

No. 49026-9

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

VERNON L. CURRY, JR.,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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Sean M. Downs  
Attorney for Appellant

GRECCO DOWNS, PLLC  
500 W 8th Street, Suite 55  
Vancouver, WA 98660  
(360) 707-7040  
sean@greccodowns.com

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## A. INTRODUCTION

On September 7, 2014, Michael Allen Ward was shot and killed in Tacoma, Washington. There were no eye witnesses to the shooting, however, some surveillance videos were recovered from some nearby businesses that appeared to show the shooter as a black man in a mask. Two men, Mr. Campbell and Mr. Henderson, admitted to firing gunshots close in time and proximity to the homicide. Days later, a mask was found in the yard of a home close in proximity to the homicide, which was later tested and found to contain DNA from Mr. Curry and an unidentified individual.

Before trial began, Mr. Curry's appointed attorney of choice, Gary Clower, was forced to withdraw because of the extremely negative position the elected prosecutor had towards Mr. Clower in that the prosecutor's office would not negotiate any favorable deals with him. This effectively denied Mr. Curry his right to counsel of his choosing and interfered with his basic right to counsel.

At trial, the State's main law enforcement witness, Det. Katz, was allowed to opine that Mr. Campbell and Mr. Henderson were not involved in Mr. Ward's shooting. A motion for mistrial regarding this point was denied. The court improperly allowed backdoor gang evidence regarding Mr. Curry under the guise of impeachment. However, Mr. Curry should

not have been subject to impeachment based on his testimony and, even if so, the impeachment was about a collateral matter that served no real probative purpose. In closing arguments, the State committed prosecutorial misconduct in arguing that its professional witnesses carried no bias and also elevated DNA testimony to near infallibility.

Lastly, the court erred in refusing to provide a lesser included jury instruction for the crime of Manslaughter in the First Degree. The court erroneously believed that the facts could not support recklessness based on the number of shots fired.

Mr. Curry was ultimately denied the right to a fair trial based on the accumulation of errors.

#### B. ASSIGNMENTS OF ERROR

1. The Court erred in not granting the Defendant's Motion to Dismiss for Prosecutorial Misconduct and/or Mismanagement for Interfering with Mr. Curry's Choice of Counsel.
2. The Court abused its discretion in not granting a mistrial when Detective Katz was permitted to testify regarding his opinion that Mr. Campbell and/or Mr. Henderson were not involved in the shooting of Mr. Ward.
3. The Court erred by allowing improper impeachment of Mr. Curry about gang activity or Y Gang Entertainment.
4. The State committed prosecutorial misconduct in its closing argument.
  - a. The State made improper remarks regarding the credibility of DNA evidence.

- b. The State made improper remarks that the police have no bias.
5. The cumulative trial errors denied Mr. Curry the right to a fair trial.
6. The Court erred in refusing to instruct the jury that they could consider first degree manslaughter as a lesser included offense to the charge of first degree murder.

C. STATEMENT OF THE CASE

On or about September 17, 2014, an information was filed charging Mr. Curry with the crime of Murder in the First Degree in the death of Michael Ward from September 7, 2014. CP 1. On June 24, 2015, attorney Gary M. Clower withdrew from representation of Mr. Curry. CP 13. There was not a hearing on the merits regarding this withdrawal. RP 29. On April 25, 2016, Mr. Curry proceeded to trial and an amended information was filed adding one count of Unlawful Possession of a Firearm in the First Degree before the Honorable Kitty-Ann van Doorninck. CP 167-168.

On April 26, 2016, the Court heard the defense's Motion to Dismiss based on violations of Mr. Curry's Right to Counsel. RP 23; CP 150-163. An affidavit by Mr. Clower was filed indicating that there existed a conflict between the elected Pierce County Prosecuting Attorney and himself to Mr. Clower's representation of a defendant that ultimately resulted in civil litigation against the Pierce County Prosecuting

Attorney's Office. CP 150. The elected prosecutor thereafter decided that Mr. Clower was not to receive favorable consideration in the negotiation and settlement of future criminal case. CP 150. Mr. Curry expressed concern to Mr. Clower about receiving fair treatment from the prosecuting attorney due to this issue. CP 151. Mr. Clower believed that his representation of Mr. Curry was undermined and therefore was forced to withdraw as counsel. CP 151. The motion to dismiss was denied because it was the court's interpretation that it was Mr. Curry's choice to replace Mr. Clower because of concerns that he had. RP 24-31.

At trial, Lieutenant Robert Maule was called to testify. RP 158. He testified that on September 7, 2014 at approximately 4:00am, he was in his patrol car doing paperwork on the side of the road on 38th Street in Tacoma. RP 164, 167. At about 4:09am, he heard gunshots fired down the block. RP 172-173. He then observed a person sprinting down the sidewalk. RP 173. The person was described as a black adult male who had light-colored gloves on and an object in his right hand. RP 174. Lt. Maule chased after the person in his vehicle when he heard more gunshots approximately thirty seconds after the first gunshots. RP 178, 182. Lt. Maule stopped his chase of the person and returned to the area of 38th and Yakima. RP 182.

The State called Aaron Brown to testify. RP 309. He indicated that he was a good friend of Mr. Ward's. RP 311. The evening that Mr. Ward was killed, he was at an after-hours club shooting dice around 2:00am. RP 312, 315-316. Before the shooting, he observed a commotion that involved two women in a fight and law enforcement broke up the fight. RP 317. Ten minutes before the shooting, Mr. Brown had a conversation with Mr. Ward while Mr. Ward was in his vehicle in the street. RP 317. Mr. Brown saw Mr. Ward's vehicle drive down the street and Mr. Brown went back to shooting dice. RP 322. Mr. Brown stated he heard more than three gunshots and he went to the ground. RP 325. He stated that about thirty seconds after the shots, he saw Mr. Ward's vehicle back up and park. RP 327-328. Mr. Brown then saw another vehicle come up the street and heard more gunshots. RP 330. Mr. Brown then ran and hid in some bushes. RP 333.

The State called Isaiah Campbell to testify. RP 361-415. He stated that he was a friend of Mr. Ward's and Mr. Curry's and that he was in the area of 38th and Yakima in Tacoma at an "after-hour" club sometime after 2:00am. RP 363-364; 396. Sometime after 3:00am, Mr. Campbell interacted with Mr. Ward briefly as he was driving by in his vehicle. RP 366-367. Mr. Campbell stated that minutes later he heard gunshots down the block. RP 370. About thirty seconds before the gunshots, Mr.

Campbell stated that he saw a tall, black male wearing gloves walking down the center of the street towards the direction of Mr. Ward. RP 372-376. He indicated that there were five or six rapid-fire gunshots that he heard. RP 378. He described four or five people around Mr. Ward's car that scattered after the gunshots. RP 379. Mr. Ward backed his vehicle up and parked near where Mr. Campbell was located and stated that he had been shot. RP 380. Mr. Campbell stated that he observed a firearm in Mr. Ward's vehicle and then observed a vehicle come down the street with what looked to be the same person that walked down the street previously. RP 383. Mr. Campbell stated he took the firearm from Mr. Ward's vehicle and then fired it towards the other vehicle. RP 383.

Xavior Henderson testified that he was friends with both Mr. Ward and Mr. Curry and that he had to be picked up by law enforcement as a material witness. RP 420, 464. Mr. Henderson saw Mr. Ward's vehicle in the area, but he did not see Mr. Ward. RP 432. Mr. Henderson stated that he was at the same after-hours club shooting dice with Mr. Campbell and Mr. Brown when he heard gunshots. RP 426, 435. Mr. Henderson stated that he ran away from the shots and then fired shots from his firearm at a brick wall for cover. RP 437, 441. Mr. Henderson testified that he told law enforcement that he witnessed the shooting but did not state that he saw the shooter or that he was present when Mr. Ward was shot. RP 450-451.

Mr. Henderson stated that he told law enforcement that the shooter was wearing a ski mask. RP 469. Mr. Henderson's recorded interview with law enforcement was admitted into evidence through Detective Katz's testimony and the transcript was provided as a listening aid. RP 790, 1249.

Carmin Edgmon testified that she was around the after-hours club in her vehicle when she heard five to six gunshots coming from behind her. RP 691. She then saw an African-American male with a white t-shirt pull a gun from his waist and shoot. RP 682-688. She testified that the person who grabbed the gun from his waist may have been wearing jeans or shorts. RP 704.

Cory Foote testified that he lived at 3816 South Park Avenue on September 7, 2016 and saw a person run in front of a neighbor's house, across the street, described as black, 5'10"-6'2", 180-220 pounds, jeans and a t-shirt, with hair 1" long or shorter. RP 711-712. Mr. Foote observed some cars traveling around, one that he describes as a red Acura, which stopped near his house. RP 714-715. He described a person get out of the Acura as someone different than who he saw in front of his neighbor's house. RP 716. He was shorter, black, wearing sweat pants and a baseball cap, and he was looking for something in the bushes. RP 715, 718. He did not indicate that there was any front or rear damage as Mr. Curry later testified existed on his vehicle. RP 716, 1562.

Korlina Henson testified that she lived at 3816 South Park Avenue with her son Cory Foote and daughter, Jennifer Henson. RP 728-744. She discovered a hat, described as a beanie, in her yard and asked her neighbor if it was hers. RP 733-34. On September 17, 2014, police responded to Ms. Henson's house to recover a gun found on the right side of the house near the fence line. RP 736-737. The gun was found in close proximity to where she was standing and where the police were going in and out. RP 746-747. No latent fingerprints were found on the gun or the magazine. RP 940.

Jennifer Hayden testified that she is a Forensic Scientist with the Washington State Patrol Crime Laboratory in the DNA Unit. RP 956-1003. Ms. Hayden testified that the crime lab is accredited by American Crime Laboratory to make sure that it is producing accurate and reliable results every time. RP 961. She testified that the DNA collected from the aforementioned hat/mask and the DNA from the reference sample of Mr. Curry matched. RP 975. At the request of defense on February 16, 2016, additional testing for the presence of saliva was conducted with defense expert, Mr. Milne, present. RP 976. The defense DNA expert found a second profile on the back side of the mask. RP 1001. No profile was obtained from the gun because the DNA was too low to continue testing. RP 994.

Detective Daniel Davis testified that he is employed by the Tacoma Police Department and he interviewed Mr. Campbell as part of this investigation. RP 1075. Det. Davis testified that Mr. Campbell was someone that law enforcement had dealt with before so they knew that he would not be cooperative in the investigation. RP 1076-1077. Mr. Campbell gave a general description of a person he thought was involved. RP 1082. At no time during the interview was Mr. Campbell told that Mr. Curry had been arrested nor did Mr. Campbell indicate that Mr. Curry could not be involved in this incident. RP 1083. The firearms that Mr. Campbell and Mr. Henderson used were never recovered. RP 1093-1094.

Detective Jack Nasworthy testified that he is a detective with the City of Tacoma Police Department currently assigned to the homicide unit. RP 1111-1147, 1377-1415. Det. Nasworthy has some training with electronic surveillance with cellular phones, the intercepting and analysis of cell phones, cell phone records. RP 1113. He testified that a cell phone will register with a specific tower and the cell phone has a specific serial number based on the carrier and the cell phone will communicate (or talk) with the carrier's cell tower. RP 1114. Cell phones will communicate with the tower both actively and passively. RP 1115. The cell phone and the cell phone towers are constantly in communication with one another as long as the phone is on and a record is created. RP 1118-1120. The data

received from AT&T was input into a program called Cell Hawk Analytics for analysis. RP 1133. This program takes data such as voice calls, text messages, and data messages and puts it in chronological order and corrects the time to our time zone. RP 1133-1134. This report provides both a cell ID number and the sector, and he can tell what tower that the phone call was hitting and the direction it came from. RP 1353. He was asked to take those phone calls and attempt to determine the handset location based on the cell tower activation for a particular date and time range. RP 1354. The Cell Hawk program created maps and documents which demonstrate the location of the tower and direction of the call which were used in his PowerPoint. RP 1355.

He was asked by Det. Katz to do an analysis of the location of the cell phone from approximately two o'clock in the morning until approximately 3:00pm. for the date of September 7th. RP 1357. The first call was at 2:43 in the morning and it gives the cell tower number and cell tower direction and gives an approximate location of the handset in this case as being South Seattle. RP 1357-1358. The next call was at 3:34 in the morning the target cell phone has moved to Tacoma. RP 1358. The 3700 block of Pacific Highway East is where the tower is located and the side that it is hitting is facing southwest – towards 1417 East Harrison and the crime scene. RP 1360. 1417 East Harrison is Mr. Curry's residence.

RP 1253. The Tower is one mile from the homicide scene. RP 1360.

Again at 4:34 the target again accesses data from the same tower. RP 1361. The 3:34 and 4:34 connections were data communications such as searching the internet. RP 1361. Some of the data entries are defaults so when you compare the amount of time it shows connected to the amount of memory or information it has retrieved from the Internet, they conflict.

RP 1393. The actual coverage area of a given cell phone antenna can be mapped out with the correct technology but was not done in this case. RP 1396. The actual coverage could be different from the pie shapes presented and the pie shapes could then be misleading. RP 1397. Several factors can alter the coverage distance of a given cell tower which includes population density, environmental design, weather, height, angle of the antenna, where it is pointed, and power output of antenna. RP 1398.

Tower 1156 was not measured to determine the distance between the tower and the murder scene. RP 1401. Using Microsoft Streets and Trips, which is very accurate, Mr. Curry's residence to the Tower is approximately 1.5 miles in a straight line. RP 1413. There are closer towers to Mr. Curry's residence than tower 1156. RP 1413. The closest tower to Mr. Curry's residence is .38 miles away. RP 1413.

Det. Nasworthy was recalled on rebuttal to discuss the cell phone handset locations for Mr. Curry and Ms. Woods on September 7, 2014. RP

1721-1746. He testified that he received Ms. Woods' cell phone records from her carrier T-mobile via a search warrant. RP 1723. He reviewed call records from September 7, 2014 from 2:00 in the morning until 3:00 in the afternoon. RP 1726. Records include text messages and phone calls but not data. RP 1727. The general location of the call at 2:34am based on the two corresponding towers is located in South Seattle. RP 1734. The phone associated with Ms. Woods made a call at 10:24am to Mr. Curry's phone. RP 1734. At the time of this call, Mr. Curry was connected to a tower in Tacoma and Ms. Woods was connected to a tower near the Criminal Justice Training Center in Burien. RP 1738. The phone associated with Mr. Curry made calls at 7:37am, 8:37am and 9:20am and the towers associated with those calls was located in Tacoma and Fife. RP 1736. Mr. Curry made a call to Ms. Woods at 12:01 and his phone connected to several towers in Tacoma and hers did not change from the Criminal Justice Training Center location. RP 1739. At 12:29, Mr. Curry's phone is again located in the Des Moines, Burien area, near the Criminal Justice Training Center, as is Ms. Woods's phone. RP 1740-1741.

Detective John Bair testified that he is employed as a cell phone forensic analyst with the City of Tacoma Police Department. RP 1149-1209. He primarily focused on the handset and the data within the phone. RP 1154-1155. The extraction tool used in this case is called Cellebrite.

RP 1166. The Cellebrite program downloads what is called file system partitions which contains the SMS, MMS, geographical location, and web history, and the physical analyzer decodes it and it is compiled in PDF format. RP 1170. The extracted data was converted to Pacific Standard Time. RP 1172.

Detective Bair was asked to extract data from the flip phone which was not done originally. RP 1545. There was a search warrant for the phone but given the technology at the time, data could not be pulled off in the same way as the iPhone. RP 1547. A preliminary search of the phone indicated that it did not appear that there were any calls or texts between 4:00am and 6:20am. RP 1660. On September 30, 2014 a full extraction was not done on this phone, but technology has changed since then and Det. Bair was able to re-examine it using Cellebrite. RP 1747. There was call history, SMS, and some images in the phone. RP 1748. He reported that there was deleted call history and texts on the phone which were deleted but which could be recovered. RP 1750. There was no call history, text history, or communications from that phone between 4:00am and 6:20am on September 7, 2014. RP 1750. He was able to verify this information using an encoding to find things the tool missed. RP 1750. Detective Bair testified that with more time no additional data from September 7, 2014 would be recovered. RP 1756.

Detective Jeffrey Katz testified that he is employed by the City of Tacoma Police Department in the Homicide Unit. RP 1209-1264, 1282-1347, 1715-1721. Det. Katz was assigned as lead detective on this case. RP 1220. No one in the club reported seeing the shooting that led to Mr. Ward's death. RP 1226. A mask had been recovered in an area consistent with Lt. Maule's information regarding a fleeing suspect. RP 1228. After interviewing Mr. Foote, who reported that someone was looking for something, they searched the area again but nothing was found until September 17, 2014 when they recovered a gun from Ms. Henson's residence, which was found near the fence line in open view. RP 736-737, 1231. He testified that during his investigation there was no evidence to suggest that Mr. Campbell or Mr. Henderson were involved in the homicide of Mr. Ward. RP 1238. The defense objected that this testimony went to the ultimate issue of guilt. RP 1243-1248. The defense made a motion for mistrial based on this testimony and that it called for the witness to weigh facts and present an opinion. RP 1272-1281. The court was also uncomfortable with this line of questioning, but ruled it was not a basis for a mistrial. RP 1274. The defense was given an opportunity to prepare a limiting instruction and that instruction was read to the jury. RP 1278, 1282.

Det. Katz described surveillance video that he had viewed. RP 1303. In the video, it appeared that the shooter of Mr. Ward pulled down a mask, was wearing gloves, and appears to be a black male wearing a dark colored t-shirt, black jeans, and Jordan style shoes. RP 1304. A bulletin had been put out requesting help in locating Mr. Henderson and he was picked up and detained by the Gang Unit and brought to headquarters. RP 1246. At the time Mr. Curry was arrested, two phones associated with him were recovered, one was an iPhone and one was a flip phone. RP 1332. He defined the flip phone as a burner phone used for business which you wouldn't want on your regular phone. RP 1344. The phone was examined by Det. Bair pursuant to a search warrant. RP 1257. No call detail records were produced for the flip phone. RP 1333. Det. Katz testified that it didn't appear that the flip phone had been in regular use but testified that in hindsight it should have processed. RP 1343. Det. Katz testified that Mr. Curry indicated that he had worn a mask in a promotional shoot but didn't know what had become of it. RP 1263. Mr. Curry was shown the mask and testified that it was probably one of the masks he used during the photo shoot and which was stolen from his car. RP 1581, 1695. Mr. Curry reported being 200 pounds and was 6'1". RP 1289.

No clothing linked to the murder was recovered from Mr. Curry's home as a result of the search warrant. RP 1291. A trace was conducted on

the firearm and it was discovered that it was stolen during a burglary in 2012. RP 1298. Mr. Curry was not linked to the burglary or the owner of the weapon. RP 1298. Several surveillance videos were recorded in this case including one which purports to depict a person who is pulling a ski mask over their head, wearing gloves, and walking towards the area where the homicide took place. RP 1303. Det. Katz testified that the subject appeared to be wearing gloves, is black, wearing a dark colored shirt and black jeans, and basketball style shoes, generally Jordan style shoes. RP 1304.

Det. Katz testified regarding a search on the iPhone for “Tacoma crime” on September 7 of 2014 at 6:15 and 21 seconds in the morning. RP 1318. He testified there was another search on the phone for “Tacoma shooting” on September 7, 2014, at 6:15 and 47 seconds. RP 1320. Det. Katz testified regarding a News Tribune article entitled “Man fatally shot in Tacoma’s Lincoln District identified” with a date of September 8, 2014 at 6:55:44. RP 1323. This article was in reference to Mr. Ward. RP 1323.

The defense questioned the detective about a noticeable amount of blood on the outside of Mr. Ward’s vehicle. RP 1341. No items of clothing taken from Mr. Curry’s home were ever tested for blood splatter. RP 1342.

Marissa Woods testified that she is an acquaintance of Mr. Curry’s. RP 1417-1452. She testified that on September 7, 2014 she was with Mr.

Curry at a club in Seattle celebrating her birthday until approximately 2:30am. RP 1419. A photo was introduced of her with Mr. Curry at the club. RP 1419. She testified to being intoxicated, admitted smoking marijuana, and after the club they left for Tacoma and went to Mr. Curry's house. RP 1420, 1429. She testified that she was with Mr. Curry at his house until the next day. RP 1421. She identified the car belonging to Mr. Curry and the one he left the club in as a burgundy Acura. RP 1425. She testified that she was having trouble recalling details not because she was intoxicated but because it was two years ago. RP 1430. Once back at his residence she testified that they had sex and went to sleep. RP 1432. She could not be certain of the time she woke up but thought it was 7:00 or 7:30 in the morning. RP 1437. She testified that she and Mr. Curry then went back to Seattle. RP 1439. She testified that her house is near the Criminal Justice Training Center in the City of Burien. RP 1443. She reported that she and Mr. Curry were together until probably when she would get her kids back on Sunday around 5:00pm. RP 1445.

Edward Baker testified that he owns Video Consultants Northwest, he is a private consultant on video surveillance, image analysis, and professional instructor in the forensic sciences. RP 1452-1485. He retired from the City of Tacoma Police Department in 2009 after 24½ years. RP 1453. He has been doing video enhancement comparing and consulting for

17 years. RP 1454. He was asked to do a comparison of three pairs of shoes that were in custody, shoes that were shown worn by a subject in photographs, as well as photos that were created by a surveillance video system. RP 1455. He did a comparison of the shoes of the suspect in the surveillance with the shoes that Mr. Curry was wearing in the photo and concluded that they did not appear to be the same shoe. RP 1467. Mr. Baker made a number of enhanced photos so he could examine the characteristics of the various shoes but did not come up with any shoes which appeared to match the shoes worn by the suspect in the surveillance video. RP 1468-1477.

Larry Karstetter testified that since 1991 he owns a computer repair company and since 2002 he has been retained as a computer and digital forensics expert to perform computer and digital forensics for criminal cases and testified for the defense in this case. RP 1485-1535. He reviewed Det. Nasworthy's report and call detail records for the iPhone and testified regarding those. RP 1500. He testified regarding the phone call from Mr. Curry's phone at 9:40-9:42 am. RP 1500. He indicated that the information shows that the phone connected with a tower and the text "first" and "last" on the report demonstrates that the phone was moving from one coverage area to another or the cell phone company is moving it to another tower. RP 1501-1502. The company does this to balance the

load or for servicing reasons. RP 1502. He testified that when all these calls show up at the same exact time/minute it is more likely that the call was bounced rather than demonstrating movement. RP 1529. Regarding the time of 9:20am, he testified that Mr. Curry's phone was not within the radius of those towers near the homicide location. RP 1505. He then testified regarding a call at 7:14am. RP 1502. The records show that the phone connected to a tower and then at the same time it says "last" which means that the cell phone was handed off from this tower to another tower and that means the phone moved or that the cell phone company handed it off due to load balancing. RP 1502. Examining the exhibit he opined that if Mr. Curry had been around the homicide location at 7:14am he would have expected the data to show a small graphic but there was no graphic. RP 1503. In discussing a call at 7:14am, although Det. Nasworthy's tower map indicated that the device was moving from an area close to Tower 156 and toward the homicide scene, Mr. Karstetter testified this could be bouncing. RP 1534.

He further testified that there is a cell phone tower located on the other side of I-5, pointing back towards Mr. Curry's residence and the homicide location and the call detail records indicate that Mr. Curry's cell phone had connected to this particular tower at 4:34am. RP 1505. He measured the distance from the tower to Mr. Curry's residence to be 1.19

miles to tower 1156. RP 1508. He also measured the distance from the tower to the homicide location to be 2.41 miles from the murder scene to cell tower 1156. RP 1508. He testified that he would not expect Mr. Curry's phone to connect to this tower. RP 1506. Mr. Karstetter indicated that at 3:34am Mr. Curry's cell phone was connecting to an antenna on a particular cell tower that was pointing away from the homicide location and if his cell phone was at the homicide location it would have been pointing toward the homicide location. RP 1509-1510. He testified regarding the data entries at 3:24 and 4:24 and that the time usage was nowhere near the reported sixty minutes. RP 1510-1511. Regarding a connection at 3:24am, Mr. Curry's cell phone was connecting in that coverage area. RP 1514. He concluded that on September 7, 2014 at 3:34 and 4:34 the strongest signal for Mr. Curry's phone to connect with would be the one closest to his residence. RP 1520. He confirmed that there were no data connections between 3:34 and 4:34. RP 1531.

Mr. Curry testified on his own behalf. RP 1557-1582, 1690-1710. He testified that after going to Seattle, he and Ms. Woods drove back to Tacoma in different cars arriving in Tacoma around 3:00–3:30am and they did not leave his house until early in the morning. RP 1565-1566. He and Ms. Woods then went back to the Seattle area but they argued and he came back that morning. RP 1611. He testified that he thinks she got her

days mixed up when she testified because they went to Gucci on Friday.  
RP 1611.

He admitted to having two phone in use during the time frame of September 7, 2014. RP 1566. He indicated that he heard about the shooting of Mr. Ward when someone called him. RP 1566. Mr. Curry confirmed that he got a call, or maybe a few calls, on the phone alerting him about Mr. Ward's murder, but he did not recall who alerted him about the shooting. RP 1708-1709. Mr. Curry reported his height as 6'1" and weight as between 190-200 pounds. RP 1569. He testified that his black Dodge Challenger had been broken into and a theft occurred. RP 1571. A diamond necklace, a watch, his iPad, his iPod, and a container containing merchandise from the company was taken. RP 1572. Mr. Curry identified a photo of his shoes and explained that he is collector of Jordan shoes and sometimes sells them. RP 1573. He testified he did not own or possess a gun on September 7, 2014 and stated that he knew Mr. Ward since they grew up together. RP 1574. He indicated that he had been to the after-hours club in June 2014 when his car had been broken into. RP 1575.

YLyfe was identified as a record, video and media company involved with hip hop music. RP 1592. Mr. Curry denied that this hip-hop music condoned street violence when cross-examined by the State. RP 1592. Mr. Curry was asked by the State if he had other business dealings

with YG Entertainment or Young Gangster Entertainment, which he denied. RP 1593. The State then wished to impeach Mr. Curry about being a legitimate businessman and introduce evidence of a hip-hop video produced by YLyfe that allegedly promoted street violence. RP 1600-1601, 1616. The defense objected, indicating that it was a backdoor method to improperly introduce alleged gang evidence as ER 404(b) character evidence. RP 1595. Mr. Curry made an offer of proof that the referenced video was a political one about the death of Trayvon Martin. RP 1620. The court excluded the video, but allowed a photo showing Mr. Curry associated with the term “Y Gang”. RP 1623. The court mistakenly believed that Mr. Curry had denied involvement with Y Gang, when in fact he was only questioned about YG Entertainment or Young Gangster Entertainment. RP 1623. Mr. Curry then identified a photo of him posing in a “Y Gang Entertainment” photo. RP 1698-1699.

The defense requested Manslaughter in the First and Second Degree as lesser included offenses. RP 1654-1655. The court did not permit Manslaughter but permitted Murder in the Second Degree as a lesser included offense. RP 1655.

The State proceeded with its closing arguments. RP 1765-1802. During closing arguments, the State indicated that the professional witnesses were just doing their jobs and did not have any interest in the

case and that they did not have any bias. RP 1792. The State argued that the credibility of Aaron Brown, Isaiah Campbell, Xavior Henderson, Karin Curry, Marissa Woods, had to be evaluated differently because they had a bias. RP 1792. The State argued that Ms. Woods testified that she and Mr. Curry were together the whole day, but Det. Nasworthy's testimony showed that not to be true. RP 1796.

The State presented rebuttal closing argument. RP 1820-1833. The State in rebuttal indicated that "DNA in this day and age has great power. You hear about it all the time. Innocence Project, evidence that's tested, new DNA, evidence that couldn't be tested ages ago that's now re-tested and we learn that the person that's been incarcerated isn't the man who committed the crime. It has the power to exonerate. It has just as much power to convict." RP 1821-1822. The State argued that Mr. Curry, on what is probably the most important day of his life, could not provide a name of the person who called him, while suggesting that it was because if he gave a name, the person would come in and say that is not the truth. RP 1829. The State argued "[h]e is guilty of murdering a man who sat in his car, trapped like an – and unable to go anywhere, shot seven times and killed. And for that, he is guilty of First Degree Murder." RP 1833.

Mr. Curry was subsequently found guilty of Murder in the First Degree with deadly weapon enhancement and of Unlawful Possession of a Firearm in the First Degree. CP 302-304.

This appeal follows.

D. ARGUMENT

**1. The Court erred in not granting the Defendant's Motion to Dismiss for Prosecutorial Misconduct and/or Mismanagement for Interfering with Mr. Curry's Choice of Counsel.**

The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). This right provides a particular guarantee: that “the accused be defended by the counsel he believes to be best.” *United States v. Gonzales-Lopez*, 548 U.S. 140, 146, 126 S.Ct 2557, 165 L.Ed.2d 409 (2006); *see also*, Wash. Const. art. I, § 22 (“In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”). Among the components of the constitutional right to counsel is “the right to a reasonable opportunity to select and be represented by chosen counsel.” *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir.1978); *see also, e.g., State v. Chase*, 59 Wn.App. 501, 506, 799 P.2d 272 (1990); *United States v. Lillie*, 989 F.2d 1054,

1055 (9th Cir.1993); *Wilson v. Mintzes*, 761 F.2d 275, 278 (6th Cir.1985). “It is settled law that under the Sixth Amendment criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice.” *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir.1986) (internal quotation marks omitted). Prosecutors act as quasi-judicial officers who “represent the people and presumptively with impartiality in the interest of justice,” and therefore “must subdue courtroom zeal for the sake of fairness to the defendant.” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

A party may motion the court to dismiss due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affects the accused’s right to a fair trial. CrR 8.3(b). Denial of a motion to dismiss under this rule is reviewed for abuse of discretion. *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868, 870 (2000) (citing *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). An appellate court finds abuse of discretion only “when no reasonable judge would have reached the same conclusion.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989). To support dismissal under this rule, a defendant first must show arbitrary action or governmental misconduct. *Garza*, 99 Wn. App. at 295. The arbitrary action or mismanagement need not be evil or dishonest; simple

mismanagement is enough. *Id.* Second, the defendant must demonstrate the arbitrary action or misconduct resulted in prejudice affecting his right to a fair trial. *Id.* Dismissal may be the appropriate remedy in certain cases involving the deprivation of the right to counsel. *State v. Cory*, 62 Wn.2d 371, 376, 382 P.2d 1019 (1963).

The government misconduct in this case is clear: the elected prosecutor announced to his staff that he would not be negotiating any criminal cases with Mr. Clower. This information became public from a news article, which understandably caused Mr. Curry concern as to whether he would be treated fairly by the prosecutor's office, especially considering the serious nature of his case. There is no other reason cited for the change of counsel but for the conduct by the elected prosecutor against Mr. Clower. RP 24-31. There is no indication that Mr. Curry did not think Mr. Clower was a good attorney or that he was not doing a good job for Mr. Curry to that point in time. The substitution of counsel was not something that Mr. Curry initiated himself but something that was initiated as a result of the conduct of the elected prosecutor. Mr. Clower had no choice for his client's best interests but to withdraw as counsel. The fact that Mr. Curry was denied counsel of his choosing is inherently prejudicial.

As such, the trial court abused its discretion in denying Mr. Curry's motion for dismissal due to the State's violation of his right to counsel.

**2. The Court abused its discretion by not granting a mistrial when Detective Katz provided opinion testimony that Mr. Campbell and Mr. Henderson were not involved in the shooting of Mr. Ward.**

The trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision whether to admit or exclude evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (citing *State v. Rivers*, 129 Wn.2d 697, 709–10, 921 P.2d 495 (1996)). A trial court abuses its discretion when its evidentiary ruling is based on untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Where reasonable minds could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. *Demery*, 144 Wn.2d at 758.

ER 701 permits testimony in the form of opinions or inferences that are “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.” ER 704 provides that “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it

embraces an ultimate issue to be decided by the trier of fact.”

Notwithstanding ER 704, however, “[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). On the other hand, “testimony that is not a direct comment on the defendant’s guilt...is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

A reviewing court applies the abuse of discretion standard in reviewing a trial court’s denial of a motion for mistrial. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing *State v. Mak*, 105 Wn.2d 692, 701, 719, 718 P.2d 407, cert. denied, *Mak v. Washington*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Gilchrist*, 91 Wn.2d 603, 613, 590 P.2d 809 (1979)). An appellate court finds abuse of discretion only “when no reasonable judge would have reached the same

conclusion.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989).

The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial.

*Mak*, 105 Wn.2d at 701. In other words, a trial court’s denial of a motion for mistrial “will be overturned only when there is a ‘substantial likelihood’ the prejudice affected the jury’s verdict.” *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390, 395 (2000) (citations omitted).

In determining the effect of an irregularity, the court examines (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *See Mak*, 105 Wn.2d at 701; *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). These three criteria are known as the *Hopson* criteria. *Greiff*, 141 Wn.2d at 921.

In the instant case, twenty separate questions were posed to Detective Katz that were meant to bolster Mr. Campbell’s and Mr. Henderson’s credibility while allowing Detective Katz to opine that there was no evidence to suggest that Isaiah Campbell or Xavier Henderson were involved in the homicide of Mr. Ward. RP 1243-1248.

**a. Seriousness of the irregularity.**

Det. Katz testified that Mr. Campbell was identified as one of the shooters that night. He further testified that he was able to make the assessment of Mr. Campbell being a shooter due to a tip he received. Mr. Campbell was interviewed and confirmed that he shot a gun that night. Det. Katz did not interview Mr. Campbell himself.

Likewise, Det. Katz testified that Mr. Henderson was identified as one of the shooters that night. Yet again, he was able to make that assessment due to a tip that Mr. Henderson “may have been involved”. RP 1245. Mr. Henderson gave a description of the weapon he used as a .38 and bullets were recovered that were a .38 or .357. Mr. Henderson was interviewed nearly a month later on October 1, 2014. Detective Katz reported that they put out a bulletin asking for help in locating him and the gang unit officers picked him up and brought him in.

He inferred that they were not initially cooperative and had to be located and interviewed and yet he dismissed them to the jury as having nothing to do with this incident. He bolstered Mr. Henderson’s statement by indicating that the whole interview was not taped because they wanted the subject at ease. Also, this is done so the subject will “completely fess up to his involvement in the incident and to give an accurate accounting of that. ... We wanted him to feel at ease because we wanted to get as truthful of a statement as we could from him.” RP 1247.

There is a significant risk that a jury would convict Mr. Curry in the instant case because of Det. Katz's dismissal regarding Mr. Campbell's and/or Mr. Henderson's involvement and impeding the defense's ability to argue their theory of the case. Det. Katz was the lead detective on this case and jurors may naturally defer to the conclusions made by Det. Katz.

**b. Cumulative evidence.**

The improper statements repeated by Det. Katz were not testified to otherwise regarding Mr. Campbell's and/or Mr. Henderson's involvement in Mr. Ward's shooting. Essentially his testimony suggests that no one but Mr. Curry was involved in this incident. The jury cannot be expected to ignore these statements which were elicited from the lead detective. The effect of these impermissible opinions and conclusions is that the jury will improperly consider them in its deliberations and Mr. Curry will therefore be prejudiced by them.

**c. Curative instructions.**

The court instructed the jury to disregard any opinion testimony from Det. Katz as to the involvement of Mr. Campbell and Mr. Henderson in the September 7, 2014 shooting of Michael Ward. CP 252.

The above three factors must be considered in light of the rest of the testimony in the instant case. Even though the jury is asked to

disregard this impermissible opinion, the prosecutor nevertheless in closing argument told the jury that “[s]o the murderer gets away because those shots ring out that end up having nothing to do with the murder of Michael Ward, but to distract the officers away.” RP 1771. Once again, the State told the jury that Mr. Campbell and Mr. Henderson have nothing to do with this incident. In closing, the defense attempted to shed light on Mr. Campbell and Mr. Henderson, their weapons which were never recovered, never tested, and the chaos of people running around with guns. RP 1814. It is doubtful in light of the testimony by Det. Katz that the jury gave any thought to the facts which surrounded Mr. Campbell and Mr. Henderson.

While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. *State v. Suleski*, 67 Wn.2d 45, 406 P.2d 613 (1965). Given the above, there is a substantial likelihood that Mr. Curry was prejudiced by the impermissible opinion testimony of Det. Katz, even if stricken. Because it is the jury’s responsibility to determine the defendant’s guilt or innocence, no witness, lay or expert, may opine as to

the defendant's guilt, whether by direct statement or by inference. *State v. Farr-Lenzini* 93 Wn. App. 453, 970 P.2d 313 (1999).

Given the above, the lower court abused its discretion in failing to grant a mistrial because there was a substantial likelihood the prejudice to Mr. Curry affected the jury's verdict. Accordingly, the convictions must be reversed and the case remanded for a new trial.

**3. The Court erred by allowing improper impeachment of Mr. Curry about gang activity or Y Gang Entertainment.**

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). The final measure of error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he was afforded a fair trial. *State v. Green*, 71 Wn.2d 363, 428 P.2d 540 (1967). A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial. *State v. Devlin*, 145 Wn. 44, 258 P. 826 (1927).

A witness cannot be impeached on an issue collateral to the issues being tried. *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140,

142 (2006) (citing *State v. Descoteaux*, 94 Wn.2d 31, 37, 614 P.2d 179 (1980) overruled on other grounds). An issue is collateral if it is not admissible independently of the impeachment purpose. *Descoteaux*, 94 Wn.2d at 37–38, 614 P.2d 179. Put another way, a witness may be impeached on only those facts directly admissible as relevant to the trial issue. *Fankhouser*, 133 Wn. App. at 693 (citing *State v. Oswald*, 62 Wn.2d 118, 121–22, 381 P.2d 617 (1963); *State v. Fairfax*, 42 Wn.2d 777, 780, 258 P.2d 1212 (1953)).

YLyfe was identified as a record, video and media company involved with hip hop music. RP 1592. Mr. Curry denied that this hip-hop music condoned street violence when cross-examined by the State. RP 1592. Mr. Curry was asked by the State if he had other business dealings with YG Entertainment or Young Gangster Entertainment, which he denied. RP 1593. The State then attempted to impeach Mr. Curry about being a legitimate businessman and introduce evidence of a photo showing Mr. Curry associated with the term “Y Gang”. RP 1623. The court mistakenly believed that Mr. Curry had denied involvement with Y Gang, when in fact he was only questioned about YG Entertainment and Young Gangster Entertainment. RP 1623.

The State should not have been allowed to impeach Mr. Curry on this evidence since he answered the question correctly. The supposedly

impeaching material was regarding Y Gang Entertainment. Furthermore, the impeachment evidence was too attenuated from the material issues at trial. Information about YLyfe was used for purposes of tying Mr. Curry to a black mask that was supposedly similar to one found near the homicide scene. Information about Y Gang has no probative value – the only value it has is for attempted impeachment. Furthermore, this effort by the State was an attempt to impugn Mr. Curry’s character, and simply backdoor evidence of gang affiliation. Det. Katz testified that a burner phone is used for business which you wouldn't want on your regular phone. RP 1344. He also associated Mr. Henderson and Mr. Curry as friends, and indicated that Mr. Henderson was picked up by the gang unit officers, thereby suggesting that Mr. Henderson and Mr. Curry are gang members or gang affiliated. RP 1246.

Given the above, the court abused its discretion in allowing supposed impeachment evidence when the court was simply mistaken about what was actually testified to. The court also abused its discretion in allowing impeachment evidence regarding a collateral matter. This improper evidence prejudiced Mr. Curry in that the jury was allowed to view Mr. Curry as supposedly involved in gang culture. Accordingly, Mr. Curry’s convictions must be reversed and the case remanded for a new trial.

**4. The State committed prosecutorial misconduct in its closing argument.**

In order to establish that Mr. Curry is entitled to a new trial due to prosecutorial misconduct, Mr. Curry must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). But a defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “‘flagrant and ill intentioned’ that it causes enduring and resulting prejudice that a curative instruction could not have remedied.” *Boehning*, 127 Wn. App. at 518 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)).

**a. The State made improper remarks regarding the credibility of the DNA evidence.**

Jennifer Hayden is a Forensic Scientist with the Washington State Patrol Crime Laboratory in the DNA Unit and who testified for the State. RP 956-1003. She testified that the crime lab is accredited by American

Crime Laboratory (hereafter “ACLD”) to make sure that it is producing accurate and reliable results every time. RP 961. Similar to the issue regarding Detective Katz, the State argued that “...our professional witnesses are very similar, okay, like ... DNA folks ... [t]hey came in, they don’t have any interest in the case, they don’t have any bias. They just came in and told you what happened. Okay”. RP 1792.

Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record. *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). And it is generally improper for prosecutors to bolster a police witness's good character even if the record supports such argument. *See State v. Smith*, 67 Wn. App. 838, 844–45, 841 P.2d 76 (1992) (following line of cases from other states holding prosecutorial misconduct occurred when the State bolstered police witnesses' credibility with evidence that they received commendations and awards or had distinguished careers).

Not only did the prosecutor's argument here bolster Ms. Hayden's character but her testimony bolstered her findings. By eliciting testimony that the crime lab produces accurate and reliable results every time and

that they don't have any interest in the case, they don't have any bias, elevated her testimony.

The State further bolstered the DNA evidence and it did so by using facts not in evidence, namely that "DNA in this day and age has great power ... Innocence Project, evidence that's tested, new DNA, evidence that couldn't be tested ages ago that's now re-tested and we learn that the person that's been incarcerated isn't the man who committed the crime. It has the power to exonerate. It has just as much power to convict." RP 1821-1822. The State suggested that if DNA were untrustworthy it wouldn't have the "power to exonerate", and that if it weren't reliable and couldn't be trusted then it wouldn't be used. The argument improperly bolstered the witness and the evidence based on facts not in evidence. Comments about the infallibility of DNA evidence using facts not in evidence and comments that State lab technicians that tested the DNA had no bias, were flagrant and ill-intentioned comments that could not be cured. Accordingly, Mr. Curry's convictions must be reversed, and the case remanded for a new trial. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

**b. The State made improper remarks that the police have no bias.**

Appellate courts have repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the government's witnesses are either lying or mistaken. *State v. Casteneda–Perez*, 61 Wn. App. 354, 362–63, 810 P.2d 74 (“it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying”), review denied, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied 127 Wn.2d 1010, 902 P.2d 163 (1995); *State v. Barrow*, 60 Wn. App. 869, 874–75, 809 P.2d 209, review denied 118 Wn.2d 1007, 822 P.2d 288 (1991). In *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), the State argued the following in closing statements:

Ladies and gentlemen of the jury, for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree, with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.

The court found that statement to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial. *Fleming*, 83 Wn. App. at 214.

In *U.S. v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), the prosecutor stated that the officer had no reason to lie and then argued that to believe the defense attorney, then the cops had to have lied. The court found these statements were impermissible vouching, based on matters outside the record and may have skewed jurors' assessment of credibility. The existence of a dispute in the evidence as to the credibility of a witness – a matter that by definition is for the jury to resolve – makes the prosecutor's placement of his thumb on the scales all the more impermissible. *Weatherspoon*, 410 F.3d at 1148.

Similarly, in the instant case, the State argued in closing that "...our professional witnesses are very similar, okay, like police officers, forensics technicians. DNA folks. These people – it's their job to show up and do work in criminal investigations. They came in, they don't have any interest in the case, they don't have any bias. They just came in and told you what happened. Okay". RP 1792. Again, the State indicated that the professional witnesses are just doing their job and don't have any interest in the case, they don't have any bias. RP 1792.

This type of argument is prohibited under *Fleming* and *Weatherspoon, supra*, as it impermissibly shifts the burden to the

defense and impermissibly invades the province of the jury by vouching for the credibility of the officer. This was a flagrant and ill-intentioned violation of the rules which could not be cured. Accordingly, it necessitates reversal of the convictions and remand to Superior Court for a new trial.

**5. The cumulative trial errors denied Mr. Curry the right to a fair trial.**

The cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031, 94 P.3d 960 (2004). Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

If the court finds that none of the above-claimed errors warrants reversal on their own, then the cumulative effects of the errors nevertheless effectively denied Mr. Curry a fair trial. There is cumulative prejudice to Mr. Curry when the main detective tells the jury that two people that admitted to firing guns were not guilty of shooting Mr. Ward, when the State was allowed to admit improper gang affiliation evidence, and when the State improperly argued that its professional witnesses have

no bias and that DNA evidence is essentially irrefutable. Combined with the denial of Mr. Curry's choice of counsel, Mr. Curry was cumulatively denied the right to a fair trial. Accordingly, Mr. Curry's convictions must be reversed and remanded for a new trial.

**6. The Court erred in refusing to instruct the jury that they could consider first degree manslaughter as a lesser included offense to the charge of first degree murder.**

Under the Washington Constitution, the accused in a criminal trial has the right to be informed of the nature and cause of the offense against which he or she must defend at trial. Const. art. I, § 22 (amend.10).

Generally, a defendant can be tried and convicted only of crimes with which he or she is charged. *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). However, at common law, a jury was permitted to find a defendant guilty of a lesser offense necessarily included in the offense charged. *Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct. 2382, 2387, 65 L.Ed.2d 392 (1980). Washington codified this common law rule at RCW 10.61.006. The statute provides: "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." Our lesser included statute in some form dates back to its enactment by the Legislature of the Washington Territory in 1854. Wash. Terr. § 123, at 20 (1854).

In *Workman*, the Washington Supreme Court explicitly established a two-part test to serve as the basis for our lesser included analysis. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. *Workman*, 90 Wn.2d at 447-48, 584 P.2d 382. When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense. *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984).

The *Berlin* Court went on to state that [a] lesser included instruction is available to both the prosecution and the defense, the constitutional requirement of notice is incorporated into the *Workman* test, and the test allows both parties to effectively argue their theory of the case. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700, 703 (1997). Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense. *Id.*

RCW 9A.32.030. Murder in the first degree is defined as: “[a] person is guilty of murder in the first degree when with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person”. RCW 9A.32.030(1)(a). Manslaughter in the first degree is defined as: “[a] person is guilty of manslaughter in the first degree when he or she recklessly causes the death of another person”. RCW 9A.32.060(1)(a); *see also* CP 253 – 265 (Defendant’s Proposed Jury Instructions).

RCW 9A.08.010, defines the general requirements of culpability, and specifically defines intent as: “A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime”. RCW 9A.08.010(1)(a). This statute also defines recklessness as: “A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c). “Premeditation” is “ ‘the deliberate formation of and reflection upon the intent to take a human life’ ” and involves “ ‘the mental process of ... deliberation, reflection, weighing or reasoning for a period of time, however short.’ ” *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting *State v. Gentry*,

125 Wn.2d 570, 597–98, 888 P.2d 1105 (1995)). Premeditation must involve “more than a moment in point of time.” RCW 9A.32.020(1).

*State v. Berlin* along with its companion case, *State v. Warden*, presents the issue of whether jury instructions may be given for manslaughter when a defendant is charged with both felony murder and intentional or premeditated murder. *State v. Berlin*, 133 Wn.2d 541, 543, 947 P.2d 700, 701 (1997); *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997). The Court held that manslaughter is a lesser included offense of intentional or premeditated murder in this case. *Berlin, supra*. The State is not required to elect between the alternative means of committing second degree murder. *Id.* However, the jury must be instructed that manslaughter is a lesser included offense of intentional murder only. *Id.* Refusal to give an instruction that prevents the defendant from presenting his theory that a killing was unintentional is reversible error. *Warden*, 133 Wn.2d at 564 (citing *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981)).

In the instant case, the legal prong of the *Workman* test is satisfied as discussed in *Warden, supra*. The factual prong of the *Workman* test as applied in this case supports an inference that only the lesser included offense may have been committed. It is certainly possible that a gunman could recklessly discharge a firearm at a vehicle without having the specific premeditated intent to kill. The evidence in this case would permit

the jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense. However, the jury in this case was required to choose between only convicting Mr. Curry of a greater offense or acquitting him. Accordingly, Mr. Curry's conviction for Murder in the First Degree must be reversed and remanded for a new trial.

**7. No appellate costs are warranted in the event that Mr. Curry does not substantially prevail.**

In the event that Mr. Curry does not prevail in his appeal, he asks that no costs of appeal be authorized under RAP 14. *See State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Mr. Curry was indigent and entitled to court-appointed counsel at trial and on appeal.

E. CONCLUSION

Given the foregoing, Appellant respectfully requests that this court reverse his convictions and remand for entry of an order of dismissal, or in the alternative, for an order for new trial.

DATED this 30 January 2017

Respectfully submitted,

s/ Sean M. Downs  
Sean M. Downs, WSBA #39856  
Attorney for Appellant  
GRECCO DOWNS, PLLC  
500 W 8th Street, Suite 55  
Vancouver, WA 98660  
(360) 707-7040  
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Pierce County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on January 31, 2017 to email address PCpatcecf@co.pierce.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Vernon Curry, a true and correct copy of the document to which this certification is affixed via first class mail postage prepaid to Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362.

s/ Sean M. Downs  
Sean M. Downs, WSBA #39856  
Attorney for Appellant  
GRECCO DOWNS, PLLC  
500 W 8th Street, Suite 55  
Vancouver, WA 98660  
(360) 707-7040  
sean@greccodowns.com

# GRECCO DOWNS PLLC

**January 31, 2017 - 7:52 AM**

## Transmittal Letter

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