication in this case that the failure to ask for a material witness warrant until it was too late was tactical. Shire already had Barnes saying that he was not one of the shooters. By bringing in Kebede, and the damaging impeachment that would accompany his testimony, counsel ran the risk of weakening the impact of Barnes's testimony. Counsel may well have weighed this dilemma in favor of not trying too hard to obtain Kebede's presence.

The record supports this. When Kebede did not appear as promised, Shire's attorney did not ask for the remainder of the morning, or some other reasonable time period, in which to locate Kebede and bring him in. Rather, counsel's request was half-hearted

– “I think I would be obliged to ask.” RP 2715. When the court denied the request for a material witness warrant, counsel did not argue his case, or propose a reasonable time period, but responded, “That’s not a surprise.” Id.

This was a tactical decision, in spite of the pro forma request. Such a decision cannot form the basis for an ineffective assistance of counsel claim.

Nor can Shire show prejudice, for the reasons set out in § C.1.b, supra. This claim should be rejected.

2. SHIRE’S STATEMENT WAS NOT THE PRODUCT OF INTERROGATION, AND WAS PROPERLY ADMITTED.

Shire claims that a police officer’s statement as to why the Toyota had been stopped amounted to interrogation, and that his response, made while he was in custody, should not have been admitted at trial. This claim should be rejected. The officer’s statement was not reasonably likely to elicit an incriminating response. In any event, the admission of Shire’s statement that he had just been picked up by his friends and was not involved in anything was harmless beyond a reasonable doubt.

a. Relevant Facts.

Seattle Police Officer Shelley San Miguel responded to the scene where the suspect vehicle had been stopped. RP 105-06. Officer San Miguel took custody of Shire; she handcuffed him, walked him to a patrol vehicle, and read him his Miranda¹⁷ rights. RP 107-08. Shire said that he understood his rights, and did not wish to talk to police about the incident. RP 108. San Miguel accordingly asked him no questions. RP 108.

Officer San Miguel did, however, inform Shire of the reason for his detention. RP 108. She told him that the car in which he had been stopped was a possible suspect vehicle in an incident a few blocks away. RP 109. San Miguel did not go into detail; she did not believe she mentioned that the incident involved a shooting.¹⁸ RP 114. This statement was not meant to elicit a response, but simply to let Shire know why he was being detained. RP 109, 117. Shire told her that he was not involved in anything, and had just been picked up by his friends. RP 109, 111.

¹⁷ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

¹⁸ In light of this testimony, this Court should disregard Shire's repeated claims that Officer San Miguel told him that the car in which he had been stopped was suspected of being involved "in the shooting." BOA at 40, 44.

Shire's attorney argued against the admissibility of Shire's statement. Citing Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed.2d 297 (1980), he argued that Officer San Miguel's statement was "designed to elicit further statements" after Shire had already invoked his Miranda rights. RP 166. He pointed out that interrogation involves not only express questioning, "but also words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." RP 166. Counsel added that "[t]he latter portion of this definition focuses primarily on the perceptions of the suspect rather than the intent of the police." Id. "[W]hether [Officer San Miguel] had pure motives or was employing a trick or a tactic is irrelevant to the determination." RP 167.

The trial court found that Officer San Miguel's statement to Shire specifying the reason for his detention was not "intended or designed, *or objectively requiring a response*" from Shire. RP 173 (italics added). The court found Shire's statements voluntary, and admissible in the State's case-in-chief. RP 173. The court entered written findings of fact and conclusions of law in which it incorporated its oral ruling. CP 59-62.

b. The Statement Was Properly Admitted.

Both the federal and state constitutions guarantee the privilege against self-incrimination. U.S. CONST. amend. V; WASH. CONST. art. I, § 9.¹⁹ In accordance with this protection, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

“[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed.2d 297 (1980). Thus, “interrogation,” in addition to express questioning, includes “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.” Id. at 301.

¹⁹ The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” Article I, section 9 provides that “[n]o person shall be compelled in any criminal case to give evidence against himself.”

The focus is primarily on the perception of the suspect, rather than the intent of the police. Id. The test is an objective one. State v. Shuffelen, 150 Wn. App. 244, 257, 208 P.3d 1167, *rev. denied*, 220 P.3d 210 (2009); State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633 (2009). The subjective intent of the questioning officer, while not conclusive, is nevertheless relevant. Id.

The appellate court will defer to the trial court's findings of fact, but will review its legal conclusions from those findings, including whether officers are engaged in "interrogation" for Miranda purposes, *de novo*. In re Personal Restraint of Cross, 180 Wn.2d 664, 680-81, 327 P.3d 660 (2014).

Shire first contends that the trial court used an incorrect legal standard – a subjective rather than an objective test -- in determining whether Officer San Miguel's comment constituted interrogation. BOA at 41-42. He points to the court's finding that the comment was not intended to elicit a response. Id.

Shire omits part of the court's remarks, and ignores the context of the court's finding that his statement was not the product of interrogation. The defense argument made the objective nature of the standard clear:

Innis clearly defines interrogation under Miranda as not only express questioning, but also words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily on the perceptions of the suspect rather than the intent of the police.

[T]he standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts. The subjective intentions of the officer are not at issue.

RP 166-67. Within minutes of hearing this argument, the court found that “the statements were innocuous, they were informative only, they weren’t intended or designed, *or objectively requiring a response on behalf of Mr. Shire.* RP 173 (italics added).²⁰

The record is thus clear that the court considered the objective nature of the interrogation question. Moreover, it was not improper for the court to also take into account its own evaluation of Officer San Miguel’s intent in telling Shire the reason for the stop. See Shuffelen, 150 Wn. App. at 257 (while not conclusive, subjective intent of police officer is relevant); Denney, 152 Wn. App. at 671 (same). The trial court used the correct test.

In any event, a *de novo* review of the record shows that Officer San Miguel’s brief informative comment, viewed objectively,

²⁰ The court’s written findings of fact and conclusions of law expressly incorporated its oral findings and conclusions. CP 62.

was not reasonably likely to elicit an incriminating response. There was no reason that she “should have known” that informing Shire of the reason for the stop – that the Toyota was a possible suspect vehicle in an incident that occurred a few blocks away -- would elicit an incriminating response.

Several similar cases support the trial court’s conclusion that Shire’s statement – that he was not involved in anything and had just been picked up by his friends – was not the result of interrogation. In State v. Sadler, the defendant had been advised of his Miranda rights, and had asserted his right to a lawyer. 147 Wn. App. 97, 128, 193 P.3d 1108 (2008), *rev. denied*, 176 Wn.2d 1032 (2013). Police at that point ceased to question Sadler, who was handcuffed and detained in a patrol car parked outside his home. 147 Wn. App. at 120, 127-28. A detective told Sadler what was going on, and informed him that police intended to seek a search warrant for the house. Id. at 128. After hearing this, Sadler said a couple of times that he thought the girl was 19.²¹ Id.

The trial court found that the detective told Sadler about the request for a search warrant “as a courtesy,” and concluded that

²¹ Sadler was charged with sexual exploitation of a minor. Sadler, 147 Wn. App. at 107.

Sadler's statements were not the result of interrogation. Id. at

129-30. The appellate court agreed:

Detective Jackson merely advised Sadler that he intended to apply for a search warrant. He did not ask Sadler any questions, let alone any specific questions about his contact with K.T. or what K.T. had told him about her age. Merely telling a suspect about the status of the investigation is not reasonably likely to elicit a response.

Sadler, 147 Wn. App. at 131.

Here, Officer San Miguel's statement to Shire similarly concerned the status of the investigation, and was similarly unlikely to elicit a response. The statement did not constitute interrogation.

The Washington Supreme Court came to a similar conclusion even where a police officer's comment came in the form of a question. In In re Personal Restraint of Pirtle, a police officer, immediately after placing Pirtle into custody, asked Pirtle if he knew why he had been arrested. 136 Wn.2d 467, 485, 965 P.2d 593 (1998). Pirtle responded, "Of course I do, you might as well shoot me now." Id. The court found that the officer's question did not constitute interrogation: the question about the basis for the arrest fell into the "background questioning category," and the expected response was likely "yes" or "no." Id. at 486.

Officer San Miguel did not ask a question, so there was even less likelihood of a “response.” And, like the question about the basis for the arrest, Officer San Miguel’s statement about the reason for the stop fell into the category of background information. The statement was thus not interrogation. See Innis, 446 U.S. at 301 (excluding words or actions “normally attendant to arrest and custody” from those that constitute interrogation).

The cases on which Shire relies do not compel a different result. In United States v. Alexander, a detective told the suspect “we know what happened” or “we know you are responsible for the stabbing.” 428 A.2d 42, 51 (D.C. 1981). The detective admitted that this accusatory statement was a technique designed to get Alexander to talk. Id. Officer San Miguel neither accused Shire of anything, nor had reason to expect a response.

In State v. Wilson, an officer told the suspect, who was under arrest for stabbing her husband and had invoked her right to counsel, that her husband had died. 144 Wn. App. 166, 182-83, 181 P.3d 887 (2008). The trial court concluded that this was not interrogation because the officer did not intend to elicit an incriminating response. Id. at 183. The appellate court found that the “death notification” was the functional equivalent of interrogation

under the circumstances. Id. at 184-85. Officer San Miguel's statement as to why the car had been stopped packed none of the emotional punch of the death notification, and the trial judge here recognized the objective nature of the test. Shire's statement was not the product of interrogation.

c. Any Error Was Harmless.

Even if Officer San Miguel's statement amounted to interrogation, any error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

There was abundant evidence that Shire was one of the shooters. He was identified as such by Vincent Williams. He was identified by a disinterested bystander as one of two persons who ran away from the scene in the immediate aftermath of the shooting. He was a passenger in the car that left the scene in a hurry after the shooting, and a loaded revolver with a fired round was found directly in front of where he was sitting. He wrote a letter from jail that strongly indicated consciousness of guilt.

Shire's statement was not an admission of guilt – to the contrary, it was a proclamation of his innocence. When weighed against the inculpatory evidence, Shire's statement that he had just been picked up by his friends, and that he was not involved in anything, could have carried little if any weight in the jury's calculus. Admission of this statement, if error, was harmless beyond a reasonable doubt.

In arguing that any error in admitting his statement was not harmless, Shire relies on cases that emphasize the "profound impact" that a defendant's confession has on a jury. BOA at 45 (quoting Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991)). Recognizing that his statement was not a "confession" in the commonly understood sense, he cites to the Miranda court's conclusion that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" BOA at 46 (quoting Miranda, 384 U.S. at 477). But the fact that Shire's exculpatory statement is categorized along with confessions for Miranda purposes does not transform that relatively innocuous statement into the sort of "confession" that has a "profound impact" on the jury. Any error here was harmless beyond a reasonable doubt.

3. THE SCRIVENER'S ERROR IN THE STATUTORY CITATION ON THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Shire points out that, while he was convicted of second degree assault, his judgment and sentence mistakenly lists the statutory citation for first degree assault. Shire is correct. The statutory citations in section 2.1 for counts I to III should be changed from RCW 9A.36.011(1)(a) to 9A.36.021(1)(c). CP 83, 90, 97. The State agrees that this case should be remanded solely to correct this error in the statutory citations. Resentencing is not necessary.

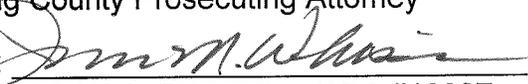
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Shire's convictions. This Court should remand for the sole purpose of correcting the scrivener's error in the statutory citations on the judgment and sentence.

DATED this 12th day of January, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:  for:
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Steed, the attorney for the appellant, at Steedj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Yusuf Haise Shire, Cause No. 72734-6, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 12TH day of January, 2016.



Name:
Done in Seattle, Washington