

NO. 49026-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

VERNON L. CURRY, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty Ann van Doorninck

No. 14-1-03668-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the court rightly refuse to find CrR 8.3 governmental misconduct in a newspaper repeating refuted allegations anonymously made against the Prosecutor? 1

2. Was the mistrial defendant sought correctly denied, for the officer testimony mischaracterized as opinion stated two facts about the absence of other-suspect evidence? 1

3. Has defendant failed to prove error in the fair response to his presentation of himself as owner of a family-endorsed business who would not gun an unsuspecting man down in cold blood amid bystanders on a city street? 1

4. Is defendant incapable of proving the prosecutor erred in arguing reasonable inferences about the reliability of DNA evidence and the credibility of law-enforcement witnesses? 1

5. Was an instruction on manslaughter accurately withheld as its *mens rea* of recklessness cannot be found in defendant's ambush-style execution of Michael Ward on a city street? 1

6. Does absence of error defeat the cumulative-error claim? 1

7. Should consideration of appellate costs await a bill? 1

B. STATEMENT OF THE CASE..... 2

1. Procedure 2

2. Facts 4

| | | |
|----|---|----|
| C. | <u>ARGUMENT</u> | 10 |
| 1. | GOVERNMENTAL MISCONDUCT CANNOT BE BASED ON A NEWSPAPER'S REPETITION OF REFUTED ALLEGATIONS ANONYMOUSLY MADE AGAINST AN ELECTED PROSECUTOR. | 10 |
| 2. | THE MISTRIAL DEFENDANT SOUGHT WAS PROPERLY DENIED, FOR THE OFFICER TESTIMONY HE MISCHARACTERIZED AS AN OPINION WAS A STATEMENT OF FACT THAT RECOUNTED THE LACK OF OTHER-SUSPECT EVIDENCE IN HIS CASE..... | 15 |
| 3. | THE STATE WAS PROPERLY PERMITTED TO RESPOND TO EVIDENCE DEFENDANT INTRODUCED TO REPRESENT HIMSELF AS A FAMILY-ENDORSED BUSINESS MAN WHO WOULD NOT MURDER SOMEONE IN COLD BLOOD..... | 22 |
| 4. | THE PROSECUTOR PROPERLY ARGUED DNA EVIDENCE IS RELIABLE AND THE STATE'S WITNESSES WERE CREDIBLE BASED ON THE EVIDENCE ADDUCED AT TRIAL..... | 29 |
| 5. | A MANSLAUGHTER INSTRUCTION WAS RIGHTLY WITHHELD AS THE REQUISITE MENS REA OF RECKLESSNESS CANNOT BE FOUND IN DEFENDANT'S AMBUSH-STYLE EXECUTION OF WARD. | 37 |
| 6. | ABSENCE OF ERROR DEFEATS THE CLAIM OF CUMULATIVE ERROR..... | 40 |
| 7. | IT IS PREMATURE TO DECIDE IF APPELLATE COSTS SHOULD BE IMPOSED. | 40 |
| D. | <u>CONCLUSION</u> | 40 |

Table of Authorities

State Cases

City of Seattle v. Heatley, 70 Wn.App. 573, 578,
854 P.2d 658 (1993)..... 19

City of Seattle v. Holifield, 170 Wn.2d 230, 237,
240 P.3d 1162 (2010)..... 12

Clawson v. Longview Pub.Co., 91 Wn.2d 408, 427,
589 P.3d 1223 (1979)..... 14

Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 457 (1986)..... 19

In re Marriage of Suggs, 152 Wn.2d 74, 80-81, 93 P.3d 161 (2004)..... 14

In re Pers. Restraint of Coggin, 182 Wn.2d 115, 124,
340 P.3d 810 (2014)..... 24

In re Pers. Restraint of Stenson, 142 Wn.2d 710, 734,
16 P.3d 1 (2001)..... 15

In re Recall of Lindquist, 172 Wn.2d 120, 125, 138,
258 P.3d 9 (2011)..... 13

Makoviney v. Svinth, 21 Wn.App. 16, 28, 584 P.2d 948 (1978) 20

Spokane County v. State, 136 Wn.2d 644, 654-55,
966 P.2d 305 (1998)..... 13

State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992)..... 40

State v. Allen, 161 Wn.App. 727, 746, 255 P.3d 784 (2011)..... 32

State v. Allen, 50 Wn.App. 412, 418-19, 749 P.2d 702 (1988)..... 19

State v. Asaeli, 150 Wn.App. 542, 584, 208 P.3d 1136 (2009)..... 24

State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) 40

State v. Barber, 38 Wn.App. 758, 771, 689 P.2d 1099 (1984) 23-24

| | |
|---|------------|
| <i>State v. Barriault</i> , 20 Wn.App. 419, 427, 581 P.2d 1365 (1987)..... | 40 |
| <i>State v. Barrow</i> , 60 Wn.App. 869, 873-74, 809 P.2d 209 (1991) | 33, 36 |
| <i>State v. Berlin</i> , 133 Wn.2d 541, 551, 947 P.2d 700 (1997) | 38 |
| <i>State v. Bingham</i> , 105 Wn.2d 820, 824, 719 P.2d 109 (1986) | 38 |
| <i>State v. Black</i> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987) | 20 |
| <i>State v. Bonner</i> , 21 Wn.App. 783, 793, 587 P.2d 580 (1978) | 15, 18, 19 |
| <i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995)..... | 29 |
| <i>State v. Briejer</i> , 172 Wn.App. 209, 226, 289 P.3d 698 (2012) | 15, 18, 19 |
| <i>State v. Brush</i> , 32 Wn.App. 445, 448, 648 P.2d 897 (1982)..... | 22 |
| <i>State v. Cleveland</i> , 58 Wn.App. 634, 648, 794 P.2d 546 (1990)..... | 36 |
| <i>State v. Coe</i> , 101 Wn.2d 772, 789, 684 P.2d 668 (1984) | 40 |
| <i>State v. Colbert</i> , 17 Wn.App. 658, 665, 564 P.2d 1182 (1977)..... | 40 |
| <i>State v. Condon</i> , 182 Wn.2d 307, 326, 331, 343 P.357 (2015)..... | 40 |
| <i>State v. Contreras</i> , 57 Wn.App. 471, 476, 788 P.2d 1114 (1990) | 34 |
| <i>State v. Copeland</i> , 130 Wn.2d 244, 290, 922 P.2d 1304 (1996)..... | 31 |
| <i>State v. Crawford</i> , 21 Wn.App. 146, 151, 584 P.2d 422 (1978)..... | 24 |
| <i>State v. Davis</i> , 133 Wn.App. 415, 422, 138 P.3d 132 (2006), vacated on other grounds, 163 Wn.2d 606, 184 P.3d 639 (2008)..... | 34 |
| <i>State v. Demery</i> , 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)..... | 15-16 |
| <i>State v. Emery</i> , 174 Wn.2d 741, 761, 278 P.3d 652 (2012)..... | 32 |
| <i>State v. Entz</i> , 58 Wn.App. 112, 116, 791 P.2d 269 (1990) | 37 |
| <i>State v. Geffeller</i> , 76 Wn.2d 449, 455, 458 P.2d 17 (1969) | 25 |
| <i>State v. Gregory</i> , 158 Wn.2d 759, 841-42, 147 P.3d 1201 (2006)..... | 30, 33 |

| | |
|--|--------|
| <i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000)..... | 40 |
| <i>State v. Grisby</i> , 97 Wn.2d 493, 499, 647 P.2d 6 (1982)..... | 24 |
| <i>State v. Guillot</i> , 106 Wn.App. 355, 368-69, 22 P.3d 1266 (2001)..... | 40 |
| <i>State v. Halstien</i> , 122 Wn.2d 109, 128, 857 P.2d 270 (1993)..... | 16, 19 |
| <i>State v. Hansen</i> , 46 Wn.App. 292, 297-98, 730 P.2d 706 (1986)..... | 40 |
| <i>State v. Hanson</i> , 46 Wn.App. 656, 662-64, Fn. 7, 731 P.3d 1140 (1987)..... | 26 |
| <i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991)..... | 29 |
| <i>State v. Jackson</i> , 112 Wn.2d 867, 874, 774 P.2d 1211 (1989)..... | 19 |
| <i>State v. Jackson</i> , 150 Wn.2d 877, 884-885, 209 P.3d 553 (2009)..... | 32 |
| <i>State v. Killingsworth</i> , 166 Wn.App. 283, 291, 269 P.3d 1064 (2012)..... | 32 |
| <i>State v. King</i> , 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009)..... | 15 |
| <i>State v. Kirkman</i> , 159 Wn.2d 918, 924, 934, 155 P.3d. 125 (2007)..... | 19 |
| <i>State v. Kone</i> , 164 Wn.App. 420, 433, 266 P.3d 916 (2011)..... | 10 |
| <i>State v. Kunze</i> , 97 Wn.App. 832, 857, 988 P.2d 977 (1999)..... | 19 |
| <i>State v. Lazcano</i> , 188 Wn.App. 388, 355-57, 354 P.3d 233 (2015)..... | 12 |
| <i>State v. Lewis</i> , 156 Wn.App. 230, 240, 233 P.3d 891 (2010)..... | 32 |
| <i>State v. Mason</i> , 160 Wn.2d 910, 933, 162 P.3d 396 (2007)..... | 16 |
| <i>State v. McChristian</i> , 158 Wn.App. 392, 400, 241 P.3d 486 (2010)..... | 30 |
| <i>State v. McFadden</i> , 63 Wn.App. 441, 450, 820 P.2d 53 (1991)..... | 22, 25 |
| <i>State v. McKenzie</i> , 157 Wn.2d 44, 56 P.3d 221 (2006)..... | 34 |
| <i>State v. Militate</i> , 80 Wn.App. 237, 250, 908 P.2d 374 (1995)..... | 31 |
| <i>State v. Parker</i> , 102 Wn.2d 161, 164, 683 P.2d 189 (1984)..... | 40 |

| | |
|--|------------|
| <i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 481, 6 P.3d 1160 (2000)..... | 38, 39 |
| <i>State v. Piche</i> , 71 Wn.2d 583, 430 P.2d 522 (1967)..... | 15 |
| <i>State v. Rafay</i> , 168 Wn.App. 734, 803, 285 P.83 (2012)..... | 18 |
| <i>State v. Ramirez</i> , 62 Wn.App. 301, 305-06, 814 P.2d 227 (1991)..... | 23 |
| <i>State v. Reed</i> , 102 Wn.2d 140, 145, 684 P.2d 699 (1984)..... | 30 |
| <i>State v. Rice</i> , 174 Wn.2d 884, 900, 279 P.3d 849 (2012)..... | 13 |
| <i>State v. Riconosciuto</i> , 12 Wn.App. 350, 354, 529 P.2d 1134 (1974)..... | 22, 33 |
| <i>State v. Riggs</i> , 32 Wn.2d 281, 283, 201 P.2d 219 (1949)..... | 18, 19, 20 |
| <i>State v. Riofta</i> , 166 Wn.2d 358, 376–77, 209 P.3d 467 (2009)..... | 36 |
| <i>State v. Roberts</i> , 142 Wn.2d 471, 515-16, 14 P.3d 731 (2001)..... | 15 |
| <i>State v. Rohrich</i> , 149 Wn.2d 647, 657, 71 P.3d 638 (2003)..... | 14 |
| <i>State v. Russell</i> , 125 Wn.2d 24, 86, 882 P.2d 747 (1994)..... | 30, 34 |
| <i>State v. Sandovol</i> , 137 Wn.App. 532, 540-41, 154 P.3d 271 (2007)..... | 32 |
| <i>State v. Sisouvanh</i> , 175 Wn.2d 607, 619, 290 P.3d 942 (2012)..... | 11 |
| <i>State v. Smith</i> , 67 Wn.App. 838, 844-45, 841 P.2d 76 (1992)..... | 32-33 |
| <i>State v. Starrish</i> , 86 Wn.2d 200, 206, 544 P.3d 1 (1975)..... | 13 |
| <i>State v. Stenson</i> , 132 Wn.2d 668, 734, 940 P.2d 1239 (1997)..... | 14 |
| <i>State v. Stith</i> , 71 Wn.App. 14, 21, 856 P.2d 415 (1993)..... | 34 |
| <i>State v. Thach</i> , 126 Wn.App. 297, 314, 106 P.3d 782 (2005)..... | 21 |
| <i>State v. Tracer</i> , 173 Wn.2d 708, 716, 272 P.3d 199 (2012)..... | 12 |
| <i>State v. Varga</i> , 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004)..... | 14 |
| <i>State v. Warren</i> , 165 Wn.2d 17, 28-29, 195 P.3d 940 (2008)..... | 32 |

| | |
|--|------------|
| <i>State v. Wheeler</i> , 95 Wn.2d 799, 804, 631 P.2d 376 (1981)..... | 15 |
| <i>State v. Wilber</i> , 55 Wn.App. 294, 299-300, 777 P.2d 36 (1989)..... | 21 |
| <i>State v. Wilson</i> , 149 Wn.2d 1, 12, 65 P.3d 657 (2003) | 12 |
| <i>State v. Workman</i> , 90 Wn.2d 443, 447, 584 P.2d 382 (1978) | 38 |
| Federal and Other Jurisdictions | |
| <i>Alexander v. United States</i> , 509 U.S. 544, 550, 113 S.Ct. 2766 (1993)..... | 14 |
| <i>Beck v. Alabama</i> , 447 U.S. 625, 635, 100 S.Ct. 2382 (1980)..... | 38 |
| <i>Imbler v. Pachtman</i> , 424 U.S. 409, 424, 96 S.Ct. 984 (1976)..... | 13 |
| <i>Michelson v. United States</i> , 335 U.S. 469, 479, 69 S.Ct. 213 (1948)..... | 22, 29 |
| <i>Morris v. Slappy</i> , 461 U.S. 1, 15, 103 S.Ct. 1610 (1983)..... | 11, 12, 14 |
| <i>Neal v. Grammer</i> , 975 F.2d 463, 467 (8 th Cir. 1992)..... | 14 |
| <i>Old Chief v. United States</i> , 519 U.S. 172, 189, 117 S.Ct. 644 (1997)..... | 18 |
| <i>Porter v. City of Chicago</i> , 393 Ill. App. 3d 855, 867, 912 N.E.2d 1262, 1272 (2009)..... | 36 |
| <i>Simon v. Nw. Univ.</i> , No. 1:15-CV-1433, 2017 WL467677, at *1 (N.D. Ill. Feb. 3, 2017)..... | 36 |
| <i>State v. Papandrea</i> , 120 Conn.App. 224, 244-45, 991 A.2d 617 (2010) <i>aff'd</i> 302 Conn. 340, 26 A.3d 75 (2011)..... | 36 |
| <i>States v. Giese</i> , 597 F.2d 1170, 1189-95 (9 th Cir. 1979) | 22, 26 |
| <i>United States v. Goosby</i> , 523 F.3d 632, 638 (6 th Cir. 2008)..... | 15, 18 |
| <i>United States v. Hall</i> , 434 F.3d 42, 57 (1 st Cir. 2006)..... | 15, 18 |
| <i>United States v. McMath</i> , 559 F.3d 657, 669 (7 th Cir. 2009)..... | 36 |
| <i>United States v. Olano</i> , 507 U.S. 725, 731, 113 S.Ct. 1770 (1993)..... | 12 |

| | |
|---|-------------------------------|
| <i>United States v. Weatherspoon</i> , 410 F.3d 1142, 1148 (9 th Cir. 2005)..... | 33 |
| <i>Wheat v. United States</i> , 487 U.S. 152, 159, 108 S.Ct. 2918 (1988) | 14 |
| Constitutional Provisions | |
| First Amendment, United States Constitution | 14 |
| Statutes | |
| RCW 36.27.020 | 14 |
| RCW 36.27.030 | 12 |
| RCW 9A.08.010(1)(a) | 38 |
| RCW 9A.08.010(1)(c) | 38 |
| RCW 9A.32.020..... | 38 |
| RCW 9A.32.030(1)(a) | 38 |
| RCW 9A.32.040(a)..... | 38 |
| RCW 9A.32.060..... | 38 |
| Rules and Regulations | |
| CrR 8.3 | 1, 10, 11, 12, 13, 14, 15, 40 |
| ER 201 | 25, 35, 36 |
| ER 403 | 22 |
| ER 404(b)..... | 22 |
| ER 701 | 16, 19, 20, 21 |
| ER 702 | 19 |
| GR 14.1 | 36 |

| | |
|--|--------|
| RAP 14.1-14.6 | 40 |
| RAP 15.1-15.6 | 40 |
| Other Authorities | |
| 5 Wash. Prac. Evid. § 24 (3d ed. 1989) | 24 |
| 5 Wash.Prac., Evid. § 103. 14 (6 th ed.) | 22, 25 |
| 5A Wash.Prac., Evid. § 281, 347 (3d ed. 1989) | 16 |
| 5B Wash. Prac., Evid. § 701.2 (6th ed.)..... | 18, 20 |
| Alien and Sedition Act of 1798 | 14 |
| http://ew.com/music/2017/04/08/rock-roll-hall-fame-2017-tupac-pearl-jam-joan-baez/ | 25 |
| http://www.thedailybeast.com/articles/2015/02/22/the-innocence-project-on-trial-in-chicago.html ("The Innocence Project May have Framed a Man for a Crime he Didn't Commit") | 36 |
| https://genius.com/Snoop-dogg-murder-was-the-case-lyrics; http://www.thefader.com/2017/04/07/snoop-dogg-tupac-rock-roll-hall-of-fame | 25 |
| https://www.census.gov/popclock/ | 35 |
| Webster's Third New International Dictionary 1127 (2002) | 32 |
| Webster's Third New International Dictionary 1582 (2002) | 19 |

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court rightly refuse to find CrR 8.3 governmental misconduct in a newspaper repeating refuted allegations anonymously made against the Prosecutor?
2. Was the mistrial defendant sought correctly denied, for the officer testimony mischaracterized as opinion stated two facts about the absence of other-suspect evidence?
3. Has defendant failed to prove error in the fair response to his presentation of himself as owner of a family-endorsed business who would not gun an unsuspecting man down in cold blood amid bystanders on a city street?
4. Is defendant incapable of proving the prosecutor erred in arguing reasonable inferences about the reliability of DNA evidence and the credibility of law-enforcement witnesses?
5. Was an instruction on manslaughter accurately withheld as its *mens rea* of recklessness cannot be found in defendant's ambush-style execution of Michael Ward on a city street?
6. Does absence of error defeat the cumulative-error claim?
7. Should consideration of appellate costs await a bill?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant proceeded to trial charged with premeditated murder and unlawful possession of a firearm for having been previously convicted of a "serious offense" when he shot Michael Ward, Jr. to death. CP 2, 167. Gary Clower was appointed to represent defendant September 18, 2014. CP 443. Almost 1 year later, defendant's motion to substitute him for other counsel was granted though *no conflict* was found. CP 13, 444. Defendant neglected to adduce a transcript of that proceeding. Roughly 1 year and 7 months after substitution, on the first day of trial, defendant moved for dismissal, blaming the State for a newspaper article that caused him to lose faith in Clower's ability to secure favorable plea deals from the State. CP 160. An affidavit Clower signed 14 months after substitution repeated anonymous reports of the elect Prosecutor directing deputies not to deal with Clower. The motion was denied as Clower averred the absence of unfair treatment in defendant's case. CP 156; RP 26-27, 31.

A total of 39 witnesses testified over the several week trial. CP 280. Detective Katz was among them. *Id.* He recounted the absence of evidence known to link Isaiah Campbell or Xavior Henderson to Ward's murder. 12RP 1228-39. Objections grounded in improper opinion were overruled and the associated motion for a mistrial was denied. 12RP 1238; 13RP 1274. A curative instruction was given even though the challenged

testimony was not perceived to be improper. 13RP 1277, 1282. The court admitted 114 exhibits through 39 witnesses. CP 271. Videos captured the gunman advance upon the victim wearing a subsequently dropped mask bearing defendant's DNA. The same phone that placed defendant near the murder contained photographs of him wearing the mask to promote his company "Ylyfe." Ex. 54, 92, 95, 115. The court permitted 2 photographs from his business to contradict the family-friendly image he painted of it in his case-in-chief.¹ He declined a limiting instruction. 17RP 1685-89.

Defendant's request for an instruction on first degree manslaughter was denied because there was no inference of recklessness to be found in a masked assailant "unloading" 7 bullets into an unsuspecting victim. 16RP 1652-1655. An instruction on how personal interests can affect credibility was given. CP 309 (Inst. 1). Without objection, the State argued witnesses without such interests were more credible than witnesses with them. 17RP 1791-93. Defendant argued against the probative value of DNA matches. 17RP 1810-12, 1817. Without objection, the State rebutted that argument with an analogy to DNA exonerations. 17RP 1821-23. Defendant was convicted as charged.² A notice of appeal was timely filed. CP 355.

¹ 12RP 1204-05; 14RP 1447-49; 15RP 1557; 16RP 1592-1601, 1617-24; 17RP 1685-1711; Ex. 166, 174A, 175A.

² CP 15 (Inst. 6), 16 (Inst. 7), 17 (Inst. 8), 19 (Inst.10), 20 (Inst.11), 303.

2. Facts

It was warm but breezy around 4 a.m. in the Tacoma neighborhood surrounding 38th and Yakima on September 7, 2014. 6RP 165; 8RP 535. The after-hours club across the street from the Hong Kong Market was in full swing. 6RP 249; 8RP 539. Defendant's friend Xavier Henderson was inside the club socializing with bouncers, "females" and bikers. 7RP 428. Other folks were outside milling about, shooting dice, or chatting with Aaron Brown.³ Isaiah Campbell was among them. 7RP 361-62, 428. Both Brown and Campbell saw the victim, 33 year old Michael Ward, drive by in his Cadillac.⁴ Mother of 3, Garmin Edgmon, was returning to the club in her car. 9RP 682, 684-85. Trinar Yelladay, a nurse, was watching "Diners Drive-Ins and Dives" in a house across the street that she shared with her boyfriend, Christopher Anderson and son. 8RP 519-22, 535, 548. Jennifer Henson, Cary Foote and Korlina Henson were asleep in their house down the road at 3816 S. Park. 9RP 655, 708-10, 729.

At 4:04 a.m. security cameras near 39th and Yakima captured video of a black male, later identified as defendant, pulling a black mask over his head as he stalked north toward the club wearing light work gloves and dark clothing.⁵ 6 minutes later, he silently approached from behind, aimed

³ 7RP 310, 311-14, 339, 357.

⁴ 6RP 155-56; 7RP 316, 322-23, 366.

⁵ 8RP 636; 9RP 663, 667; 11RP 974-75, 1081-83; 13RP 1303; Ex. 48, 54, 92, 98, 149.

a .40 caliber pistol and fired all 7 bullets into Ward's body and car.⁶ One bullet passed through Ward's right shoulder before tearing downward into his lung. 6RP 206-11. Bleeding from the wound would prove fatal within minutes. 6RP 208-09. A second bullet passed through his diaphragm, then cut a bloody track through his liver on its way to his vertebra. 6RP 212-14. He was bombarded by shrapnel when a third bullet impacted the car. 6RP 214. Yet another nearly cut his kidney in half on its way through his abdomen. 6RP 214-16. A dislodged copper jacket penetrated his forearm. 6RP 216-17. Two more bullets blew through his right wrist, breaking both bones on their way. 6RP 218-19.

Campbell saw the muzzle of defendant's pistol flash as 7 bullets were fired in rapid succession.⁷ Ward slumped out of the car. 7RP 381-83; 8RP 525-26. He was gasping for air when Campbell approached to help. 7RP 382-83. Chaos ensued. 6RP 268. People were running, screaming and driving off. 7RP 439. To preempt a second attack, Campbell kneeled a few feet from Ward and fired *a different* .40 caliber pistol down Yakima where the bullets ricocheted across the roof of Edgmon's car. This second volley was caught on video and seen by Yelladay and Anderson from their house across the street.⁸ People scattered. 7RP 376. Brown, allegedly high, hit the ground and crawled to his van for cover with a few people in tow. 7RP

⁶ 6RP 172-73; 206-14; 7RP 371-78, 396-400, 436-37, 460-63; 8RP 502-03; 9RP 692, 760-770; 11RP 1013-14, 1019, 1025-33; Ex.3-6, 12, 55-75.

⁷ 7RP 378-79, 383-94; 8RP 526-28; 9RP 688-69; 11RP 1013-14, 1044-45; Ex. 3, 12.

⁸ 8RP 526-28, 553-61; Ex. 80 (00:29, 1:07, 1:11, 1:43); 11RP 1075-83.

324-27, 349. Henderson fled from the gunfire, then decided to deter anyone from shooting him by firing 3, .38 caliber bullets from a revolver.⁹ Those bullets were not the .40 caliber bullets that killed Ward.¹⁰

Patrol commander Maule was parked just down from the club when the first shots rang out. 6RP 167-73. He saw a black male, later identified as defendant, sprinting toward him. 6RP 174. Defendant seemed to be wearing light-colored gloves and holding a gun. 6RP 174. There was a dark cover over his head. 6RP 175. Maule chased him down an alley east of Yakima until he cut across a parking lot toward 3816 S. Park.¹¹ The second volley fired by Campbell rang out.¹² Moments later, Henderson fired the third.¹³ Maule terminated pursuit to investigate. 6RP 179.

Defendant kept running. Jennifer,¹⁴ woken by gunfire, looked out the window of her house at 3816 S. Park and saw a black man in dark clothing run through her neighbor's yard at 3814 S. Park.¹⁵ Her sister, Cary Foote, saw him continue toward Lincoln High. 9RP 711-12, 720. About 3 hours later, Foote, a mechanic, saw a car she later identified as defendant's Red Acura TL drive up and down her street. 9RP 714-15. A black male got out of the car and looked through her bushes. 9RP 715-17; Ex. 11. A

⁹ 7RP 437, 441-43; 11RP 1049-50.

¹⁰ 11RP 1049-50; Ex. 22, 24, 41-42.

¹¹ 6RP 175-79; 9RP 655, 661, 667-68; 11RP 974-75.

¹² 6RP 178-179; 7RP 383-94; 8RP 526-28; 11RP 1044-45; Ex. 3.

¹³ 6RP 179, 185-90; 7RP 437, 441-43; 11RP 1049-50.

¹⁴ Jennifer's first name is used to avoid confusion with her mother. No disrespect intended.

¹⁵ 9RP 661-664, 661-72, 678-79.

black mask bearing defendant's DNA was found around the corner from those bushes near the murder weapon.¹⁶ An unidentified DNA profile was detected on the rear of the mask. *Id.*; 11RP 991-92, 1002, 1009.

The investigation was not without its difficulties. Ward did not know who shot him. 7RP 284-85. He knew defendant, and defendant knew him. 7RP 340. Ward gasped for air like a "fish out of water." 7RP 282-84. Blood pooled beneath him. 6RP 243. He grew unresponsive. 6RP 248. His throat made gurgling sounds as he struggled to breathe. 6RP 248. His car was a collage of bullet holes, broken glass and blood. 7RP 286-87.

People poured out of the club. 6RP 246. Many did not want anything to do with police. 6RP 269. Brown shared that sentiment at trial:

"I'm not giving no names [] I'm not going to never give you no name. [] I'm not going to tell the officer nothing."

7RP 357. When asked if he would identify defendant if he knew him to be the murderer, Brown replied: "I plead the Fifth [.]" 7RP 360. Defendant's friend Henderson felt similarly. 7RP 464-65. When asked if anyone would assist police, he responded: "Why would they?" 7RP 421, 439. An early morning call informed Ward's sister that her little brother, one of several siblings who lovingly referred to themselves as the "Black Brady Bunch," had been violently shot to death. 6RP 155-58.

¹⁶ 9RP 667-68, 673-78, 773-42; Ex. 8 (pg.6), 771-76, 829-34; 10RP 860-70, 890, 902-03; 11RP 962-63, 974-75, 1066-68; Ex. 14, 115.

Defendant's stepmother reported him to 911, then recanted those *recorded* statements.¹⁷ He was distraught upon arriving at her house in his red Acura on the morning of the murder. 8RP 598; Ex. 11, 86. He gave her his "C" chain to hold as he decided to move out of town.¹⁸ Meanwhile, the evidence amassed.¹⁹ Cell-tower records tracked his approach to the murder scene 40 minutes before the murder.²⁰ His return to the area around the time Foote saw his Acura patrolling the area where his mask and gun were dropped was also tracked. *Id.* The phone stored his search for information about the murder within hours of the murder. 13RP 1318-24. It also stored video that impeached his claims about visiting the area.²¹ Analysis of his backup phone confirmed call/text data created near in time to the murder had been selectively deleted. 17RP 1746-58. Trajectory analysis of Ward's bullet-riddled car combined with autopsy findings to reveal how he was ambushed from behind.²²

Defendant's girlfriend and alibi witness claimed that:

(1) they met in Seattle about midnight; (2) he arrived in his Acura; (3) they celebrated her birthday; (3) they drove to his house in Tacoma; (4) she was intoxicated; (5) they traveled in separate cars; (6) they had sex; (7) she fell asleep; (8) he

¹⁷ 8RP 573, 577-78, 587, 592; 11RP 1084-89; Ex. 86.

¹⁸ 8RP 614-18; Ex. 85, 88-89, 91-92; 17RP 1690-92.

¹⁹ 6RP 172-78; 9RP 667; 11RP 974-75, 1004-55; 12RP 1158-1202, 1261-64; 13RP 1299; Ex. 14, 54, 98, 115, 129-30 (pg. 88-89, 92, 95). 144, 149.

²⁰ 12RP 1114-38; 13RP 1351-63; Ex.30, 48, 54, 92, 98,123-124.

²¹ 12RP 1264, 1283-86; Ex. 130, 137.

²² 6RP 206-18; 7RP 477-88; 8RP 498-504; 506-11; 12RP 1105-06, 1108, 1239-43.

was not in the room when she woke up around 7:30 a.m.; (9) she found him down stairs cleaning; (10) they caravanned to Burien that morning; (11) Ylyfe is a music company; (12) defendant is the man wearing the mask and chain in Ex. 95.

14RP 1418-51. That account of their activities, if even true, allowed for defendant to leave after she fell asleep, murder Ward and return to clean up before she woke. 15RP 1564-65; 16RP 1604. But Woods' claim about leaving with defendant the next day was impeached by cell-tower records that showed he headed north several hours after her departure.²³

Consistent with descriptions of the shooter, defendant is 6'1" and weighs about 200 lbs.²⁴ He proffered an analyst who opined shoes seized from defendant's house differed from those visible in video of the shooter; however, all the shoes in defendant's collection were not compared. 14RP 1445-46, 1452-81. Defendant's phone expert suggested movement patterns defendant admitted to might be caused by tower overloads not likely to occur in the hours at issue, and that witness had to concede dependence on data the State's expert was more qualified to interpret.²⁵

²³ 16RP 1604-05, 1610-13; 17RP 1722-45; Ex. 180-A.

²⁴ 7RP 396-400; 9RP 712; 13RP 1289; Ex. 150.

²⁵ 14RP 1418-51; 1522-23; 1527-33; 15RP 1564-65; 16RP 1604.

C. ARGUMENT.

1. GOVERNMENTAL MISCONDUCT CANNOT BE BASED ON A NEWSPAPER'S REPETITION OF REFUTED ALLEGATIONS ANONYMOUSLY MADE AGAINST AN ELECTED PROSECUTOR.

CrR 8.3 dismissals require prejudicial misconduct attributable to the State. Denial of a CrR 8.3 motion should be affirmed absent an abuse of discretion. *State v. Kone*, 164 Wn.App. 420, 433, 266 P.3d 916 (2011). Defendant mischaracterizes as fact refuted allegations anonymously made against our Prosecutor that were publicized by a local newspaper. CP 158-63. In the article, the Prosecutor's Chief Civil Deputy described them as:

[b]aseless allegations in an anonymous complaint[.] A complaint can be filed for any reason without any basis. We are confident an investigation will confirm the office acted properly in serving the public[.]

CP 158. The anonymously targeted Prosecutor added:

Our hardworking staff remains focused on doing our jobs and serving our community.

CP 158. Page 3 of the 6 page article repeated a baseless allegation deputy prosecutors were told not to give plea offers to attorneys in a "confederacy of dunces," that included defendant's first attorney Gary Clower. CP 160. Defendant's motion for substitution was granted with a finding of "no conflict" about 1 year after Clower's appointment. CP 13; 444. Instead of providing a transcript of that proceeding, defendant proffered his hearsay statements about his motivations for the substitution through an affidavit

signed by Clower 7 months after substitution and presented to the State on the day of trial. CP 145, 155-56. The affidavit claimed defendant lost confidence in Clower after reading an article about the State's refusal to negotiate with him. CP 155, 156. To his credit, Clower averred:

[he] did not believe [he] had been treated unusually or unfairly by [the deputy assigned to defendant's case].

CP 156. He shared as much with defendant. RP 26-27. The court denied the CrR 8.3 motion based on those representations. RP 31.

- a. Failure to perfect the record should preclude review.

Defendants raising issues for review must adduce adequate records for review. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). Defendant's failure to adduce a transcript of the substitution precludes review, for the transcript may betray reasons for substitution different than defendant claims. It may contain unreviewable credibility findings that refute his claims, such as those underlying the finding of no conflict. The incomplete record mostly consists of a trial brief filed on the day of trial. Timing which forced the State into an extemporized account of an old-unopposed substitution that was unremarkable until the motion. RP 25-26. "A criminal trial is not a game[.]" *Morris v. Slappy*, 461 U.S. 1, 15, 103 S.Ct. 1610 (1983). This assignment of error should fail.

b. The untimeliness of defendant's CrR 8.3 motion forfeited any claim for relief.

No procedural principal is more familiar than the forfeiture of untimely raised claims. *State v. Lazcano*, 188 Wn.App. 388, 355-57, 354 P.3d 233 (2015); *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770 (1993). Dismissal under CrR 8.3 is a "last resort" remedy only appropriate when no intermediate remedial action can cure governmental misconduct that materially prejudiced the defendant's right to a fair trial. *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010); *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

Defendant's motion was filed 19 months after Clower's substitution was granted with a finding of no conflict. CP 444. A hearing on the CrR 8.3 claim could have been held when substitution was addressed. If Clower's treatment was deemed prejudicial, it could have been cured with the intermediate step of appointing a special prosecutor. *State v. Tracer*, 173 Wn.2d 708, 716, 272 P.3d 199 (2012); RCW 36.27.030. Defendant cannot by sitting on the claim for a year insulate himself from being held accountable for murdering a man in cold blood. Once again, "[a] criminal trial is not a game[.]" *Morris*, 461 U.S. at 15.

- c. A newspaper's publication of anonymously made accusations against the Prosecutor is not misconduct attributable to the State.

Prosecutors are elected officers who decide which charges to file, if any, against criminal defendants. *State v. Rice*, 174 Wn.2d 884, 900, 279 P.3d 849 (2012). Appreciation for the animosity engendered by that role prompted the Supreme Court to grant prosecutors immunity from suit. *Imbler v. Pachtman*, 424 U.S. 409, 424, 96 S.Ct. 984 (1976). "[I]f the prosecutor could be made to answer [] each time [] a person charged him with wrongdoing, his [] attention would be diverted from the pressing duty of enforcing the criminal law." *Id.* As elected officials, prosecutors are periodically targeted by political antagonists, or those who perceive their careers might improve under a different prosecutor. *E.g., In re Recall of Lindquist*, 172 Wn.2d 120, 125, 138, 258 P.3d 9 (2011):

The timing of the recall petition supports [] it was filed for [] political harassment. The timing allowed the [] petition's charges to be known before the election, but too late for Lindquist to clear his name in a hearing on the merits.

Id.; see also *Spokane County v. State*, 136 Wn.2d 644, 654-55, 966 P.2d 305 (1998) (new prosecutor may reorganize staff); CP 158 (allegations of mismanagement by deputy), 163 (another informed he might not be suited to continue as chief criminal deputy).

Unilateral-private conduct is not contemplated by CrR 8.3. *State v. Starrish*, 86 Wn.2d 200, 206, 544 P.3d 1 (1975). Dissatisfied employees are free to anonymously complain about their boss. Media companies are

free to publicize those complaints, however false. Both are beyond the State's control, so cannot trigger the "last resort" remedy of CrR 8.3 dismissal. RCW 36.27.020; *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766 (1993); U.S. Const. Amend. I; *In re Marriage of Suggs*, 152 Wn.2d 74, 80-81, 93 P.3d 161 (2004).²⁶

d. Actual prejudice was never proved.

Dismissal is a last resort remedy requiring proof of actual prejudice materially affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). The possibility of prejudice is insufficient. *Id.* The "right to counsel is a shield, not a sword." *Neal v. Grammer*, 975 F.2d 463, 467 (8th Cir. 1992). It cannot be manipulated to disrupt trial. There is no right to appointed counsel of one's choice or to satisfaction with that lawyer's abilities. *Id.*; *Wheat v. United States*, 487 U.S. 152, 159, 108 S.Ct. 2918 (1988); *Morris*, 461 U.S. at 13-14; *State v. Varga*, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004); *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Reviewing courts note with:

increasing concern [] it seems to be standard procedure for the accused to quarrel with [] counsel, or to develop an undertone of studied antagonism and **claimed distrust**, or to be reluctant to aid [] in preparation of a defense [.] This appears to be done to leverage claimed infringements of the right to counsel on appeal.

²⁶ See *Clawson v. Longview Pub.Co.*, 91 Wn.2d 408, 427, 589 P.3d 1223 (1979) (quoting the Alien and Sedition Act of 1798, which punished "any false, scandalous and malicious writing [] against the government [] with intent to [] bring them into contempt or disrepute; or to excite against [it] the hatred of the [] people [.]")

In re Pers. Restraint of Stenson, 142 Wn.2d 710, 734, 16 P.3d 1 (2001); *State v. Piche*, 71 Wn.2d 583, 430 P.2d 522 (1967) (emphasis added).

Defendant failed to prove prejudice. He proceeded to trial after the appointment of two other lawyers ostensibly able to secure the favorable plea deals Clower allegedly could not. If one assumed the State's best offer was withheld from Clower, it cannot be said to have impacted the case as defendant chose trial over a plea. *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981) (no right to plea offers). There is no proof defendant's trial counsel was prejudicially less effective than Clower. *State v. Roberts*, 142 Wn.2d 471, 515-16, 14 P.3d 731 (2001). Being without proof of CrR 8.3 misconduct or prejudice, this assignment of error should fail.

2. THE MISTRIAL DEFENDANT SOUGHT WAS PROPERLY DENIED, FOR THE OFFICER TESTIMONY HE MISCHARACTERIZED AS AN OPINION WAS A STATEMENT OF FACT THAT RECOUNTED THE LACK OF OTHER-SUSPECT EVIDENCE IN HIS CASE.

Detectives do not express opinions by describing investigations. See *State v. Briejer*, 172 Wn.App. 209, 226, 289 P.3d 698 (2012); *State v. Bonner*, 21 Wn.App. 783, 793, 587 P.2d 580 (1978); *United States v. Goosby*, 523 F.3d 632, 638 (6th Cir. 2008); *United States v. Hall*, 434 F.3d 42, 57 (1st Cir. 2006). Courts may admit opinions based on perception when helpful to jurors' understanding of a case. *State v. King*, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009); *State v. Demery*, 144 Wn.2d 753, 759,

30 P.3d 1278 (2001). *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993); 5A Wash.Prac., Evid. § 281, 347 (3d ed. 1989); ER 701. Evidentiary rulings are not disturbed absent an abuse of discretion. *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007).

Defendant began cross-examination of his friend Henderson by eliciting Henderson's belief police thought he shot Ward. 7RP 466-67. Detective Katz explained the investigation several days later. 12RP 1228-52. Ballistics evidence from the crime scene and video was described. 12RP 1223-38. Campbell and Henderson were identified as 2 of the 3 shooters. 12RP 1238. The challenged testimony came next:

Q: Looking over the entirety of the investigation, did you develop any evidence that [] Campbell had in any way been involved in the murder of [] Ward? [objection claiming opinion on guilt overruled]

Q: Looking at the totality of your investigation, are you aware of any evidence that suggested [] Campbell had been involved in the homicide of [] Ward?

A: No.

Q: Question [sic] same for [] Henderson. Are you aware of any evidence that suggests -- [same objection overruled]

Q: Are you aware of any evidence that suggested [] Henderson had been involved in the homicide of [] Ward?

A: No.

12RP 1238. Follow-up examination placed those responses in the context of the scene, *i.e.*, relative position, casings, distinguishing ballistics, trajectories, video, interviews and phone data. 12RP 1238-62; 13RP 1282-1324; Ex. 3, 12, 54, 98, 130, 146, 148-149. Campbell was captured on

video shooting the second volley of .40 caliber bullets he admitted firing and Henderson admitted to firing the third volley of .38 bullets, consistent with forensic evidence. *E.g. Id.*; 12RP 1244-46.

Defendant moved for a mistrial, claiming Katz negative responses to questions about other suspect evidence were opinions on guilt. 13RP 1272-74. The court distinguished his remarks about the absence of other-suspect evidence, which was "fine," from unchallenged testimony about Henderson's straightforwardness. 13RP 1277-78. Defendant's motion for a mistrial was denied, but his request for a limiting instruction was granted to ensure jurors would not infer an opinion from testimony that has not been challenged in this appeal. *Id.* A defense-approved instruction was issued when Katz' testimony resumed:

The jury is the sole judge of credibility and the facts. The jury will disregard any opinion testimony from Detective Jeff Katz as to the involvement of Isaiah Campbell and Xavior Henderson in the September 7, 2014, shooting of Michael Ward. Such testimony is stricken.

13RP 1278, 1282. The jury was recalled to its exclusive authority to weigh the evidence. CP 309 (Inst.1). Defendant's argument focused on the absence of a witness identifying him as the murderer. 17RP 1805. Far from pointing the finger at Campbell or Henderson, defendant identified them as witnesses who credibly exculpated him. 17RP 1806-08, 1814-15, 1818. Katz challenged testimony did not contradict that theory. *Id.*

- a. Statements about the absence of evidence do not express opinions.

Investigation leading to a defendant's arrest is relevant. *Briejer*, 172 Wn.App. at 226; *Bonner*, 21 Wn.App. at 793; *Goosby*, 523 F.3d at 638; *Hall*, 434 F.3d at 57. Other suspects are eliminated when evidence of involvement fails to materialize or proof of innocence is discovered. *Id.*; *State v. Rafay*, 168 Wn.App. 734, 803, 285 P.83 (2012). Defendants often allege failure to investigate other suspects undermines the State's case. *Id.* "There lies the need for evidence in all its particularity to satisfy the jurors expectations about what proper proof should be[.]" *Old Chief v. United States*, 519 U.S. 172, 189, 117 S.Ct. 644 (1997).

The challenged testimony conveyed observation not opinion. Katz was familiar with his investigation. His described lack of awareness of, and failure to develop, evidence Campbell or Henderson murdered Ward communicated direct knowledge about what Katz knew and did not do. Identification of facts outside his awareness or investigation is a function of perception. Such statements are descriptive of comparative content. *See State v. Riggs*, 32 Wn.2d 281, 283, 201 P.2d 219 (1949). They say nothing about who committed the murder.

"Strictly speaking, all statements about one's observations involve the perception process and therefore an inference process." 5B Wash. Prac., Evid. § 701.2 (6th ed.). Yet a common sense distinction exists, for "opinion" connotes a conclusion about or inference from observed facts.

Id.; **Dickinson v. Edwards**, 105 Wn.2d 457, 461, 716 P.2d 457 (1986); **State v. Jackson**, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989); Webster's Third New International Dictionary 1582 (2002). An opinion about the involvement of Campbell or Henderson from Katz' challenged testimony would therefore require three analytical steps, *i.e.*:

1. I am not aware of nor did I develop evidence of their involvement in the murder;
2. *If either was involved, I would have developed or be aware of evidence establishing that fact;*
3. *Therefore, neither committed the murder.*

But Katz stopped short of the middle term and the conclusion.

- b. To the extent Katz expressed opinions, they were lay opinions admissible under ER 701.

Detectives can testify in the form of opinion provided it is based on perception, helpful to determining a material fact and is not based on ER 702 expertise. **City of Seattle v. Heatley**, 70 Wn.App. 573, 578, 854 P.2d 658 (1993); **State v. Kunze**, 97 Wn.App. 832, 857, 988 P.2d 977 (1999) (opined scene seemed "staged."). These ER 701 opinions may convey knowledge, like awareness of existent evidence, or describe things, like supervised investigations. *See Id.*; **State v. Kirkman**, 159 Wn.2d 918, 924, 934, 155 P.3d. 125 (2007) (content neutral comment on absence of evidence); **Halstien**, 122 Wn.2d at 128; **Riggs**, 32 Wn.2d at 283; **State v. Allen**, 50 Wn.App. 412, 418-19, 749 P.2d 702 (1988); **Briejer**, 172 Wn.App. at 226; **Bonner**, 21 Wn.App. at 793. Provided they do not

directly comment on guilt or credibility. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Even where admissibility is "debatable, the trial court has very wide discretion and will not be reversed[.]" *Makoviney v. Svinth*, 21 Wn.App. 16, 28, 584 P.2d 948 (1978).

There is no logical definition of degree or importance of inference necessary for a statement of fact to become opinion. 5B Wash. Prac., Evid. § 701.2 (6th ed.). Where it is difficult to make a distinction, a statement of opinion, if it is such, will often be necessary or desirable in order for the witness to place the subject matter before the jury. Thus, it is probably true that it is more important to get at the truth and permit statements involving some inference than to quibble over distinctions between fact and opinion. *Id.* (quoting *Riggs*, 32 Wn.2d at 283).

In the spirit of avoiding a quibble here, Katz descriptions of what he knew and did not do are covered by ER 701 to the extent they crossed the vague border separating communicated perceptions from inferential opinions about facts perceived. Each hallmark of ER 701 evidence is present. Katz' remarks were based on perceptions informed by unique familiarity with his own mind and case, which included evidence linking Campbell and Henderson to the guns that were not used to murder Ward. The information was helpful as it provided jurors a better understanding of the investigation. If Katz' remarks proved inconsistent with the jurors' own appraisal of the evidence, it might have diminished their opinion of Katz.

The third ER 701 factor is met, for the thoroughness of the investigation and the credibility of its lead detective were material.

There is no logical construction of the challenged remarks capable of communicating a direct comment on defendant's guilt. Stating one is unaware of evidence implicating Campbell or Henderson does not directly exclude them, much less directly identify defendant as the culprit. Katz did not even indirectly identify defendant as the culprit, for his remarks allowed for the possibility evidence linking Campbell or Henderson to the murder simply remained unknown to him. But if defendant's claim of error is predicated on process of elimination, it is conceptually flawed since elimination is an inherently indirect method of identification.

Assuming Katz excluded Campbell and Henderson, and all other evidence linking defendant to the murder is put out of mind, the universe of potential shooters would have been reduced to anyone else matching the shooter's description in that troubled part of town. Then there is all that troublesome evidence of defendant's guilt. Like a DNA profile making him a 1 in 13 quintillion match to the DNA profile extracted from the shooter's mask. 11RP 974-75, 997-98. Evidence that joined an impressive array of previously mentioned facts, which make Katz' remarks harmless if error, especially given the jury's presumptively followed instruction to disregard Katz' opinions. *State v. Thach*, 126 Wn.App. 297, 314, 106 P.3d 782 (2005); *State v. Wilber*, 55 Wn.App. 294, 299-300, 777 P.2d 36 (1989). The trial court should be affirmed.

3. THE STATE WAS PROPERLY PERMITTED TO RESPOND TO EVIDENCE DEFENDANT INTRODUCED TO REPRESENT HIMSELF AS A FAMILY-ENDORSED BUSINESS MAN WHO WOULD NOT MURDER SOMEONE IN COLD BLOOD.

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit[.]" *Michelson v. United States*, 335 U.S. 469, 479, 69 S.Ct. 213 (1948). Defendants invite contradiction with extrinsic evidence when they inject their positive business practices, for it invites the jury to infer something good about them by association. *State v. Riconosciuto*, 12 Wn.App. 350, 354, 529 P.2d 1134 (1974); *State v. McFadden*, 63 Wn.App. 441, 450, 820 P.2d 53 (1991); *State v. Brush*, 32 Wn.App. 445, 448, 648 P.2d 897 (1982); *States v. Giese*, 597 F.2d 1170, 1189-95 (9th Cir. 1979); 5 Wash.Prac., Evid. § 103. 14 (6th ed.). The decision to admit extrinsic evidence under the open-door rule for contradiction should be affirmed absent an abuse of discretion. *Brush*, 32 Wn.App. at 453.

Without objection, "Ylyfe" was introduced by the State as 5 letters of an email address linked to defendant's phone. 12RP 1194-1202.²⁷ This was foundation for the Ylyfe photograph depicting him in a mask identical to the one dropped near the murder scene bearing his DNA. Ex. 54, 92, 95,

²⁷ Defendant earlier interposed an objection, claiming the records were "duplicative," he did not make an ER 403 or 404(b) objection claiming evidence connecting him to an email address beginning with "ylyfe" was unduly prejudicial. 12RP 1196.

115. Nothing more was said about Ylyfe until cross-examination when he asked the detective to agree with his characterization of Ylyfe photographs in the phone as "promotional pictures selling [] clothes." 12RP 1204-05. The detective did not have an opinion. *Id.*

Without objection, Ylyfe was next mentioned by the State for the limited purpose of admitting a Ylyfe photograph depicting defendant in the mask wearing a "CC" pendant like the one he gave his stepmother the morning of the murder as part of his plan to leave town. 12RP 1260-63.²⁸ Defendant introduced Ylyfe as a music company in his case. 14RP 1447-49. He then secured the admission of photographs depicting Ylyfe as a family-endorsed clothing company. 15RP 1557; Ex. 166. The challenged "Y Gang Entertainment" ("YG") photographs were admitted because they contradicted the character of a business defendant put at issue.²⁹ Different from the family-endorsed Ylyfe brand, YG, bearing defendant's "Y" logo theme, depicted less wholesome endorsement of greed, bravado and vice. He declined the limiting instruction offered to him. 17RP 1685-89.

- a. Defendant forfeited this claim of error when he refused a limiting instruction.

"When error may be obviated by an instruction [], the error is waived unless an instruction is requested." *State v. Ramirez*, 62 Wn.App. 301, 305-06, 814 P.2d 227 (1991); *State v. Barber*, 38 Wn.App. 758, 771,

²⁸ 8RP 614-18; Ex. 85, 88-89, 91-92; 17RP 1690-92.

²⁹ 16RP 1592-1601, 1617-24; 17RP 1685-1711; Ex. 174A, 175A.

689 P.2d 1099 (1984); *State v. Crawford*, 21 Wn.App. 146, 151, 584 P.2d 422 (1978); 5 Wash. Prac. Evid. § 24 (3d ed. 1989). Invited error bars defendants from relying on prejudice they create to overturn convictions. *See In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 124, 340 P.3d 810 (2014). "The goal of [that] doctrine is to prevent a party from setting up an error at trial and then complaining of it on appeal." *Id.*

A properly worded instruction would have eliminated the prejudice wrongly attributed to the contradiction evidence. The prejudice claimed is that defendant's jury was allowed to view him as involved in gang *culture*. But a presumptively followed instruction limiting consideration of that evidence to contradiction of the picture he painted of his business would have neutralized the problem or abated it to the point of irrelevance. *See State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Jurors can follow instructions that limit proof of gang *affiliation*. *State v. Asaeli*, 150 Wn.App. 542, 584, 208 P.3d 1136 (2009). So they are necessarily able to compartmentalize far less, if at all, prejudicial evidence of involvement with gang *culture*, which for better or worse is a feature of popular culture.

The common place quality of imagery like that depicted in the YG photographs is exemplified by now *historic* music labels like "Death Row Records," which produced now *classic* songs such as "murder was the case that they gave me," performed by now *mainstream* artists like Snoop Dogg—who recently inducted "thugged-out superhero" Tupac into *the*

Rock and Roll Hall of Fame. ER 201.³⁰ To leave this point in context, Tupac joined a slate of inductees that included folk hero and *anti-Vietnam War activist* Joan Baez. ER 201.³¹ Recognition that proves both genres are now *far* from taboo. Defendant's refusal of an instruction that would have confined the challenged evidence to its limited purpose of contradicting a fact he *needlessly* made relevant precludes review.

- b. The challenged photographs contradicted the incomplete image of defendant as the owner of a family-endorsed enterprise.

There are two permutations of the open-door rule:

1. Parties may open the door to otherwise inadmissible rebuttal evidence by introducing facts that are of questionable admissibility, or
2. Parties may open the door to evidence offered to explain, clarify or contradict subjects they introduce.

5 Wash.Prac., Evid. § 103. 14 (6th ed.). Invocation of the rule has been aptly called "fighting fire with fire." *Id.* "To close the door after receiving only part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths." *State v. Geffeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); *McFadden*, 63 Wn.App. at 450 (proof of past drug

³⁰<https://genius.com/Snoop-dogg-murder-was-the-case-lyrics>; <http://www.thefader.com/2017/04/07/snoop-dogg-tupac-rock-roll-hall-of-fame>.

³¹ <http://ew.com/music/2017/04/08/rock-roll-hall-fame-2017-tupac-pearl-jam-joan-baez/>

deals admissible to contradict defense that McFadden was not "the kind of guy" to deal drugs); *State v. Hanson*, 46 Wn.App. 656, 662-64, Fn. 7, 731 P.3d 1140 (1987); *Giese*, 597 F.2d at 1189-95 ("Giese threw open the subject of his literary tastes" when he "portrayed himself as a scholarly [] peace-loving political activist").

The character of defendant's business was initially irrelevant. In the State's case, Ylyfe linked him to the mask dropped near the murder:

Q: [I] want to talk about some [] photos and videos. I'm going to hand you photographs [] marked as 88, 89, 92 and 95. [] Are these [] stored on the phone[?]

A: Yes. []

A: We have Big C's iphone. And then [] there's name, [] Vernon and [] Curry is used in the phone[.] And then also CC and I believe the Apple ID was YLYFE45, and that is spelled ylyfe45@yahoo.com. The unique spelling of that particular Ylyfe is also the way the images are depicted in some of the exhibits [], which kind of substantiates [] whoever is using this has [] a lot of information that has to do with either the nickname or a moniker that has to do with something like Big C or CC or Ylyfe. That metadata is all over in the file system.[] There's an email called vicc4500gmail. There's ylyfe and [] ylyfecece@ gmail.com. [] And then the [] gmail with [] YLYFECECE@gmail. [] And then in the Instagram account, the user name for the Instagram account is ylylfe_ce. [] There's a hit on the name Vernon.

12RP 1195-1202; Ex. 92, 95. Ylyfe was only addressed to the extent it represents 5 letters in metadata and email accounts linking defendant to the phone in which photographs tying him to the shooter's mask were stored. It was technical testimony, purely foundational.

During cross-examination, defendant injected Ylyfe's character:

- Q: How many photos are on this phone? []
A: 14,889.
Q: 14,889 photos. And the name on at least some of the user accounts on the phone is this word Ylyfe?
A: Correct. []
Q: Would you agree or did you form an opinion as to whether these pictures were promotional pictures selling garments and clothes?
A: I didn't form an opinion one way or another.
Q: Okay. Did it show – do you know whether it showed photos of garments for sale?
A: No. I don't know if it showed those photos or not.

12RP 1204. (emphasis added) During the defense case, he *extracted* proof of Ylyfe's character from his girlfriend with persistent-leading questions:

- Q: Tell me about Ylyfe?
A: I don't know.
Q: What do you mean you don't know?
A: His friend raps. I'm not from the Tacoma area. I'm from Seattle so that's stuff I really –
Q: You don't know what Ylyfe is?
A: From what I understand, it's his friend that raps. I mean, it was just like a music.
Q: What was the defendant's involvement with Ylyfe?
A: I don't know. []
Q: Ylyfe was a music production company started up by the defendant. Would that be true?
A: I believe so.
Q: So now do you know Ylyfe is a music production company started up by the defendant?
A: That's what I believe.
Q: Does he have office space for it?
A: Unsure.
Q: Unsure meaning "no"
A: Unsure meaning I don't know. []
Q: Exhibit 95, do you see Mr. Curry in that photograph?
A: Yes. []

14RP 1448-49. Still not satisfied, he pressed the point in his testimony:

Q: What do you do, in terms of business?

A: [C]o-owned a record, media [] videography company.

Q: And what was the name of that?

A: Ylyfe Entertainment.

Q: Did that involve the sale of clothes?

A: Yes, sir.

Q: And what else?

A: Music.

Q: I'm handing you Exhibit 166, what is that"[]

Q: So what is page 1 of 166? []

A: A collection of photos that display the product that we are selling: The hoodies, the shirts, the logos of the actual Ylyfe. It has a few different logos, those are a few different designs. [] In the top left, []that's just again showing people supporting and wearing the actual clothing.

Q: How about page 2?

A: Again, that would be people supporting and bought the clothing, with their kids, and [] showing the product, holding the [] music CD and the clothing.

16RP 1557-1561 (emphasis added); Ex. 166-72.

Of all the Ylyfe imagery available to him, he chose a photograph of a family with "kids" "supporting" his company. Why? *Advertisements that depict such a family's support for his business suggest it is good; by extension, he is good and therefore less likely to be a murderer.* Ex. 166. In this way, the depicted family indirectly vouched for him. The State's exhibits contradicted the impression he created only in so far as they revealed a somewhat less family-friendly quality of his business. 17RP 1686-89. Exhibit 175-A connected Ylyfe to YG through the stylized-Y logo both shared. *Id.*; 16RP 1557-1561. Exhibit 174-A depicted him

promoting YG holding a fan made of cash amid less wholesome imagery than the happy family he introduced the jury to through his exhibit.

Consistent with its limited purpose, YG was presented as a "music production company," *so not a gang*, 17RP 1696-97. Exhibits 174-A and 175-A also impeached cross-examination testimony where he disavowed knowledge of YG's existence. 15RP 1593. His effort to disassociate himself from it until confronted with proof of it was properly raised as bearing on his credibility.³² It was not otherwise addressed. A complete picture of his business was a fair price he paid for presenting half of it to portray himself in a positive light. *Michelson*, 335 U.S. at 479. Any error in exposing his effort to benefit from a half-truth was as harmless as it was self-inflicted. There is no valid reason to assume the jury convicted him for promoting edgy hip-hop music the nice looking family in his exhibit *might not* so enthusiastically endorse. The ruling should be affirmed.

4. THE PROSECUTOR PROPERLY ARGUED DNA EVIDENCE IS RELIABLE AND THE STATE'S WITNESSES WERE CREDIBLE BASED ON THE EVIDENCE ADDUCED AT TRIAL.

Defendants must prove the impropriety and prejudicial effect of challenged argument. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Remarks are reviewed in the context of the entire argument, issues raised,

³² 15RP 1593-94; 17RP 1696-99, 1707-08, 1711, 1799-1800.

evidence addressed and instructions given. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Timely objected to argument is reviewed for a substantial likelihood an impropriety affected the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *State v. McChristian*, 158 Wn.App. 392, 400, 241 P.3d 486 (2010). Absent an objection error must be flagrant and ill-intentioned misconduct resulting in incurable prejudice. *Id.*; *State v. Gregory*, 158 Wn.2d 759, 841-42, 147 P.3d 1201 (2006).

Defendant challenges two remarks in the State's summation. The first referenced absence of bias as a reason to credit the State's DNA and police witnesses. App.Br. at 37, 40 (citing 17RP 1792). The second argued the reliability of DNA evidence in rebuttal. *Id.* at 38 (citing 17RP 1821). Both remarks were proper. Jurors were instructed to decide credibility and to disregard arguments unsupported by the evidence. CP 309. Summation followed. 17RP 1765. The State recalled jurors to the admitted evidence, which was argued according to the elements and burden of proof. 17RP 1765-68. A timeline of events derived from the evidence was presented with emphasis placed on proof identifying defendant as the murderer. 17 RP 1768-91. Challenged argument came next.

- a. The State may properly argue reasons why jurors should believe its witnesses.

Prosecutors are given wide latitude to draw and argue reasonable inferences from the evidence. *State v. Gregory*, 158 Wn.2d 759, 841, 147

P.3d 1201 (2006); *State v. Militate*, 80 Wn.App. 237, 250, 908 P.2d 374 (1995). This includes inferences as to why jurors would want to believe one witness over another. The rule applies to a defendant's credibility. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

The State's challenged remark invoked the credibility instruction:

Let's talk about witness credibility. You heard the judge's instructions. You're the sole judge of witness credibility. Credibility is kind of a fancy way of saying do you believe what the witness is telling you; do you believe it. And the Court's instructions kind of give you some helpful things to look to: Observation, memory, manner. [] Any interest they have in the case, in the outcome of the case. Any bias that they have, for or against people involved in the case.

17RP 1791-92. Without objection, the challenged remark followed:

And then our professional witnesses are very similar, okay, like police officers, forensic technicians. DNA folks. These people - - it's their job to show up and do work in criminal investigations. They came in, don't have any interest in the case, they don't have any bias. They just came in and told you what happened.

Id. These witnesses were contrasted against those aligned with defendant; again without objection or challenge on appeal. 17RP 1792-95. Testimony from defense-aligned witnesses was contrasted with evidence impeaching their accounts as the State returned to evidence and elements. 17RP 1795-82. The prosecutor concluded by urging jurors to:

"look at the instructions, look at the evidence," which was described as proving: "the man in the mask [] killed [] Ward [] and [] defendant was that man in the mask."

17RP 1802. Defendant's failure to object requires him to prove argument explaining the credibility of State's witnesses was incurably flagrant and ill-intentioned misconduct. "Flagrant misconduct" requires flauntingly or purposefully conspicuous error of law. See *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 652 (2012); *State v. Warren*, 165 Wn.2d 17, 28-29, 195 P.3d 940 (2008); *State v. Killingsworth*, 166 Wn.App. 283, 291, 269 P.3d 1064 (2012). Webster's Third New International Dictionary 1127 (2002). Ill-intentioned argument evinces a malicious disregard for a defendant's right to due process. *Id.*

Neither definition fits. For the challenged remark tracks argument affirmed as appropriate in *State v. Jackson*, 150 Wn.2d 877, 884-885, 209 P.3d 553 (2009) (police testified consistent with duty to accurately report), *State v. Allen*, 161 Wn.App. 727, 746, 255 P.3d 784 (2011) (disinterested educator was credible) and *State v. Sandovol*, 137 Wn.App. 532, 540-41, 154 P.3d 271 (2007) (veracity of medical witness emphasized). See *State v. Lewis*, 156 Wn.App. 230, 240, 233 P.3d 891 (2010). The remark explained why some witnesses fell outside the personal-interest category of bias identified by the credibility instruction. The remark contrasted witnesses without that recognized attribute from witnesses with personal ties to defendant. This comparison is not comparable to the "bolstering" cases defendant cites, where irrelevant accolades are presented as proving veracity. *E.g.*, *State v. Smith*, 67 Wn.App. 838, 844-45, 841 P.2d 76

(1992). Here, disinterest was argued as attending jobs that drew the State's witnesses into the case without personal feelings about defendant.³³

Defendant misapplies "false choice" cases to credibility remarks about State's witnesses. *E.g.*, ***State v. Barrow***, 60 Wn.App. 869, 874-75, 809 P.2d 209 (1991)). The problem with those "false choice" arguments is acquittal is invalidly framed as dependent on proof of police dishonesty. ***Barrow***, 60 Wn.App. at 874-75; accord ***United States v. Weatherspoon***, 410 F.3d 1142, 1148 (9th Cir. 2005). So framed, two possibilities are obscured: police were benignly mistaken or honest about evidence that is insufficient to overcome the burden of proof. There is no false choice in recalling jurors to bias as a factor relevant to credibility. Nor in linking bias to personal interests and then arguing why witnesses without them are more deserving of belief. The jury knew it was free to disagree. It did not, or found the issue dwarfed by proof of defendant's guilt. Either way, the challenged remark is endorsed by precedent and supported by evidence, so it cannot be flagrant and ill-intentioned misconduct.

- b. Rebuttal remarking upon the now common knowledge of DNA's reliability was a fair and proper response to defendant's case.

Prosecutors may respond to evidence and argument presented by the defense. ***Gregory***, 158 Wn.2d at 842; ***Riconosciuto***, 12 Wn.App. at 354. It is proper to attack the improbabilities of a defendant's exculpatory

³³ Defendant urged jurors to credit his shoe expert for the same reason. 17RP 1818.

interpretation of evidence or theory of the case. See *Russell*, 125 Wn.2d at 87, *State v. Davis*, 133 Wn.App. 415, 422, 138 P.3d 132 (2006), *vacated on other grounds*, 163 Wn.2d 606, 184 P.3d 639 (2008); *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). Even improper rebuttal will not result in reversal where invited by the defense, provided the rebuttal is neither impertinent nor incurably prejudicial. *Id.*; *State v. McKenzie*, 157 Wn.2d 44, 56 P.3d 221 (2006) (pointed reply to defense theme). The rule against misconduct should not hamper rebuttal. *State v. Stith*, 71 Wn.App. 14, 21, 856 P.2d 415 (1993).

Defendant's DNA expert explained the capacity of modern DNA testing to identify "very, very specific, highly specific profiles," by which she meant profiles specific to individuals. 10RP 859. His expert stated a DNA profile can be "*compare[d] to other people to see whether [] somebody is excluded [] or could be the source.*" 10RP 867 (emphasis added). Without objection, the State's DNA expert described DNA as the "blueprint of life." 11RP 961-62.³⁴ She explained DNA's capacity to match defendant's known DNA profile at a ratio of 1 in 13 quintillion. 11RP 973-76. A calculation framed in terms world-wide populations. 10RP 894, 897-98; 11RP 997-98. It is common knowledge there are about 7 billion people on this planet, which is far fewer than 13 quintillion. 10RP 895-96

³⁴ Defendant's expert was called out of order to accommodate her availability. 10RP 854.

("18 zeros."); ER 201. ³⁵ Defendant's expert matched him to the ski mask at a ratio of 1 in 4.13 quintillion. 10RP 895-96.

Defendant argued against the significance of the DNA evidence in closing, claiming a pre-incident theft of the mask bearing his DNA. 17RP 1810-11. The rebuttal emphasized that evidence's significance in context with other facts tying him to the crime. 17RP 1820-21. There was no objection to the challenged rebuttal:

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 as much power to convict.

17RP 1821-22. From here, the DNA match's probative value was, again, argued from facts corroborating its capacity to identify Ward's murderer. 17RP 1822-25, 1830-33. Contradiction of the impeached alibi evidence followed. 17RP 1825-30. The jury was reminded of its duty to weigh evidence according to the State's burden. 17RP 1830. Rebuttal concluded with reference to instructions on the elements and the burden. 17RP 1833.

Because defendant failed to object, the challenged rebuttal cannot support reversal unless proven to be incurably flagrant and ill-intentioned misconduct. Rebuttal argument that DNA matches can support conviction as well as acquittal is a common sense extension of testimony adduced through defendant's DNA expert, who explained DNA comparisons can

³⁵ <https://www.census.gov/popclock/>

exclude or include a person as the source of a relevant DNA profile. 10RP 867; *E.g.*, ***State v. Barrow***, 60 Wn.App. 869, 873-74, 809 P.2d 209 (1991) There is nothing problematic about the point made.

The Innocence Project probably should not have been mentioned as there was rightly no evidence introduced about its debatable claims. ER 201.³⁶ Still, there is no incurably flagrant or ill-intentioned error in the reference as that entity's claims are common knowledge. ***State v. Riofta***, 166 Wn.2d 358, 376–77, 209 P.3d 467 (2009) (Chambers, J., dissenting) (DNA exonerations linked to Innocence Project). Extemporaneous rebuttal about the entity's success could have been perceived amid the real-time capacity for reflection separating idea from utterance to be an analogy fairly argued from generally known fact. ***Barrow***, 60 Wn.App. at 873-74; ***State v. Cleveland***, 58 Wn.App. 634, 648, 794 P.2d 546 (1990) (common knowledge neutralized objectionable quality); ***State v. Papandrea***, 120 Conn.App. 224, 244-45, 991 A.2d 617 (2010) *aff'd* 302 Conn. 340, 26 A.3d 75 (2011) (analogies appeal to common sense); ER 201; ***United States v. McMath***, 559 F.3d 657, 669 (7th Cir. 2009). There is no incurable error in mentioning an entity now synonymous with the need to carefully scrutinize inculpatory evidence to avoid wrongful convictions. The remark

³⁶ ***Porter v. City of Chicago***, 393 Ill. App. 3d 855, 867, 912 N.E.2d 1262, 1272 (2009); ***Simon v. Nw. Univ.***, No. 1:15-CV-1433, 2017 WL467677, at *1 (N.D. Ill. Feb. 3, 2017); GR 14.1; <http://www.thedailybeast.com/articles/2015/02/22/the-innocence-project-on-trial-in-chicago.html> ("The Innocence Project May have Framed a Man for a Crime he Didn't Commit").

reflects argument far more prone to be objectionably made by defendants because it implicitly urges nullification for proof problems in unrelated cases. An instruction could have neutralized the remark; assuming effect despite the instruction to disregard unsupported argument. So, the remark is harmless if error.

The rebuttal's insignificance was overwhelmed by the information adduced to inform the jury's assessment of the DNA evidence according to its instructions on weighing expert testimony and other evidence. Expert testimony alerted jurors to DNA's ability to be transferred among objects, then remain long enough to preclude an expert from assigning a date to the transfer. 10RP 909-10, 913. This evidence enabled jurors to intelligently compare a theory of innocent trace-evidence transfer against the State's theory that the DNA match established defendant's guilt when considered amid the totality of facts firmly linking him to Ward's murder.

5. A MANSLAUGHTER INSTRUCTION WAS RIGHTLY WITHHELD AS THE REQUISITE MENS REA OF RECKLESSNESS CANNOT BE FOUND IN DEFENDANT'S AMBUSH-STYLE EXECUTION OF WARD.

Juries should only be instructed on first degree manslaughter in a murder case if the evidence supports an inference that only manslaughter was committed. *State v. Entz*, 58 Wn.App. 112, 116, 791 P.2d 269 (1990). First degree manslaughter, with its *mens rea* of recklessness, meets the "legal" prong of the two part test, leaving the "factual" prong to be proved.

Id.; *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). A person commits first degree manslaughter when she "recklessly" causes the death of another person. RCW 9A.32.060. This requires the defendant:

Knows of and disregards a substantial risk a wrongful act may occur and her disregard of such substantial risk is a gross deviation from conduct a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(c). A person commits premeditated murder when:

With a premeditated intent to cause the death of another person, [] she causes the death of such person[.]

RCW 9A.32.030(1)(a). "Premeditation" requires reflection however short. RCW 9A.32.020; *State v. Bingham*, 105 Wn.2d 820, 824, 719 P.2d 109 (1986). Second degree murder requires intentional killing where death was an objective of a charged act. RCW 9A.32.040(a); RCW 9A.08.010(1)(a).

To satisfy the factual prong there must be substantial evidence affirmatively proving manslaughter was committed to the exclusion of first or second degree murder. *State v. Perez-Cervantes*, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000); *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997); *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382 (1980). "It is not enough [] the jury might [] disbelieve the State's evidence." *Id.*

Defendant's ambush-style execution of Ward is devoid of evidence that could support a charge of first degree manslaughter to the exclusion of premeditated or intentional murder. Video captured him stalking toward Ward from blocks away wearing a mask and work gloves to conceal his

identity. Once in range, he fired an entire magazine of .40 caliber bullets at Ward, inflicting 3 mortal wounds that tracked downward into his body from where defendant snuck up on him from behind. Defendant fled once the deed was done. Nowhere in this case can one find death inadvertently brought about by substantial disregard of a gun's lethal capacity. Bluntly stated, this was a hit; if Ward were a prominent person, it would be called an assassination.

The propriety of refusing to instruct on manslaughter is supported by *Perez-Cervantez*, where it was claimed one can recklessly stab a person multiple times without intending to cause death. *Id.* at 481. Here, it is likewise claimed one can recklessly fire 7 bullets at a person inside a car without intent to kill. Neither theory can overcome the presumption actors intend the natural-foreseeable consequences of their conduct. *Id.* Added to this presumption is the jury's capacity to infer criminal intent where it is plainly indicated from conduct as a matter of logical probability. *Id.* Both defeat arguments for a lesser offense instruction predicated on the theory a lesser mental state was not excluded. *Id.* Defendant incorrectly describes Ward's car as targeted. Autopsy findings in the context of the crime scene prove the bullets were fired at Ward. The car got in the way of a few shots, but not enough to spare Ward's life. The jury also rejected its option to

convict defendant of second degree murder, so manslaughter would not have been reached had the option of that lesser offense been available.³⁷

6. ABSENCE OF ERROR DEFEATS THE CLAIM OF CUMULATIVE ERROR.

Cumulative error will only be found when trials contain numerous and egregious errors. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992). This is because a "perfect trial is always sought but seldom, if ever, attained." *State v. Colbert*, 17 Wn.App. 658, 665, 564 P.2d 1182 (1977). Cumulative error has not been proved as there is no error, much less a prejudicial aggregation of error.

7. IT IS PREMATURE TO DECIDE IF APPELLATE COSTS SHOULD BE IMPOSED.

A ruling on costs should await a bill. RAP 14.1-14.6, 15.1-15.6.

D. CONCLUSION.

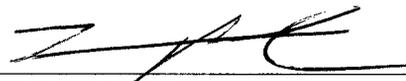
A newspaper's publication of baseless accusations privately made by anonymous parties is not CrR 8.3 misconduct attributable to the State.

³⁷ *State v. Guillot*, 106 Wn.App. 355, 368-69, 22 P.3d 1266 (2001) (harmless to omit manslaughter option where jury rejected second degree murder to convict of first degree murder); see also *State v. Hansen*, 46 Wn.App. 292, 297-98, 730 P.2d 706 (1986); *State v. Barriault*, 20 Wn.App. 419, 427, 581 P.2d 1365 (1987); Cf. *State v. Condon*, 182 Wn.2d 307, 326, 331, 343 P.357 (2015) (not harmless where jury given "all-or-nothing choice) (citing *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984)).

Katz' statements of fact about his case were not opinions. Defendant failed to prove contradiction of "good business" character evidence he injected was improper or prejudicial. The same is true of challenged arguments, which fairly characterized the witnesses as credible and DNA as reliable. An instruction on manslaughter was rightly withheld as Ward's death was not recklessly caused. There is no cumulative error or cost bill to review. So, defendant's well-deserved convictions should be affirmed.

RESPECTFULLY SUBMITTED: APRIL 28, 2017

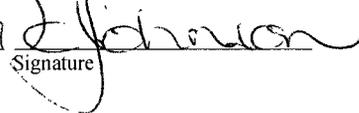
MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{file} U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/28/17 
Date Signature

PIERCE COUNTY PROSECUTOR
April 28, 2017 - 1:29 PM
Transmittal Letter

Document Uploaded: 4-490269-Respondent's Brief.pdf

Case Name: State v. Vernon Curry, Jr.

Court of Appeals Case Number: 49026-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

sean@greccodowns.com