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

STATE OF WASHINGTON,

Respondent,

v.

GERALDO CASTRO DEJESUS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00972-7

BRIEF OF RESPONDENT

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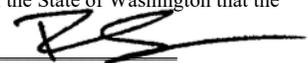
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, because tool mark identification has been universally found to be a generally accepted technique within the relevant scientific community, the trial court properly concluded that no *Frye* hearing was required?

2. Whether DeJesus fails to show a sufficient nexus between either of his other suspects and the murders?

3. Whether the trial court properly limited DeJesus's use of evidence admitted only to impeach the investigation to that purpose?

4. Whether the trial court properly admitted evidence that DeJesus fabricated a kidnapping and robbery of himself in order to divert police attention where the evidence showed that the robbery was likely fabricated and further showed, by DeJesus's own statements, that the intent was make it look like a third party was the killer?

5. Whether DeJesus fails to meet his burden of establishing cumulative error?

6. Whether the evidence was sufficient to support a finding that the murder of Kaden and the attempted murder of Jalisa were premeditated where it was a reasonable inference that DeJesus intended to shoot Jalisa to prevent her from calling for help and/or to eliminate a

witness, and further, DeJesus's premeditated intent to kill Dean transferred to his attack on Jalisa and Kaden?

II. STATEMENT OF THE CASE

A. COMMENT ON REFERENCES TO THE RP

To avoid confusion that State will follow the numbering scheme for the report of proceedings that DeJesus has used in his brief:

The verbatim report of proceedings is cited as follows: 1RP - 2/26/16; 2RP - 3/17/16; 3RP - two consecutively paginated volumes consisting of 3/30/16, 3/31/16; 4RP - 30 consecutively paginated volumes consisting of 7/25/16, 7/28/16, 8/1/16, 8/2/16, 8/3/16, 8/4/16, 8/8/16, 8/9/16, 8/10/16, 8/11/16, 8/15/16, 8/16/16, 8/17/16, 8/18/16, 8/22/16, 8/23/16, 8/24/16, 8/25/16, 8/29/16, 8/30/16, 8/31/16, 9/1/16, 9/6/16, 9/7/16, 9/8/16, 9/9/16, 9/12/16, 9/13/16, 9/19/16, 9/20/16, 9/21/16, 9/22/16, 9/27/16; 5RP - 11/1/16; 6RP - 12/5/16; 7RP - 12/12/16.

Brief of Appellant at 3 n.2. However, 3RP and 4RP contain multiple volumes, the State will also include the court reporter's volume number for these reports. Thus, for example, 4RP-XII 1955 would be the first page of the report of August 18, 2016.

A number of individuals with last names in common, including Ivy DeJesus, may be referred to by their first names for clarity. No disrespect is intended. DeJesus, when used alone, refers to the defendant.

B. PROCEDURAL HISTORY

Geraldo Castro DeJesus was charged by information filed in Kitsap County Superior Court with the following crimes:

- I. First-degree premeditated murder of Heather Kelso
- II. First-degree felony murder of Heather Kelso
- III. First-degree burglary
- IV. First-degree premeditated murder of Kaden Lum
- V. First-degree felony murder of Kaden Lum
- VI. First-degree murder of Kaden Lum by extreme indifference
- VII. Attempted first-degree murder of Matthew Dean
- VIII. Attempted first-degree murder of Jalisa Lum

CP 272-281. Counts II, III, and v. through VIII also alleged the use of a firearm. Count I also included the aggravating circumstance of violation of a protection order. Counts I and IV also included the aggravating circumstance of multiple victims. Counts I through III also alleged domestic violence. *Id.*

The State agreed to the dismissal of Count VI before the case was submitted to the jury. 4RP-XXVIII 4900. The jury found DeJesus guilty as charged on the remaining counts and special allegations. CP 402-12. The convictions for Counts II and v. were stricken from the judgment. CP 459-60.

C. FACTS

At 2:18 a.m. on March 28, 2015 police were dispatched with regard to gunshots in progress at the Kariotis Mobile Home Park in East Bremerton. 4RP-VIII 1273, 1313. There had been numerous calls to 911 about it. 4RP-VIII 1274. There were reports of multiple casualties, and

multiple paramedics were also dispatched. 4RP-VIII 1275.

When police arrived at Space 47, Justin Helwick came out and quickly went back inside. 4RP-VIII 1282. They ordered him to come back out. 4RP-VIII 1282. He was wearing a T-shirt and underwear and did not appear armed. 4RP-VIII 1282. He said someone inside had been shot. 4RP-VIII 1282.

Inside Helwick's trailer they found Matthew Dean lying on his stomach. 4RP-VIII 1289. His arm was outstretched and covered in blood and Brianna Helwick was kneeling next to him. 4RP-VIII 1289. Dean was extremely lethargic and was coming in and out of consciousness. 4RP-VIII 1291. He indicated he had been shot three times. 4RP-VIII 1291.

In an effort to provide first aid, they cut Dean's shorts off. He had a bullet hole in his right buttock. 4RP-VIII 1295. Blood was dripping out of his penis. 4RP-VIII 1289.

Justin directed the police to where the shooting occurred, at Space 21. 4RP-VIII 1346. A west-facing window was broken out and the glass was on the ground below it. 4RP-VIII 1347. They heard a woman's faint screams that became louder. 4RP-VIII 1347-48. They went toward the front door and Jalisa Lum came out. 4RP-VIII 1348. She was carrying a lifeless toddler, her son Kaden, in her arms. 4RP-VIII 1348. He had a bullet wound above his eye. 4RP-VIII 1348. She gave the boy to a deputy, who

attempted CPR. 4RP-VIII 1348-49. When the aid car arrived, Schaefer turned the boy over to the medics. 4RP-VIII 1349.

They then went into the trailer and found Heather Kelso toward the back of the trailer in the kitchen area. 4RP-VIII 1350. She had been shot in both thighs and in the face. 4RP-VIII 1350. She appeared to be dead. 4RP-VIII 1350.

Jalisa had met Kelso on Craigslist while looking for a roommate and they moved in together in early 2015. 4RP-XIII 2160. She never saw a gun, a gun case, or ammunition at the house, and never saw Kelso with a gun. 4RP-XIII 2161.

The night of the shooting, Jalisa and Kaden, who was two years old, went to bed around 10:00 p.m. 4RP-XIII 2163, 2174. Dean came over that evening, which was not unusual. 4RP-XIII 2163. She was already in bed when Dean arrived, but she heard his voice. 4RP-XIII 2163. She went to sleep. 4RP-XIII 2164.

Jalisa later awoke to Kaden crying, and she shushed him and they went back to sleep. 4RP-XIII 2164. Although the bedroom door was closed, she was again awakened by a loud noise. 4RP-XIII 2164-65. Then she heard gunshots. 4RP-XIII 2164. Kelso cried out that she had been shot and said "Help." 4RP-XIII 2164. She heard more shots and then heard Dean say, "Ow. Jalisa, help." Jalisa dove to the floor with Kaden. 4RP-

XIII 2165.

Then she heard screaming and running and her door opened. 4RP-XIII 2165. The door slammed shut again and then the window shattered. 4RP-XIII 2165-66. Although it was dark, she thought it was Dean because he told her to call 911. 4RP-XIII 2166. Then the door opened again and someone shot at her and Kaden. 4RP-XIII 2166.

She felt the heat of the bullet when it went by. 4RP-XIII 2167. She dropped her head and pretended she was dead. 4RP-XIII 2167. She prayed that Kaden would not cry out. 4RP-XIII 2168. Then she heard shots being fired outside. 4RP-XIII 2167.

After not hearing anything for a few minutes, she found her cell phone, which was on the floor by the bed, and called 911. 4RP-XIII 2168. Then she heard people arriving and then her neighbor's voice. 4RP-XIII 2169.

She felt safe then and picked up Kaden. 4RP-XIII 2169. But he felt lighter than normal, and she felt around in the dark, and there was blood everywhere. 4RP-XIII 2169. She "went black" and took him and went running through the house screaming. 4RP-XIII 2169. She got to the front door and it was locked. 4RP-XIII 2169.

After opening the door she handed off Kaden to the first person she

saw and went back to get her contacts because she could not see. 4RP-XIII 2169. She went back out and Kaden was lying on the sidewalk. 4RP-XIII 2170. Everyone looked terrified and she started giving Kaden compressions. 4RP-XIII 2170. Then she looked down and saw he had a gunshot wound by his right eye. 4RP-XIII 2170. The medics arrived and she kissed Kaden and handed him to them. 4RP-XIII 2171. After that her neighbor held her and she just screamed. 4RP-XIII 2171. Then she called her mom. 4RP-XIII 2171.

Dean was staying with his friends Justin and Brianna Helwick at the time of the shooting. 4RP-XIII 2194-95. They lived at space 47 at the Kariotis park. 4RP-XIII 2195. Although he had known her for several years, Dean did see Kelso very often until he moved in with the Helwicks around December 2014. 4RP-XIII 2197-98. He had met DeJesus a few times at the Helwicks' house. 4RP-XIII 2198. After DeJesus moved out, Dean began to see more of Kelso, occasionally spending the night. 4RP-XIII 2200.

Before DeJesus moved out, Kelso came over to the Helwicks a few times, upset. 4RP-XIII 2201. Shortly before he moved out, Kelso came over with her baby, and asked to use the phone so she could call for a ride so she could get out of the area. 4RP-XIII 2202. She said that earlier, DeJesus had his kids over and he was chasing them around and yelling at

his daughter. 4RP-XIII 2202. DeJesus was chasing his daughter with his belt and telling her he would beat the anxiety out of her. 4RP-XIII 2203. When Kelso tried to intervene, he became upset and she decided to leave for the evening. 4RP-XIII 2203.

During the time Dean visited Kelso, he never saw a gun, ammunition, holsters, or targets in the house. 4RP-XIII 2203. He never knew her to go shooting. 4RP-XIII 2203.

On the day of the shooting Dean was hanging out with Justin and Brianna at the home of Justin's mother Elke, which was a few minutes from the mobile home park. 4RP-XIII 2205-06. They used the hot tub, and had some food and drinks. 4RP-XIII 2205. He accidentally dropped his phone in the hot tub. 4RP-XIII 2205. Later, when he got to Kelso's he put it in a bag with some rice. 4RP-XIII 2206.

Around 8:00 or 9:00 p.m. they went back to Justin's house. 4RP-XIII 2206. They had a few drinks and Kelso joined them. 4RP-XIII 2206. Then Dean and Kelso went and got some food and returned to Kelso's house. 4RP-XIII 2206. He had had quite a bit to drink over the course of the day. 4RP-XIII 2206. On an intoxication scale of one to 10, he was probably a five or six. 4RP-XIII 2207. They arrived at Kelso's house around 10 or 11:00 p.m. and he parked his car in her carport. 4RP-XIII 2207.

They tried to watch a movie on the computer but it was not working so they went to bed around 1:00 a.m. 4RP-XIII 2209. Although he had spent the night several times before, it was the first time they had kissed and had sex. 4RP-XIII 2209. They were not quiet. 4RP-XIII 2209. Afterwards, Kelso went outside to smoke. 4RP-XIII 2209. He stayed in bed. 4RP-XIII 2210.

Shortly afterward, he heard gunshots nearby and ran to the back door. 4RP-XIII 2210. He yelled “What’s going on?” and Kelso came limping into the house. 4RP-XIII 2210. She yelled that she had just been shot. 4RP-XIII 2210. Dean pulled her into the house and laid her down. 4RP-XIII 2210. He was thinking that he did not know where the shooter was and had had gotten Kelso out of the way, and because he was unarmed, he needed to go. 4RP-XIII 2211. He ran through the kitchen toward Jalisa’s bedroom. 4RP-XIII 2211. He heard more gunshots. 4RP-XIII 2212. He ran into Jalisa’s room and closed the door. 4RP-XIII 2212. Then he realized he had been shot. 4RP-XIII 2212. He yelled to Jalisa to call 911 and ran to the window. 4RP-XIII 2213. He tried to break the window with his fists but it would not, so he jumped through headfirst. 4RP-XIII 2213.

He ran. 4RP-XIII 2214. He heard another shot, but kept running to Justin’s house. 4RP-XIII 2214. He banged on the door and yelled to Justin

that he had been shot. 4RP-XIII 2215. It took longer than Dean would have liked, but then Justin opened the door, gun in hand. 4RP-XIII 2215. Dean ran in and they ran to the back bedroom. 4RP-XIII 2216. Dean, Brianna and the dog went into the room, and Justin “posted” at the door. 4RP-XIII 2216. They closed the door and turned off the light. 4RP-XIII 2216. He laid down on the floor. 4RP-XIII 2216. Brianna was crying and screaming. 4RP-XIII 2217. Dean slipped in and out of consciousness and vaguely recalled the police arriving. 4RP-XIII 2217. They took him out to an ambulance in a blanket and then he woke up at Harrison Hospital. 4RP-XIII 2218. He was then airlifted from Harrison to Harborview in Seattle. 4RP-XIII 2219.

Helwick grew up with Kelso, she was about five years his senior. 4RP-X 1722. Kelso and DeJesus had a rocky relationship. 4RP-X 1723. About a month before the incident, Kelso came to his house to borrow the phone. 4RP-X 1724. She was crying and said she had gotten into an altercation with DeJesus about him abusing his kids 4RP-X 1724-25. She wanted to call a friend to get a ride and leave. 4RP-X 1725. Pretty soon after than she got a protection order. 4RP-X 1726. Dean was his best friend. 4RP-X 1726. The night of the shooting, Dean went to Kelso’s and then came home to get some shorts and was very happy because he had kissed her for the first time. 4RP-X 1728. He had had a crush on Kelso for

about a year. 4RP-X 1728. He came home again later to get his keys so they could go for some dinner. 4RP-X 1728. Justin went to sleep, and was awakened later by Dean frantically banging on his door. 4RP-X 1728. Bri attended to Dean while Justin called 911. 4RP-X 1729. 911 call played. 4RP-X 1730.

James Trammell was Kaden's father. 4RP-IX 1375. Kaden was two years old. 4RP-IX 1376. He was not in a relationship with Kaden's mother Jalisa Lum at the time of the shooting. 4RP-IX 1377. They had joint custody, with Kaden spending Monday, Tuesday, Wednesday and every other Saturday, Sunday and Monday with Trammell. 4RP-IX 1377. Jalisa had moved in with Heather Kelso at the park about three weeks before the shooting. 4RP-IX 1377. Trammell had not met Kelso until Jalisa moved in with her. 4RP-IX 1378.

On Friday, March 27, Trammell went pick up Kaden around 5:00 p.m. 4RP-IX 1378. When he arrived, Kelso was on the front porch and Kaden was outside playing. 4RP-IX 1378. Jalisa was inside cleaning. 4RP-IX 1378. Kelso, who was normally pretty friendly, seemed pensive. 4RP-IX 1379. Trammell smoked a cigarette and then went inside. 4RP-IX 1379. Jalisa wanted to keep Kaden overnight, so Trammell agreed to come get him in the morning. 4RP-IX 1379. Trammell left after 30 to 45 minutes and returned to his home in Belfair. 4RP-IX 1379. He hung out at home

and went to bed around 10 or 11:00 p.m. 4RP-IX 1380.

His mother woke him up and told him Kaden had been shot. 4RP-IX 1380. He grabbed his guns and got in the car with his mother and headed to Bremerton. 4RP-IX 1380. He took a 9mm and two .223s. 4RP-IX 1380. He was going to kill the shooter. 4RP-IX 1381. First he went to Harrison Hospital, but it was locked down and they did not know where Kaden was, so he went to the trailer park. 4RP-IX 1381. When he got there the park was closed off and he parked right at the entrance. 4RP-IX 1382. An officer immediately approached and asked who he was when he got out of the car. 4RP-IX 1382.

A deputy also asked him if he had any guns, and Trammell told him he did and let him look at them. 4RP-IX 1383. The deputy wrote down the serial numbers. 4RP-IX 1384.

The early the morning of the shooting, occupants of a home abutting the park looked out the kitchen window and saw a man frozen on top of the fence. 4RP-XIII 2311, 4RP-XVIII 3154-55. He was wearing a sweats, a black hoodie and a ski mask covering his face. 4RP-XIII 2312. About 15 minutes later, they looked out the garage window and saw the man again. 4RP-XIII 2318. He was standing next to the front walk of the house. 4RP-XIII 2321. It took four minutes to walk and two to jog from Kelso's house to the back yard where the man was. 4RP-XXII 3896.

Port Orchard police located DeJesus's vehicle at 1330 Sidney Avenue in Port Orchard. 4RP-XV 2654. They arrived there around 5:50 a.m. 4RP-XV 2654. The dome light was on and the engine area was still warm. 4RP-XV 2657. There were lights on in two windows of the residence. 4RP-XV 2658.

In the car was a receipt from McDonalds in Silverdale from 12:03 on March 27. DeJesus's wallet was in the center console. 4RP-XV 2662.

In the son's bedroom they found a shoebox with a box of Federal hollow point 9mm rounds. 4RP-XV 2622. There was also an envelope addressed to DeJesus in the shoebox. 4RP-XV 2623. There were also some printed-off text messages with the name "Jerry" on them.¹ 4RP-XV 2623. There were 10 rounds in the Federal box. 4RP-XV 2624. It originally contained 20 rounds. 4RP-XV 2625.

Police found a Smith & Wesson pistol box in the basement. 4RP-XV 2700. It was located in a portable hanging wardrobe. 4RP-XV 2701-02. The wardrobe was zipped closed before it was searched. 4RP-XVI 2798.

The box indicated it was for a 9mm pistol and indicated the serial number of the gun that came in it. 4RP-XV 2702. Inside was a loaded

¹ DeJesus was known as Jerry. 4RP-XVI 2843.

magazine, a cleaning brush and some literature regarding the gun. 4RP-XV 2711. The magazine had 15 Federal 9mm hollow-point rounds in it. 4RP-XV 2114-16. They were jacketed hollow points, which have an indented lead bullet with a copper coating on them, designed for better “stopping power”: when the bullet enters tissue it spreads apart instead of going straight through. 4RP-XV 2720-21.

DeJesus had more than 10 pairs of shoes, primarily of the skateboarding type. 4RP-XVIII 3140.

A friend of Ivy and DeJesus’s daughter had a sleepover with her basketball team the night of the murder. 4RP-XVI 2820. DeJesus’s daughter attended and the mother asked Ivy to spend the night to help out. 4RP-XVI 2821. Ivy arrived around 6:00 p.m. 4RP-XVI 2822. She left around 7:00 a.m. the next day.

Detectives interviewed DeJesus in the patrol car after he came out of the house on Sidney. 4RP-X 1652. When they told him that they were investigating the murder of Kelso and Kaden, his reaction was indifference. 4RP-X 1652.

He said he had worked the swing shift that evening. He got off work at 10:40 p.m. 4RP-X 1701. After that he stopped at a 7-Eleven on Wheaton way to buy a beer and then went to his friend Nicholson’s house on Clover Blossom Lane. 4RP-X 1652. He said he changed his shoes but

not the rest of his clothes before going to Nicholson's. 4RP-X 1701.

He left Nicholson's at approximately 12:10 a.m. 4RP-X 1702. He stopped at the store on Tremont in Port Orchard and, bought another beer and some chips and went home to 1330 Sidney. 4RP-X 1652, 1703. When he got there he sat in his car "smoking and stewing." 4RP-X 1652. He was stewing about the situation with his kids. 4RP-X 1653.

He said he had a 9mm at one point but had given it back to his friend. 4RP-X 1653. He subsequently asserted that he had given to Kelso for protection. 4RP-X 1653. He last saw the gun stored under Kelso's bed. 4RP-X 1707. Brandon Whittaker confirmed he had sold the Smith & Wesson in its case to DeJesus about four years earlier. 4RP-XVII 3057.

He asked at one point whether his daughter was all right. 4RP-X 1654. It was not his first question. 4RP-X 1654. He did not mention having seen Kelso the previous day at McDonald's. 4RP-XX 3382.

They asked him what he had been wearing and he said he had changed his clothing and described what he had been wearing. 4RP-X 1655. He agreed to give the police what he had been wearing. 4RP-X 1655. He directed them to a brown zip-front hoodie from a laundry basket in his son's room. 4RP-X 1658. They also retrieved a grey Nike T-shirt that DeJesus said he had been wearing from the laundry pile in the room. 4RP-X 1658-59.

DeJesus had a scrape on his left shin. 4RP-X 1660. He said he had sustained it, along with a hip injury, at work. 4RP-X 1661.

DeJesus suggested that James Houston, a 50-year-old black male, might be a possible suspect. 4RP-X 1710.

DeJesus said the injury to his leg was from a falling tank and that he also bruised his ribs. 4RP-XX 3391.

DeJesus never said on March 28 that he had the gun case. 4RP-XX 3394. He suggested that it was still at Kelso's house. 4RP-XX 3394.

During on interview March 30, police learned from deputies executing the search warrant the ammunition had been found in DeJesus's room. 4RP-XX 3409. They asked DeJesus why he had not mentioned the ammunition. 4RP-XX 3409. DeJesus said he just did not recall. 4RP-XX 3409. He added that it was just in shoe box with stuff he had brought from Kelso's house. 4RP-XX 3410. He still did not mention the gun case. 4RP-XX 3410.

DeJesus's ex-wife Ivy testified that they had divorced six years earlier and remained good friends. 4RP-XVI 2842-43. Their relationship had become more intimate again. 4RP-XVI 2852. They ended their conversations with "I love you." 4RP-XVI 2852. They were still just friends at the time of the murder. 4RP-XVI 2853.

DeJesus started staying in their son's room after Kelso got the protection order. 4RP-XVI 2853. He met Kelso around the time they started talking about separating. 4RP-XVI 2854. DeJesus and Kelso got engaged sometime before Kelso got pregnant. 4RP-XVI 2854-55. DeJesus and Kelso subsequently broke up for a time and then got back together at some point before she got pregnant. 4RP-XVI 2855. While DeJesus was in San Diego, Ivy occasionally brought her daughter to spend time with Kelso and Kelso's daughter at his request. 4RP-XVI 2856.

DeJesus told her the hole in the wall at Kelso's was from when he and Kelso had an argument about Kelso smoking around their daughter and DeJesus put his fist through the wall. 4RP-XVI 2857.

Kelso obtained the restraining order a few weeks after his return from San Diego and Ivy told him he could stay with her. 4RP-XVI 2858. Ivy had no contact with Kelso after the order. 4RP-XVI 2858. He had his clothes in the son's room and some boxes in the garage. 4RP-XVI 2859.

Ivy stated that DeJesus was sad and upset about the protection order because he couldn't believe that Kelso would ever do that or accuse him of abusing their kids. 4RP-XVI 2863. He was hurt by the CPS action. 4RP-XVI 2863. Ivy wrote a letter of support for him to take to the protection order hearing. 4RP-XVI 2864. After the murder DeJesus told Ivy he did not know that Kelso had a roommate. 4RP-XVI 2867.

Ivy knew DeJesus had a gun. 4RP-XVI 2867. He brought it to her house at least two years before the murder. 4RP-XVI 2867. He took it away before he went to San Diego. 4RP-XVI 2868. After the protection order, he brought some of his things back, including the gun box. 4RP-XVI 2869. Ivy put the box in the wardrobe in the garage. 4RP-XVI 2869. She never opened it. 4RP-XVI 2870. At some point she suggested selling the gun, and he said “okay.” 4RP-XVI 2871. He went to get it from the gun box but it was not there. 4RP-XVI 2871. She told him to ask Liz to get it back from Kelso. 4RP-XVI 2872.

While Ivy and her daughter were at the basketball sleepover, her son spent the night at his uncle’s house. 4RP-XVII 2916. After his first interview with the police, DeJesus told Ivy that his gun was still missing because he had never gotten it back from Kelso. 4RP-XVII 2923.

After his car was impounded, DeJesus had borrowed a Jeep Wrangler. 4RP-XVII 2930-31. A few weeks after the murder, DeJesus woke her up in the night. 4RP-XVII 2930. DeJesus told her that he went outside to smoke around midnight. 4RP-XVII 2935. While on the porch he saw the lights on in the Jeep. 4RP-XVII 2935. When he went to investigate, someone grabbed him and told him to get on his knees. 4RP-XVII 2931. They put a gun to his head and asked him how much his life was worth. 4RP-XVII 2931. Then they told him to get in the Jeep and

drive to an ATM. 4RP-XVII 2931. The assailant sat in the back seat. 4RP-XVII 2931. He drove to the ATM and withdrew money and gave it to the robber. 4RP-XVII 2932. The attacker then had him drive around and threatened to shoot him and bury him. 4RP-XVII 2932. He dropped him off and the person told him that if he contacted the police he would come back for DeJesus's family. 4RP-XVII 2932. He burnt him in the face with a cigarette. 4RP-XVII 2932. After he told her about it she persuaded him to call 911. 4RP-XVII 2933.

The police came out to the house. 4RP-XVII 2933. About a week later, he went to the police station. 4RP-XVII 2934. After the police interview, DeJesus told her that he had lied about the guy sitting in the backseat. 4RP-XVII 2934. Now he said he had dropped him off at the corner before going to the ATM. 4RP-XVII 2934. He went to the ATM by himself, but the assailant told him if he did not bring the money he would kill his family. 4RP-XVII 2935. He also now said the robber made him burn his own face. 4RP-XVII 2935.

In May, the detectives arranged to interview her at home. 4RP-XVII 2937. They asked her about the shoes DeJesus had. 4RP-XVII 2937. She texted DeJesus that the police were there. 4RP-XVII 2937. When he arrived home she may have asked DeJesus if he only had Nike, DC, and Vans. 4RP-XVII 2939.

The yellow shoe box was not from her or her children's shoes. 4RP-XVII 2940. She knew that DeJesus had bought new boots. 4RP-XVII 2940. She thought the gun was in the case when he brought it over. 4RP-XVII 2956.

Ivy denied telling detectives that DeJesus never told her the gun was missing. 4RP-XVII 2985. This was contradicted by a deputy who reported that after DeJesus came out of the house, he heard him say to Ivy that the gun he got was missing. 4RP-XVIII 3168. DeJesus punched a hole in the wall during an argument relating to his and Ivy's breakup. 4RP-XVII 2998.

On April 15, a Port Orchard officer responded to DeJesus's report of robbery and kidnapping. 4RP-XVIII 3209. He did not know DeJesus was a suspect in this case at the time. 4RP-XVIII 3209. DeJesus described the attacker as between 5'8" and 5'10" wearing a hoodie and a ski mask. 4RP-XVIII 3211. He could not identify their race. 4RP-XVIII 3211. It appeared the attacker knew him because he asked where DeJesus's car was. 4RP-XVIII 3211.

DeJesus appeared to be "animated but not traumatized." He was crying and sobbing but there were no tears. 4RP-XVIII 3212. There was a burn mark on his face, which DeJesus said the attacker had inflicted with a cigarette. 4RP-XVIII 3212.

DeJesus stated that they went through the drive-thru ATM. 4RP-XVIII 3214. He said he could only get \$400 out, and the robber said, “Is that all your life is worth?” 4RP-XVIII 3214. Then he was forced to drive toward Cedar Heights on Pottery Avenue, where he was told “You are going to do what I want you to do, or I am going to come back.” 4RP-XVIII 3214. They pulled over again on the Highway 16 overpass and the threats were repeated. 4RP-XVIII 3215. Three and half minute route, but 40 minutes from time of incident to 911 call. 4RP-XVIII 3215. They continued to Geiger Road, where the suspect asked to be let out. 4RP-XVIII 3215.

The officer found it odd that DeJesus had waited as long as he did to call 911. 4RP-XVIII 3219-20. He was also skeptical about the claim that the robber got in the backseat. 4RP-XVIII 3220. It would have been a difficult maneuver while maintaining a gun on someone, and there was a child seat and other items in the backseat. 4RP-XVIII 3220.

Billy Nicholson was a close friend who worked with DeJesus at shipyard. 4RP-XVIII 3096. Close friend. 4RP-XVIII 3096. They watched an episode of Walking Dead after he got off work. 4RP-XVIII 3097. DeJesus was angry about the no-contact order. 4RP-XVIII 3099.

They talked the morning after the murders. 4RP-XVIII 3100. DeJesus said he was feeling hungover. 4RP-XVIII 3100.

DeJesus told him after the robbery/kidnapping incident that the robber said he was doing it to show him that he was “not untouchable and that he could be accessed at any time.” 4RP-XVIII 3101. He also said “it was to point out that he could set him up and point him up -- put him as a fall guy at any time and touch his family.” 4RP-XVIII 3101. He specifically tied it to the murders— “that he would set him up and that he would go down as the fall guy.” 4RP-XVIII 3101. The night of the murders he claimed he had scraped his leg at work. 4RP-XVIII 3104.

Nicholson denied telling detectives on March 28 that he was not aware of DeJesus having any injuries that night. 4RP-XVIII 3114. He also denied telling them that you didn’t know of any injuries to him, but it wouldn’t be unusual for him to have bruising on his hands. 4RP-XVIII 3114. Finally, he denied telling detectives that DeJesus was wearing a black T-shirt. 4RP-XVIII 3115. Detectives contradicted these claims. 4RP-XVIII 3133, 4RP-XXI 3702.

Shortly after DeJesus returned from a work assignment in San Diego, Kelso obtained a protection order and asked Forrester’s husband to change the locks on her doors. 4RP-XVI 2827. The boyfriend of Kelso’s mother never knew Kelso to have anything to do with guns. 4RP-XVII 3052. He saw Tony Forrester change the locks on the house. 4RP-XVII 3052. A day or two later, DeJesus called him from Kelso’s cell phone and

asked him if he was the person who changed the locks. 4RP-XVII 3053. DeJesus's tone of voice was intimidating— "it sent a chill." 4RP-XVII 3054.

Before she got the protection order, Kelso had spoken to several of her colleagues. 4RP-IX 1546. She was scared and did not know what to do. 4RP-IX 1546. She wanted to end the relationship with DeJesus but did not know how. 4RP-IX 1546. Contrary to her usual happy demeanor, she was crying and shaky. 4RP-IX 1547. The night before, DeJesus's other children had joined them for dinner. 4RP-IX 1568. The oldest daughter was not eating, so DeJesus smacked her in the back of the head. 4RP-IX 1568. When Kelso responded to that, DeJesus grabbed her and pushed her up against the wall. 4RP-IX 1568. She expressed concern that the relationship was becoming violent. 4RP-IX 1569.

Kelso also said that she was very afraid for her life, that DeJesus had said he would shoot her if she took their child from him or prevented him from seeing her. 4RP-X 1620. She also said he had a pistol. 4RP-X 1620. They referred her to CEAP which was a counseling service for civilian employees of the shipyard. 4RP-IX 1569. What she was really concerned about was that he would become violent with her baby. 4RP-IX 1569. They also suggested she talk to security at the shipyard. 4RP-IX 1569.

In another incident, Kelso became very upset because DeJesus had tried to pick up the baby from daycare without her knowledge. 4RP-X 1764. He had previously threatened to take her away because she was an unfit mother. 4RP-X 1765. Kelso also mentioned that he was physical with her a couple of times and had threatened her. 4RP-X 1770 Another colleague recommended she contact the YMCA. 4RP-X 1765. Kelso spoke to them on the phone and arranged an appointment. 4RP-X 1766.

Kelso reported DeJesus to CPS on February 24. 4RP-XII 2011. The investigation pertained to Ivy and DeJesus's children. 4RP-XII 2014. The investigation was closed on March 17. 4RP-XII 2011. Per certified mail receipt, DeJesus received the notification on March 26. 4RP-XII 2012. The finding was unfounded. 4RP-XII 2013.

The court issued a temporary protection order on February 24. 4RP-XII 2022. Kelso was the petitioner and DeJesus was the respondent. 4RP-XII 2022. Their daughter was also named in it. 4RP-XII 2022. A hearing was set for March 5. 4RP-XII 2023. A permanent order was issued on that date. 4RP-XII 2023.

DeJesus became really angry when they served him with the protection order. 4RP-XII 2073. DeJesus gave her a written list of stuff he wanted from the house. 4RP-XII 2074.

Subject: Geraldo's belongings at Heather Kelso's

residence.

To: Liz Forrester.

I am writing this list to request that the items listed below are returned as scheduled to be returned to me, Geraldo DeJesus III, at a future date, from the residence at 3060 Northeast McWilliams Road, Trailer 21, Bremerton, Washington, 98311.

All items were in working condition when I was locked out illegally on February 24, 2015, and then served a restraining order vacating me from the address listed above by Heather Kelso. In order to protect myself from violating said restraining order, I'm communicating solely with Liz Forrester. I will have a photocopy of this list, and the original will be handed personally to Liz Forrester on 3/10/2015.

Items to be returned: A 32-inch TV with remote; an air purifier given to me by my mother, Maria Elena Castro Hansen; china set, dish set, belongs to my mother, with cups; DVD player and remote; two 2011 Honda Accord keys, one remote, one spare; one Verizon cellphone with number (360) 865-0358, with charger; one gas-operated weed trimmer; one pair of hedge trimmers; one rice cooker with all attachments; one crock pot; one vacuum set, already boxed, three parts; one gray-black surge protector; charger and battery for power tools; boxes containing belongings to my mother, Maria Elena Castro Hansen, my sister Angelica DeJesus, and myself; one serrated kitchen knife about nine inches in length given to me by my mother, Maria.

Please schedule a date for any items listed above with me at any way to contact me listed below. Thank you.

4RP-XII 2075-76. Forrester received the note on March 10. 4RP-XII 2076.

They gathered the stuff and DeJesus's friend picked it up. 4RP-XII 2077. He never asked for a gun. 4RP-XII 2077. She never turned over a

gun case to him. 4RP-XII 2077. After DeJesus moved out Forrester thoroughly cleaned Kelso's house-- all the closets, all the drawers, everything in the kitchen. 4RP-XII 2078. After that, she came over once or twice a week to tidy up. 4RP-XIII 2152. She never saw a gun, case, holster, targets, or ammunition anywhere. 4RP-XII 2078, 2086-87. She never saw Kelso with a gun. 4RP-XII 2079.

On March 27, Kelso called her and was extremely upset and angry. 4RP-XII 2089, 2098. She had had a confrontation with DeJesus at McDonald's. 4RP-XII 2098-99.

DeJesus came to see his daughter that day with his two other children. 4RP-XII 2099. Forrester told him that the baby was going to be staying at her house that night because Kelso was sick and the baby was very sick. 4RP-XII 2100.

A close friend of Kelso's stayed at house about 10 days before murder. 4RP-XV 2646. There was a dent in the refrigerator. 4RP-XV 2647. After that she texted Kelso. 4RP-XV 2647. Moments later, DeJesus called her from Kelso's number. 4RP-XV 2648. He said he was upset by the restrainer order but that if it were lifted "everything would be okay." 4RP-XV 2648. He was also upset about the CPS issue and said no one was going to tell him how to discipline his children. 4RP-XV 2648-49.

In February 2015, DeJesus reported to his employers at Puget

Sound Naval Shipyard that he had received a temporary no-contact order. 4RP-XV 2592. On March 6 he reported that a permanent order had been issued. 4RP-XV 2594. He had to report them because it could affect his security clearance and employment. 4RP-XV 2596.

DeJesus made a number of postings on Facebook after his breakup with Kelso:

My daughter Alexialei and I finally had a chance to “visit” Avalee last weekend. I miss her so much. It’s a shame that, after all I’ve been through with her mother, it is like this.

4RP-XII 1972.

These photos are my daughters and one of Heather and I. Just wish the kids were not involved in our breakup. Wish things were honest and right. My two girls spending time together. She’s getting so big. Just wish I could witness this every day. I remember the days when we would talk. Wish things could have turned out differently for all three of the kiddos.

4RP-XII 1972.

I just want to thank all my family and friends for having my back in this painful time in my life. I may need letters of character here soon to show the courts that I am not a violent person so I can hopefully share or have custody of my daughter Avalee. I’ve always put my kids before myself, and I know now that putting someone before myself other than my kids has come to affect them negatively. My thoughts and prayers to all of you. Thanks again.

4RP-XII 1972-73.

The autopsy showed that Kelso was shot four times. 4RP-XIV

2365. Once in each thigh, and twice in face. 4RP-XIV 2366. She received a bullet to face fired from less than a foot away. 4RP-XIV 2375. Kaden was shot from about 18 inches. 4RP-XIV 2391.

The possible source of the shoeprints in Jalisa's room were determined to be from a company called IPath, models O'Connor or Ras. 4RP-XVII 3014.

The director of manufacturing for Smith & Wesson explained that their handguns that shipped in plastic cases included a lock, literature, and an envelope that contained one fired shell from each firearm. 4RP-XX 3457. Magazines would be included for pistols as well. 4RP-XX 3458. On the outside of the case would be a label with the SKU number, the model number and the serial number. 4RP-XX 3458. The fired casings were required by law in certain states, so they included them in all cases they shipped. 4RP-XX 3460. The casing was placed in a sealed envelope sealed with tape and the tester's initials. 4RP-XX 3462. A label is also printed out with the gun's serial number and affixed to the envelope. 4RP-XX 3462. The envelope then ships with the gun. 4RP-XX 3462. The information on the label is also maintained in Smith & Wesson's databases. 4RP-XX 3463.

The envelope with the test-fire in it matched DeJesus's gun case. 4RP-XX 3477. The test-fire envelope also the matched gun case for

Trammell's gun. 4RP-XX 3478. The two guns were different models and their components were not interchangeable. 4RP-XX 3485. The firing pins were unique. 4RP-XX 3486.

Tool mark comparison showed that all of the fired cartridge casings from the scene were consistent with Smith & Wesson test-fire cartridge from DeJesus's gun case. 4RP-XXI 3628-33. They were all consistent with having been fired from a single firearm. 4RP-XXI 3638. The fired bullets also were consistent with having been fired from the same gun. 4RP-XXI 3634. Her conclusions were peer reviewed per crime lab protocols. 4RP-XXI 3646.

The lead detective asked Trammell to bring his gun in on February 24, 2016. It was a 9mm Smith & Wesson in its plastic case and included the manufacturer's test-fire round. 4RP-XVIII 3235. Tool mark comparison also eliminated the test fire from DeJesus's gun case and the cartridge case collected from the scene from having been fired from Trammell's gun. 4RP-XXIV 4258.

Nicholson's neighbor's security video confirmed the time that DeJesus arrived and left Nicholson's. 4RP-XV 2688-90.

Surveillance videos from the 76 station on Tremont showed DeJesus stopping at the store at 12:47 a.m. 4RP-XIV 2428, 2436. He purchased a bag of Cool Ranch Doritos, a can of Olde English 800, 24-

ounce can, and a pack of Marlboro 100's box. 4RP-XIV 2434. He left around 12:50. 4RP-XIV 2432. He headed east away from Highway 16 when he left. 4RP-XIV 2435. A car similar to his drove by at 2:38 a.m., again heading east. 4RP-XIV 2432, 2435-36.

When the police searched the house the next morning Doritos and Olde English were still in the bag on the coffee table, unopened. 4RP-XX 3382.

In the video, the hoodie and pants DeJesus was wearing were clearly different from the ones he asserted he had been wearing and that were collected. 4RP-XXII 3789-80. On May 29, Nicholson told him that DeJesus was wearing blue jeans and a black shirt. 4RP-XXII 3881. He could not recall about the hoodie. 4RP-XXII 3881. The jeans DeJesus turned over were black. 4RP-XXVII 4736.

An officer travelling eastbound on 11th Street in Bremerton near Naval Avenue sometime between 2:30 and 2:45 saw a dark colored Honda headed in the opposite direction at or below the speed limit. 4RP-XV 2559, 2577.

Netflix records showed that on March 28 DeJesus's account showed activity at 3:29 a.m. for 78 minutes on an iPhone. 4RP-XIX 3314. Title was a movie called November Man. 4RP-XIX 3319.

DeJesus uploaded a picture to Facebook from Sidney Ave IP address at 3:15 a.m. on March 28.

DeJesus was arrested on August 20. 4RP-XXVI 4688.

A summary of various evidence produced a timeline of DeJesus's activities On March 27 and 28:

12:03 p.m. McDonald's Silverdale per receipt from his car

12:32 p.m. text to Liz Forrester that he was on his way

10:40 p.m. left shipyard per DeJesus statements

10:59 p.m. texted Nicholson that he was on his way

11:07 p.m. arrived at Nicholson's, per Parsons's surveillance video

12:24 a.m. left Nicholson's, per Parsons's surveillance

12:49 a.m. at cashier at 76 on Tremont

1:26 a.m. DeJesus text to Ivy indicating he is watching TV

2:18 a.m. shooting

3:15 a.m. DeJesus uploads picture to Facebook from Ivy's

3:17 a.m. Uploads second Facebook picture

3:29 a.m. Started watching Netflix at Ivy's

4:47 a.m. Stopped watching Netflix

4:57 a.m. Law enforcement locate his car at Ivy's house

4RP-XXVII 4746-50. It took 24 to 26 minutes in traffic to drive from Kelso's to Ivy's. 4RP-XXVII 4753.

III. ARGUMENT

A. BECAUSE TOOL MARK IDENTIFICATION HAS BEEN UNIVERSALLY FOUND TO BE A GENERALLY ACCEPTED TECHNIQUE WITHIN THE RELEVANT SCIENTIFIC COMMUNITY, THE TRIAL COURT PROPERLY CONCLUDED THAT NO *FRYE* HEARING WAS REQUIRED.

Dejesus argues that the trial court erred in failing to conduct a *Frye*² hearing on the admissibility of tool mark evidence. He argues that although such evidence is not novel, it fails the general acceptance in the relevant scientific community test because recent literature has criticized the methodology. This claim is without merit because this type of evidence is neither new nor novel, because no court has excluded this type of evidence, because the critique of tool mark examiners comes from outside of the relevant community and as such goes to weight rather than admissibility, and, most importantly, it is in fact generally accepted in the relevant scientific community.

“Questions of admissibility under *Frye* are reviewed de novo.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011). But under ER 702, trial courts have broad discretion in determining the admissibility of expert testimony and if the basis for admission is fairly debatable, the trial court’s ruling will not be disturbed

² *Frye v. United States*, 293 F. 1013 (1923).

on appeal. *In re McGary*, 175 Wn. App. 328, 339, 306 P.3d 1005, *review denied*, 178 Wn.2d 1020 (2013).

“Testimony that does not involve new methods of proof or scientific principles to reach its conclusions is not subject to the *Frye* test.” *State v. Ortiz*, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992). “It applies where either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community.” *Anderson*, 172 Wn.2d at 611. “*Frye* does not require that the specific conclusions drawn from the scientific data upon which [the witness] relied be generally accepted in the scientific community.” *Id.* (alteration added). “*Frye* does not require every deduction drawn from generally accepted theories to be generally accepted.” *Anderson*, 172 Wn.2d at 542. Under *Frye*,

The primary goal is to determine whether the evidence offered is based on established scientific methodology. Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*. If there is a *significant* dispute among *qualified* scientists in the relevant scientific community, then the evidence may not be admitted, but scientific opinion need not be unanimous.

Anderson, 172 Wn.2d at 603 (*quoting State v. Gregory*, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006)) (internal quotation and citation omitted; emphasis in original). “Once a methodology is accepted in the scientific

community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.” *Gregory*, 158 Wn.2d at 829–30.

Below, DeJesus brought nothing showing that the methodology used is not generally accepted in the community of tool mark examiners. 3RP 36. Here, DeJesus similarly fails to cite to any authority showing that any court has excluded this sort of evidence. Moreover, neither here nor below has DeJesus credibly argued that the tool mark evidence admitted in this case was erroneous or infirm.

1. The relevant scientific community is tool-mark examiners.

DeJesus bases this claim on the criticisms contained in two reports: Nation Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (“NAS report”)³ and President’s Council of Advisors on Science and Technology, *Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016) (“PCAST”).⁴ He claims that scientists in general have queried the reliability of tool mark evidence. But the outside criticism is not concerned with admissibility issues. And,

³ See <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> (viewed Feb. 28, 2018).

⁴ See https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (viewed Feb. 28, 2018).

DeJesus reads the word “relevant” out of the phrase “relevant scientific community.”

The focus on the relevant community is important in that the *Frye* test recognizes that “Judges do not have the expertise required to decide whether a challenged scientific theory is correct.” *State v. Wilbur-Bobb*, 134 Wn. App. 627, 632, 141 P.3d 665 (2006). A physicist may have the expertise to critique a particular medical procedure but is not an expert on medical theory or general medical practice. A trial court judge is not required to choose between the opinions of experts from various fields of inquiry. Rather, the focus is on the bona fides of the expert within her area of expertise. As the *Frye* court put it “general acceptance in the *particular field* in which it belongs.” *Frye*, 293 F. at 1014 (emphasis supplied).

In *State v. Pigott*, 181 Wn. App. 247, 325 P.3d 247 (2014), a challenge to the admissibility of fingerprint evidence was considered. The work of the NAS was argued by Pigott. *Pigott*, 181 Wn. App. at 250. The court properly cabined the inquiry: “The evidence presented clearly demonstrated that this specific method is commonly used and generally accepted by the *fingerprint analysts*.” 181 Wn. App. at 249 (emphasis supplied). The relevant scientific community was fingerprint analysts, not physicians, physicists, or dog trackers. In the present case, the relevant community is that of tool mark examiners. DeJesus does not rely on

criticism from within that community but rather from outside of it.

The relevant community ideally consists of scientists with direct empirical experience with the procedure in question. *People v. Young*, 425 Mich. 470, 481, 391 N.W. 2d (1986). PCAST had no members from the field of firearm and tool mark examination. *See* PCAST at pp. v, vi, vii (listing names and credentials of the PCAST members). The listing of credentials shows that the PCAST is the commentary of a small group of academicians and scientists from varying backgrounds and disciplines outside the field of the relevant community of forensic firearms and tool mark analysts.

The Association of Firearm and Tool Mark Examiners (AFTE) responded that “[d]ecades of validation and proficiency studies have demonstrated that firearm and tool mark identification is scientifically valid, and that despite the subjective nature of the final comparison state of analysis, competent examiners employing standard, validated procedures will rarely, if ever, commit false identifications or false eliminations.” Association of Firearm and Tool Mark Examiners, *Response to PCAST Report on Forensic Science*, (2016), at 1 (“AFTE Response”).⁵ AFTE expressed concern regarding the PCAST’s “stated brief review of the literature,” which failed to consider the full array of

⁵ *See* <https://afte.org/uploads/documents/AFTE-PCAST-Response.pdf> (viewed Feb. 28,

existing research into the field of firearm and tool mark examinations. AFTE Response, at 1. In closing, AFTE noted that several comments in the PCAST report “suggest a fundamental lack of understanding about the range of analysis done in this forensic discipline” and a “lack of adequate investigation and understanding on the part of the PCAST.” AFTE Response, at 1-2.

2. That tool mark evidence may include a subjective element is not fatal to admissibility.

DeJesus makes much of the assertion that the conclusions of tool mark examiners are subjective. But *Frye* applies to “new methods of proof or new scientific principles,” *Pigott*, 181 Wn. App. at 248, regardless of whether the scientific principles are subjective or objective. It applies to techniques and methodologies from many disciplines.

Experts apply their expertise and render opinions. Opinions by their nature are subjective. For instance, “[m]any expert medical opinions are pure opinions and are based on experience and training rather than scientific data.” *Anderson* 172 Wn.2d at 610. Moreover, ER 702 allows opinions based on “knowledge, skill, experience, training, or education.” The application of experience and training is acceptable under the law but DeJesus would banish it in favor of hard-science type quantification. *See*,

2017) (copy attached as App. A).

e.g., PCAST, at 47 (procedures must be standardized and quantifiable).

Mathematical precision is not required by *Frye*. The *Anderson* case was about whether or not parental exposure to toxic solvents could cause birth defects. The Supreme Court explained the limits of *Frye* with regard to the subjective opinions of experts:

According to Akzo’s evermore nuanced argument, to satisfy *Frye*, Anderson must establish that the specific causal connection between the specific toxic organic solvents to which she was exposed and the specific polymicrogyria birth defect is generally accepted in the scientific community. If we were to accept Akzo’s argument and require “general acceptance” of each discrete and evermore specific part of an expert opinion, virtually all opinions based upon scientific data could be argued to be within some part of the scientific twilight zone.

Anderson, 172 Wn.2d at 611. Cross examination and, possibly, contrary opinions by opposing experts may leave a particular expert’s opinion in shreds but this eventuality does not make her opinion inadmissible. *See State v. Ellis*, 136 Wn.2d 498, 521-23, 963 P.2d 843 (1998) (expert’s opinions “would be subject to cross-examination as they were as ‘hostile witnesses’ ... The trier of fact—the jury—can then determine what weight, if any, it will give to their testimony. This is fundamentally fair and consistent with due process.”). That opinions may be subjective is true. But “[t]he *Frye* test is only implicated where the opinion offered is based on novel science.” *Anderson*, 172 Wn.2d at 611.

3. *There is no significant dispute within the relevant community*

of tool mark examiners.

As noted, general acceptance is not found under *Frye* if there is a *significant* dispute amongst *qualified* experts. *Anderson*, 172 Wn.2d at 603. But “this standard does not require unanimity.” *In re Pettis*, 188 Wn. App. 198, 206, 352 P.3d 841 (2015), *review denied* 184 Wn.2d 1025 (2015) (citing *Lake Chelan Shores Homeowners Ass’n, v. St. Paul Fire and Marine Ins. Co.*, 176 Wn .App. 168, 176, 313 P.3d 408 (2013) *review denied* 179 Wn.2d 1019 (2014)).

This court did not find unanimity in the field with regard to a new sex offender risk assessment instrument—the SRA-SV; the instrument was attacked from within the community of mental health professionals who evaluate sex offenders. *Pettis*, 188 Wn. App. at 209. A practitioner in the field published a peer-reviewed article that criticized the instrument. *Id.* An opposing mental health professional testified that the instrument is based on old samples of offenders and that only “some” of his colleagues relied on it. *Id.* The proponent of the instrument testified that the inter-rater reliability of the instrument was only “modest” (.55) and hoped for better agreement between raters in the future. *Pettis*, 188 Wn. App. at 207. It could be seriously questioned whether the assessment technique had “reliability, repeatability, reproducibility and accuracy.” *Cf.* Brief of Appellant, at 23 (citing the PCAST report). Nevertheless, despite the

significant intra-discipline criticism and a reliability of only a little better than one half, the Court found that the instrument was general accepted in the relevant scientific community. *Pettis*, 188 Wn. App. at 209-10. This holding was in spite of the fact that the Court could only conclude that “most practitioners” found the tool useful. *Pettis*, 188 Wn. App. at 209. The intra-discipline critique and testimony did not rise to the level of a significant dispute. *But see In re Ritter*, 177 Wn. App. 519, 312 P.3d 723 (2013) (remanding for *Frye* hearing on the same risk assessment instrument).⁶

In *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), the Supreme Court considered a *Frye* challenge to a new DNA typing technique. The Court concluded the new technique was generally accepted and admissible. *Russell*, 125 Wn.2d at 54-55. This holding followed consideration of criticism of the technique much like the criticism raised in the present case. The trial court heard from defense witnesses that included a DNA analysis director, a clinical chemist, and a molecular laboratory professor. *Russell*, 125 Wn.2d at 42. The DNA analysis director attacked the new method: “Dr. Gerdes felt it was too early for the Cetus kit to produce reasonable results in a forensic setting because of the danger of typing a contaminant, the low power of discrimination, and the lack of

⁶ After remand, the Court found that *Frye* was satisfied. *In re Ritter*, 192 Wn. App. 493,

independent validation of laboratories.” *Russell*, 125 Wn.2d at 43. The clinical chemist was concerned that there were insufficient validation studies. *Id.* The molecular laboratory professor believed the technique to be too “unreliable for use in forensic settings.” *Id.*

Added to these three intra-discipline critiques was a report from the NAS’s Committee on DNA Technology in Forensic Science. *Russell*, 125 Wn.2d at 44. The report found no dispute about the validity of the general principles involved. *Russell*, 125 Wn.2d at 45. But the Committee criticized the methodology and made recommendations including “quality-assurance programs, individual certification, laboratory accreditation, and state or federal regulation.” *Id.* Ultimately, the Committee approved of DNA typing theory, but remained skeptical of “the adequacy of laboratory procedures and of the competence of the experts who testify.” *Russell*, 125 Wn.2d at 46.

Nevertheless, the Supreme Court, citing with approval cases from California and Colorado, emphasized the distinction between general acceptance and the absence of the methodological safeguards. *Russell*, 125 Wn.2d at 47-48. The message was that concerns about forensic application go to weight rather than admissibility. The Court found that problems that may occur in the forensic setting do “not affect the general scientific

499, 372 P.3d 122, *review denied*, 185 Wn.2d 1039 (2016)

acceptance of PCR methodology.” *Russell*, 125 Wn.2d at 51.

The process of tool mark identification is the rather unremarkable enterprise of finding, observing, and comparing random marks on tools. *See* CP 548 (Declaration of State’s expert Kathy Geil, which clearly lays out the process of tool mark evaluation). Nothing presented by DeJesus questions this fundamental aspect of tool mark examination or its general acceptance. DeJesus can assert no intra-discipline challenges to the theory or methodology of tool mark examiners. Unlike the risk assessment tool in *Pettis*, no expert in this case opined that the reliability of tool mark examination only 50 percent. There is no significant dispute within the relevant community.

The PCAST report itself denies its applicability to the question of admissibility in a court of law:

Judges’ decisions about the admissibility of scientific evidence rest solely on the *legal* standards; they are exclusively the province of the courts and PCAST does not opine on them.

PCAST, at 4 (emphasis in original). The report repeats this admonition in the section focused on tool mark evidence:

Whether firearm analysis should be deemed admissible on current evidence is a decision that belongs to the courts.

Id. at 12. The authors never assert that such evidence should not be admitted; instead they recommend that if the evidence is admitted, the

expert should not inflate error-rates. *Id.* The report addresses its view of scientific validity, not legal considerations. *Id.* This can be starkly seen in the denigration of experience and subjective judgment. PCAST, at 6. Absent from the assertions is an understanding of the process of adversarial testing that is fundamental to the consideration of any evidence in a legal setting.

Moreover, the PCAST authors themselves recognized the distinction between the underpinnings of the science and the procedures of the particular expert in the particular case. In discussing the notion of uniqueness in comparison undertakings, they clarify that the science is sound if properly applied:

The issue is not whether *objects* or *features* differ; they surely do if one looks at a fine enough level. The issue is how well and under what circumstances *examiners* applying a given metrological method can reliably *detect* relevant differences in features to reliably identify whether they share a common source.

PCAST at 62 (emphasis in original). The notion that objects and features differ is the fundamental notion upon which tool mark examination proceeds. As with those criticizing the DNA technique at issue in *Russell*, PCAST critiques the process of the individual examiner while admitting that the underlying theory—that things differ—is true.

At bottom, PCAST simply does not recommend that tool mark evidence not be admitted. The authors admit (grudgingly perhaps) that

“[t]he early studies indicate that examiners can, under some circumstances, associate ammunition with the gun from which it was fired.” PCAST, at 111. But they recommend more studies. *Id.* The authors do not even foreclose the continuation of the calling “as a subjective method.” *Id.* at 112. But, again, they want to see more studies done. *Id.* PCAST does not raise a significant dispute. It points out problems and recommends better practices. But the report appreciates and does not contest the primary principles upon which the practice proceeds.

4. All other jurisdictions have admitted tool mark evidence.

The de novo standard of review for *Frye* issues is quite broad; Washington courts may look to decisions from other jurisdictions as persuasive authority on the issue of general acceptance. The state can find no case from outside Washington that supports DeJesus’s argument that the evidence should be excluded.

A wrinkle in this part of the case is that DeJesus correctly says that no *Frye* jurisdiction has considered the issue since the publication of the 2016 PCAST report. However, the state has found one state court and one federal court that have provided apt analysis of the impact of the PCAST report on the question of admissibility of tool mark evidence. Moreover, cases from around the country have uniformly rejected *Frye* challenges to tool mark evidence.

In *Com. v. Legore*, SUCR 2015-10363 (Mass. Super., Nov. 17, 2016),⁷ the court denied the defendant’s motion for a *Daubert* hearing based on PCAST. *Legore* observed that Massachusetts courts have previously determined that firearm comparison evidence is generally accepted and admissible, even following issuance of the 2009 NAS/NRC Report. *Legore*, at 1-2. *Legore* examined whether, based on the PCAST, that precedent should be revisited. *Legore* at 2. *Legore* concluded that PCAST merely “echoes the concerns articulated by the National Research Council in 2009, regarding the scientific (foundational) validity of comparative ballistics analysis.” *Legore*, at 3. *Legore* noted that while PCAST identified studies conducted since the 2009 NAS/NRC report, PCAST also acknowledged that “no study has undermined the claimed reliability of comparative ballistics evidence.” *Legore*, at 3. *Legore* emphasized that PCAST’s review of comparative firearms analysis did “not significantly alter the findings and conclusions of the [2009] NRC report” and therefore the court saw “no reason to conduct a formal *Daubert/Lanigan* hearing based upon the report issued by the President’s Council.” *Legore*, at 3-4.

In *United States v. Chester*, No. 13 CR 00774 (Order, E.D. Ill. Oct.

⁷ Attached as App. B.

7, 2016)⁸ the court ruled on defendants’ renewed motion to exclude firearm tool mark analysis. The renewal of the motion was occasioned by the publication of the PCAST report. *Chester*, at 1. The court found that the document did not address admissibility but “[r]ather, the report provides foundational scientific background and recommendations for further study.” *Id.* The court further noted that, “as such, the report does not dispute the accuracy or acceptance of firearm toolmark analysis within the courts.” *Chester*, at 2.

The federal court further noted that the PCAST report provided the defense with “fodder for cross-examination.” *Chester*, at 2. The court thus ruled that PCAST goes to weight rather than admissibility of such evidence. The court concluded that the adversarial process was the best way to address any shortcomings identified in PCAST:

In short, the PCAST report does not undermine the general reliability of firearm toolmark analysis or require exclusion of the proffered opinions in this case. Questions about the strength of the inferences to be drawn from the analysis of the examiners presented by the government may be addressed on cross-examination.

Chester, at 2. This ruling is consistent with Washington law. The federal court recognized that PCAST simply does not undermine the general

⁸ Federal Rules of Appellate Procedure allow citation to “unpublished” authority issued after January 1, 2007. FRAP 32.1. A copy is attached (App. C) in accordance with GR 14.1(d). Appeals from the defendants’ convictions are pending in the U.S. 7th Circuit. See *United States v. Chester*, 2017 WL 3394746 (E.D. Ill. Aug. 8, 2017).

theory applied by tool mark examiners but provides a basis for cross examination of the particular application by the particular expert.

Chester cited to another federal case, *United States v. Otero*, 849 F. Supp. 2d 425 (D.N.J. 2012). *Chester*, at 2. There, the district court considered, among other things, the NRC report. *Otero*, 849 F. Supp. 2d at 427. The court considered evidence on the issue in a three-day hearing. It noted that its *Daubert* analysis included the question of “whether the technique has achieved general acceptance in the relevant scientific or expert community.” *Otero*, 849 F. Supp. 2d at 430.

The *Otero* court noted that the NRC report had:

identified deficiencies in the forensic sciences and concluded that generally, the forensic identification disciplines, other than nuclear DNA analysis, lack sufficient grounding in scientific research to verify the accuracy and validity of their methodologies.

Otero, 849 F. Supp. 2d at 430. The court noted that the NRC report expressed no opinion on the admissibility of tool mark evidence. *Id.* Nevertheless, on the general acceptance question, the district court found widespread acceptance:

Courts have observed that the AFTE theory of firearms and toolmark identification is widely accepted in the forensic community and, specifically, in the community of firearm and toolmark examiners.

Otero, 849 F. Supp. 2d at 435. Further, it noted that even those critical of it, had acknowledged its general acceptance:

Even courts which have criticized the bases and standards of toolmark identification have nevertheless concluded that AFTE theory and its identification methodology is widely accepted among examiners as reliable and have held the expert identification evidence to be admissible, albeit with limitations.

Id. The court concluded that the evidence the government submitted “demonstrates the general acceptance of the AFTE theory among professional examiners as a reliable method of firearms and toolmark identification.”

Otero has been applied with approval in the *Frye* context. In *People v. Robinson*, 377 Ill. Dec. 467, 2 N.E. 3d 383, 386. (2013), the defendant challenged tool mark evidence based on *Frye*.⁹ After concluding that tool mark evidence should be considered as scientific evidence, the court considered whether or not tool mark evidence is novel. *Robinson*, 2 N.E. 3d at 397. Reviewing Illinois precedent, the court found it was likely not new or novel but nevertheless decided to proceed with a *Frye* analysis. *Robinson*, 2 N.E. 3d at 398.

The court noted that no Illinois case had excluded tool mark evidence, which had “been generally admissible in Illinois courts for decades.” *Robinson*, 2 N.E. 3d at 399. The court considered and

⁹ Illinois is a *Frye* state, and Illinois rules under *Frye* are indistinguishable from the pronouncements of Washington courts. *See Robinson*, 2 N.E.3d at 396.

discounted three federal cases asserted by the appellant.¹⁰ The review of federal authority led the Illinois court to conclude that tool mark identification was generally accepted:

In none of these judicial decisions—including those specifically cited by defendant in this appeal—did a court rule traditional microscopic firearms comparison testimony was generally inadmissible.

Robinson, 2 N.E. 3d at 400. The court further noted that under the *Daubert* standard, federal courts still considered general acceptance. *Id.* In particular, the Illinois court focused on the general acceptance analysis from *Otero*, discussed above. *Robinson*, 2 N.E. 3d at 401.

Robinson argued the 2009 NRC report and scholarly articles critical of the enterprise. The court concluded that “Federal and state courts considering these materials nevertheless have found microscopic firearms comparison methodology to be generally accepted and declined to exclude the type of testimony at issue in this case.” *Robinson*, 2 N.E.3d at 402. The court therefore allowed the evidence:

In short, in recent years, federal and state courts have had occasion to revisit the admission of expert testimony based on toolmark and firearms identification methodology. Such testimony has been the subject of lengthy and detailed hearings, and measured against the standards of both *Frye* and *Daubert*. Courts have considered scholarly criticism of the methodology, and

¹⁰ *United States v. Green*, 405 F. Supp. 2d 104 (D. Mass. 2005); *United States v. Monteiro*, 407 F. Supp. 2d 351 (D. Mass. 2006); and *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008).

occasionally placed limitations on the opinions experts may offer based on the methodology. Yet *the judicial decisions uniformly conclude toolmark and firearms identification is generally accepted and admissible at trial*. Accordingly, we conclude the trial court did not err in ruling the testimony in this case was admissible and did not require a *Frye* hearing, particularly where the trial judge barred the witnesses from testifying their opinions were “within a reasonable degree of scientific certainty.”

Robinson, 2 N.E.3d at 402. See also, *Jones v. United States*, 27 A.3d 1130, 1137 n.7 (D.C. App. 2011) (*Frye* hearing properly denied where 2009 NAS report offered and court ruled “[a]lthough such evidence is not properly before us, even after considering it, we are still unpersuaded that pattern matching is no longer generally accepted.”); *State v. Lee*, 217 So. 3d 1266, 1278 (La. App. 2017) (“[E]ven after publication of the NAS Report, courts have addressed, in detail, the reliability of [firearms and tool mark identification] testimony and ruled it admissible[.]”); *People v. Rodriguez*, 413 Ill. Dec. 996, 79 N.E. 3d 345, 355-56 (App. 2017) (affirming trial court’s denial of a *Frye* hearing on tool mark evidence because the NAS/NRC report does not sufficiently undermine the reliability of ballistics evidence and instead goes only to the weight not admissibility of such evidence).

Well-reasoned judicial opinions from around the United States have universally that tool mark analysis is generally accepted, even in the face of strident criticism from some illustrious scientists. The State knows

of no case that has excluded the evidence on the grounds of lack of general acceptance. Both state and federal courts in *Legore* and *Chester* have found general acceptance even in light of the 2016 PCAST report. The firearm tool mark evidence used in the present case was based on a generally accepted comparison procedure. The trial court properly denied a *Frye* hearing and its ruling should be affirmed.

5. Any error would be harmless.

Finally, even if the trial court erred, it would be harmless. Admission of evidence where a *Frye* hearing should have been held is nonconstitutional error that is harmless where the error did not affect the outcome of the trial within reasonable probabilities. *State v. Leuluaialii*, 118 Wn. App. 780, 796, 77 P.3d 1192 (2003), *review denied*, 154 Wn.2d 1013 (2005). Here, as outlined above, there was ample evidence of DeJesus's motive, opportunity and lack of an alibi. Moreover, DeJesus himself presented a day and half of testimony from two experts who testified to essentially all the alleged failings of tool mark identification. 4RP-XXIII 3967-4029, 4101-11, 4118, 4RP-XXIV 4128-48, 4167-70. This claim should be denied.

B. DEJESUS FAILS TO SHOW A SUFFICIENT NEXUS BETWEEN EITHER OF HIS OTHER SUSPECTS AND THE MURDERS.

Dejesus next claims that the trial court erred in excluding his

proposed other suspect evidence. This claim is without merit because DeJesus failed to show a sufficient nexus between either of his other suspects and the murders.

1. The presentation of other suspect evidence requires that the defense establish a nexus between the other suspect and the crime.

A criminal defendant has a constitutional right to present a defense under the federal and state constitutions. *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). The defendant does not, however, have a constitutional right to present evidence that is irrelevant or otherwise inadmissible. *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

A defendant thus does not have an absolute right to present other-suspect evidence without first establishing a foundation that connects another person with the crime charged. *Maupin*, 128 Wn.2d 918. The trial court's decision to exclude other-suspect evidence is reviewed for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014).

The defendant has the burden to establish relevance and to show a "clear nexus between the other person and the crime." *State v. Rafay*, 168 Wn. App. 734, 800 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023, *cert. denied*, 134 S. Ct. 170 (2013). The nexus must be "a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party." *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932).

“Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.” *Id.* Essentially, the evidence the defense seeks to admit must show that the purported other suspect took some step that indicates their intention to act on motive or opportunity. *Id.* There may not be the necessary nexus even in situations where the purported other suspect had motive and made threats to the victim. *State v. Kwan*, 174 Wash. 528, 25 P.2d 104 (1933).

In addition to analyzing the foundational requirements, before admitting other-suspect evidence, the trial court must engage in a balancing test to determine whether the probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury. *Franklin*, 180 Wn.2d at In determining the probative value of other-suspect evidence, the court must determine whether the evidence has a logical connection to the crime—not based on the strength of the State’s evidence. *Id.* The trial court has the responsibility to focus the trial by excluding evidence that has only a very weak logical connection to the central issues. *Franklin*, 180 Wn.2d at 378.

Whether other-suspect evidence should be admitted is inherently a fact-based decision. The State will therefore review a number of decisions that may be compared to DeJesus’s case.

In *State v. Strizheus*, 163 Wn. App. 820, 262 P.3d 100 (2011),

review denied, 173 Wn.2d 1030 (2012), the defendant was charged with attempted murder for stabbing his wife, Valentia. At the time of the incident, Valentia indicated that her husband had stabbed her. Some time after the incident, the defendant's son, Vladimir made a sort of confession to stabbing his mother. At the time of the confession, Vladimir was drunk. Vladimir had a history of malicious mischief against his mother. At the time of the stabbing, Vladimir was the respondent in a no contact order with his mother as the protected party. Subsequent to the stabbing, Vladimir assaulted his mother. He later recanted his confession. Prior to trial, Valentia claimed she had no memory of the stabbing. The defendant moved for admission of other-suspect evidence, alleging that Vladimir had opportunity, motive to commit the assault as well as prior and post-incident domestic violence incidents against his mother. The court excluded the other-suspect evidence holding there was no evidence that established a nexus or physical evidence that connected Vladimir to the stabbing. *Strizheus*, 163 Wn. App. at 832. The court noted that no eyewitness placed Vladimir at the scene and that there were no witnesses who presented evidence who contradicted the State's version of the facts. *Id.* Additionally, the defendant could not show evidence that Vladimir took any steps that showed he intended to act on his alleged motive. *Id.*

In *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986), *overruled*

on other grounds, State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994), the defendant attempted to connect a certain person to the infamous Wah Mee Massacre at a gambling club in Seattle's International district. The defendant offered other-suspect evidence of a person who had a plan to control gambling in the district, had contacted one of the perpetrators of the killing on the day of the murders and had offered to sell that perpetrator a bulletproof vest one week before the killing. *Mak*, 105 Wn.2d at 715-16. The Supreme Court upheld the trial court's ruling to exclude the evidence because part of the defendant's offer of proof connecting the purported other suspect with the mass murder was an inadmissible hearsay statement regarding the vest. *Mak*, 105 Wn.2d at 717.

In *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), the defendant attempted to introduce evidence that two other men had a motive to kill one of Russell's three victims, each of whom were sexually assaulted prior to being killed. One of the men was a suspect in a rape and murder that bore little resemblance to Russell's crimes. The other man had been in a romantic relationship with one of the victims and had told the police that he had been with a different woman the night of the victim's murder but could not produce evidence of the other woman. The trial court excluded the other-suspect evidence and its holding was affirmed based on

Kwan because mere evidence of the existence of someone else's motive to commit the crime is not enough to allow other-suspect evidence. *Russell*, 125 Wn.2d at 76-77 (citing *Kwan*, 174 Wash. at 533).

In *In re Lord*, 123 Wn.2d 296, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994), the Washington Supreme Court affirmed the exclusion of evidence that: (a) other individuals had refused to give hair samples or take polygraph examinations when the police asked them to do so, (b) one of the victim's neighbors owned a blue pickup truck which was not seen after the victim disappeared, (c) the victim's boyfriend wanted to have sex with her, (d) the victim had expressed concern about being followed by someone in a car, and (e) several other persons had access to a U-Haul blanket with the victim's blood and to the residence in which the victim had last been seen alive. *Lord*, 123 Wn.2d at 315-16. The trial court properly excluded this evidence under *Mak*, *Downs* and *Kwan*, because none of the proffered evidence tended to point clearly to anyone else as the guilty party. *Lord*, 123 Wn.2d at 316 (citing *Mak*, 105 Wn.2d at 716-17; *Downs*, 168 Wash. at 667; *Kwan*, 174 Wash. at 533).

Maupin illustrates what actually qualifies as admissible other-suspect evidence. *Maupin* was convicted of the felony murder of a six year-old child, after unsuccessfully attempting to introduce the testimony of an alibi witness who would have testified to seeing the child alive and

in the custody of other persons *after* the State claimed the child had been abducted and killed. *Maupin*, 128 Wn.2d at 920. The Supreme Court reversed, but not before reiterating the holding in *Downs*:

“[W]here there is no other evidence tending to connect such outsider with the crime... his bad character, ... his means or opportunity to commit, or even his conviction of, the crime, is irrelevant to exculpate accused[.]” Mere opportunity to commit the crime is not enough. Such evidence would be “the most remote kind of speculation.”

Maupin, 128 Wn.2d at 925 (quoting *Downs*, 168 Wash. at 667-68) (citations omitted). The evidence offered in *Maupin*, however, differed from that in *Downs* and its progeny:

Unlike any of the *Downs* line of cases, and contrary to the State’s argument, Brittain’s testimony was neither evidence of another’s motive nor mere speculation about the possibility that someone else might have committed the crime. Instead, Brittain would have testified he saw the kidnapped girl with someone other than the defendant after the time of kidnapping. Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have seen, it at least would have brought into question the State’s version of the events of the kidnapping. An eyewitness account of the kidnapped girl in the company of someone other than Maupin after the time of the kidnapping certainly does point directly to someone else as the guilty party, as *Downs* requires.

Maupin, 128 Wn.2d at 928.

The Court found that the error was not harmless, in part because the State failed to make any record to support its claims that Brittain was not credible and that his “story was created out of whole cloth and it

would have been destroyed at trial if presented.” *Maupin*, 128 Wn.2d at 929. The Court noted that the State asserted that numerous police reports of witness interviews contradicted Brittain’s statements, but failed to include any of the reports in the appellate record. Thus, the Court had to treat Brittain’s testimony as true for purposes of review, and concluded that it would cast substantial doubt on the State’s version of the crime. *Maupin*, 128 Wn.2d at 929-30.

In *State v. Wade*, 186 Wn. App 749, 346 P.3d 838 (2015), the Court excluded other-suspect evidence that the victim’s ex-boyfriend may have committed the murder. There, the victim had been strangled and her body had been hidden in a closet. Wade’s DNA was found at the scene and surveillance cameras at the victim’s apartment complex entrance showed Wade coming and going from the apartment. The victim’s boyfriend had strangled the victim years earlier and had actually left several threatening messages on her voicemail three months prior to the murder. There was no evidence, however, to connect him to the murder. The Court noted that the ex-boyfriend had a bad character, had a violent history and had an actual motive to harm the victim. *Id.* Nevertheless, this evidence was not sufficient because it did not lead to a “nonspeculative” link between the crime and the ex-boyfriend. *Wade*, 186 Wn. App

2. DeJesus failed to establish a nexus between Trammell and the crime where the evidence affirmatively eliminated Trammell

as a suspect.

Here, DeJesus made an offer of proof that consisted primarily of a quote from a domestic violence protection order petition Jalisa Lum filed against James Trammell:

March 28, 2015 my baby was shot in Bremerton shooting. S[i]nce that day, my baby's dad, James, has become very unpredictable and aggressive towards me. On April 19, 2015 he accused me of leaving out baby out in the open to be shot. He is carrying his fire arm out in the open. He is threatening me with harrassing [sic] text messages. The combination of his harrassing [sic] text messages, his anger and needing to blame someone, and his fire arms are causing me to fear for my life. We have had a very difficult relationship all along and have never felt fearful of him, like I do now. The anger and the rage is all over his face and it is directed towards me. In the past he has chocked [sic] me and pushed me due to his anger. The last event was before the baby died, a week prior. He screamed in my face, called me a niger [sic] bitch, a worthless slut and a liar. He knocked my ciggarette [sic] out of my hand while screaming in my face. I fear for my life at this point, and especially under the circumstances.

CP 49. In considering this offer, the trial court correctly declined to compare the relative strength of the evidence against DeJesus versus the evidence against Trammell, instead looking only at the evidence regarding Trammell. 3RP-I 16.

At the hearing, the State pointed out that Lum made clear she was not fearful of Trammell until after the shooting. 3RP-I 17. It further noted that there was no evidence of tension between them the day before the shooting; to the contrary, Trammel agreed to let Kaden spend the night

even though it was Trammell's turn to host him. 3RP-I 17-18. Additionally, Trammell, who lived nearly an hour away, arrived at the scene with his mother, and there was no evidence whatsoever that the mother had any motive. 3RP-I 18. Further, Trammel's gun had a different firing mechanism than the weapon used in the shooting and it was almost impossible that this firearm could have been used in this particular shooting based on the markings on the casings.¹¹ 3RP-I 19. Finally, Trammell knew his son was in the home at the time of the shooting and there was no evidence at all that he had ever been abusive toward Kaden. 3RP-I 19-20.

After hearing the offers made by the parties, the trial court concluded that the showing was insufficient to allow other suspect evidence:

I'm not able to, based on what's been presented this morning -- I don't believe that the strength of the defendant's showing of the -- some tangible connection between the other person, Mr. Trammell, and the crime charged is sufficient.

There is an insufficient train of facts or circumstances as presented in the offers of proof. And so I'm going to deny the motion with regards to other suspect evidence in this matter.

However, Mr. Weaver, Mr. Cunningham, you have leave to renew this motion pending additional information certainly and perhaps most importantly what I'm hearing crime lab information with regards to the firearm that Mr.

¹¹ The gun was subsequently excluded as the murder weapon. 4RP-XXIV 4258.

Trammell turned over. So I guess it remains to be seen what that says, but if you believe it's relevant, you certainly have leave to refile your motion.

3RP-I 22-23. The trial court did not abuse its discretion. Moreover, given the evidence presented that affirmatively excluded Trammell as the killer, any error would have been harmless.

3. *There was no nexus beyond a flimsy motive between Houston and the murders.*

Before beginning his cross-examination of the medical examiner, Dr. Lacsina, DeJesus made lengthy argument regarding Kelso's drug use.

4RP-XIV 2398-2402. The court then sought to clarify the defense request:

Specifically as relates to Dr. Lacsina, you're asking that I allow you to inquire with him with regards to the toxicology; is that right?

4RP-XIV 2402. DeJesus wavered in his response, between the idea that he wanted to "poke holes" in the police investigation, and whether Houston was an "other suspect":

But where we don't want to go is, we don't want to say it was James Houston because, quite frankly, we don't know. Yesterday the jury heard from -- yet another suspect, a white guy with a scruffy chin.

4RP-XIV 2405. The State vehemently argued that DeJesus had failed to show a sufficient nexus between Houston and the murders:

I fail to see how Heather Kelso's drug use is relevant in this particular case. Defense has to show more than a motive under the case law in order to identify James Houston as another suspect, and that is the only thing that they have been able to point to is motive in this particular

case.

And it's a pretty weak motive, to begin with, to suggest that somebody who might owe another individual money, it's probably the least effective way to get your money is by killing that person. In addition, there's no evidence that there was any robbery of the house, that there were any items taken from the house. There was still money found at the scene, which would contradict this being motivated by some sort of financial vendetta.

I don't think there's enough information to say that James Houston was dealing her drugs. It's difficult to read the text message that Heather Kelso wrote that defense counsel is referring to. It doesn't say "drug dealer" on it like defense counsel likes to assert. It appears to be some type of misspelling. But I don't believe it's clear that James Houston sold her drugs, that Heather Kelso owed him money for those drugs.

And certainly beyond motive, defense counsel has absolutely nothing to show nexus, and the case law is abundantly clear that that is not -- that's not enough. Motive is simply not enough. And the Court has already allowed it in terms of -- for the jury to decide whether the State's witnesses did a proper investigation, and I think that's the end of the analysis.

4RP-XIV 2408-09. The State further pointed out that the medical examiner would not be able to provide that nexus:

Dr. Lacsina can't provide any information that would assist in establishing a nexus of the fact that she had used drugs, most of which she had a prescription for, and we don't have a toxicologist here to testify as to the difference between oxycodone and hydrocodone and how things appear in your system versus the drugs that were actually prescribed to Heather. We don't have Heather's doctor here to testify which drugs she was prescribed, whether she had previous prescriptions for oxycodone and hydrocodone.

Defense counsel wants to make an unreasonable inference here that Heather Kelso had drugs illegally when

they have no evidence of that. They don't have Heather Kelso's medical records. They don't have information from her pharmacy as to what drugs were dispensed and whether generics were used and whether that would change the content. We don't even have a toxicologist here. Dr. Lacsina simply cannot provide the information necessary that defense is seeking.

4RP-XIV 2409-10. In response, DeJesus conceded that he had been inconsistent in what he was requested vis-à-vis Houston:

I guess, to some extent, we are sort of -- we've been inconsistent, I'll concede that, about whether this is really other suspect evidence or whether this is just something we want to probe.

4RP-XIV 2410. The trial declined to find that DeJesus had met the bar for presenting other suspect evidence relating to Houston:

As relates to this particular witness at this particular time, I'm not finding that Heather Kelso's drug use is relevant to the nature, quality, and extent of law enforcement's investigation in this case. So from that standpoint, my previous decision as relates to Heather's drug use and alleged drug use and whatnot remains.

I'm also not finding at this point that, through this witness at this time, there's a sufficient nexus between Heather's drug use and what we're referring to as other suspect evidence and that test. The nexus at this time doesn't exist in my mind sufficient to allow inquiry.

So I'm going to deny your request to cross-examine Dr. Lacsina on the toxicology information that he obtained, but I think everyone has made their record adequately. In the case or need of further review, I'm sure it will be an ongoing discussion.

At this time I'm not finding a sufficient nexus to attach it to other suspect evidence, and I'm not finding it relevant as it relates to the nature, quality, and extent of law enforcement's investigation.

4RP-XIV 2411-12.

This decision was well within the court's discretion. The only evidence tying Houston to the crime was the contention that sometime in the past he had sold drugs to Kelso, that she may have owed him money, and that an unidentified black man was seen parked near her house the day before. Notably, she had \$600 dollars on her at the time of the murders which the assailant did not take. Further, her home was on near the main entrance to the park, at the first branching of the roads. That someone, who was not identified as Houston in any way, was stopped there in a car proves little.

Finally any error would again be harmless. There was no evidence whatsoever placing Houston near the scene of the crime. The likely assailant who was scene scaling a neighboring fence, round the time of the shootings, as noted by DeJesus, was not a black man, and the very thinness of this theory in no way casts doubt on the abundant evidence tying DeJesus to the crime. This claim should also be rejected.

4. This Court is bound by the Supreme Court's prior holding that Washington's other suspect rule is constitutional.

DeJesus also argues that if the trial court correctly applied Washington's other-suspect rule in his case, then the rule must be unconstitutional under *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). In *Holmes*, the Court addressed a South

Carolina rule allowing the exclusion of third party suspect evidence when the evidence against the defendant was strong, “even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.” *Holmes*, 547 U.S. at 329.

But the *Holmes* court noted its approval of the rule in Washington when the evidence was speculative or remote or did not tend to prove or disprove a material fact. *Holmes*, 547 U.S. at 327. This Court has therefore held that *Holmes* does not support the claim that Washington’s other suspect limitation is unconstitutional. *Rafay*, 168 Wn. App. at 802-03, 285 P.3d 83 (2012); *Strizheus*, 163 Wn. App. at 833–35.

Moreover, and more importantly, the Supreme Court has distinguished Washington’s rule from that at issue in *Holmes*. *Franklin*, 180 Wn.2d at 381-82. Instead it found that *Downs* and its progeny were consistent with *Holmes*. *Id.* DeJesus’s claim must therefore be rejected because it would require this Court to exceed its authority by not following controlling Supreme Court precedent. *See State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984) (once the Washington State Supreme Court decides an issue of law, that interpretation is binding on all lower courts until overruled by the Supreme Court).

C. THE TRIAL COURT PROPERLY LIMITED DEJESUS'S USE OF EVIDENCE ADMITTED ONLY TO IMPEACH THE INVESTIGATION TO THAT PURPOSE.

DeJesus next claims that the trial court erred in limiting his argument about a theoretical pawning of the gun. This claim is without merit because the trial court properly limited his use of evidence admitted only to impeach the investigation to that purpose. Moreover, any error would be harmless where the pawning theory defied the evidence and logic.

This contention must be viewed in the context of DeJesus's entire closing. Counsel opened his argument with a lengthy discussion of his "fear" that the jury would decide the case based on sympathy. 4RP-XXIX 5055-58. He discussed a case where an innocent person was convicted on faulty tool-mark analysis. 4RP-XXIX 5058. He then went on to talk about the presumption of innocence, and reasonable doubt. 4RP-XXIX 5058-60. From there he went into a discussion of direct and circumstantial evidence, and argued that the evidence in this case was largely circumstantial, and that the eyewitnesses had little useful evidence. 4RP-XXIX 5060-64. He then proceeded to "go through the circumstantial evidence." 4RP-XXIX 5064. After that he sidetracked into what he categorized as "major surprises in this case.": the Netflix records, the PCAST report, and DeJesus's clothes. 4RP-XXIX 5064-66. Counsel then started a discussion

of the circumstantial evidence, including various forensic findings and jail calls. 4RP-XXIX 5066-77.

Counsel then opined that it was reasonable to have investigated DeJesus, but that they should have investigated others as well. 4RP-XXIX 5078-79. He then discussed the timeline and related evidence. 4RP-XXIX 5079-91. He then encapsulated the defense theory:

I'm going to suggest to you that the State's case is built on a web of three things: speculation, supposition, and junk science. Speculation, supposition, and junk science.

4RP-XXIX 5092. He then argued that the case was a "sole suspect express" and elaborated on that theory at length. 4RP-XXIX 5092-97. He then launched into a renewed attack on "speculation, supposition, and the junk science." 4RP-XXIX 5097-5103.

Only at this point to counsel turn to Houston:

And in particular, they did not do a thorough investigation of James Houston. Now, James Houston was a name that was provided to them as early as March 28. They knew James Houston is a possible suspect.

By the way, I want to be clear on one thing. I am not saying James Houston is the shooter, because I don't have any evidence that he's the shooter. Why do I not have any evidence he's the shooter?

4RP-XXIX 5104. The State's objection was overruled, *id.*, and counsel continued:

Why do I not have any evidence that he's the shooter? Because law enforcement failed. Law enforcement

did not investigate James Houston, despite the fact that he was a suspect -- he was a known suspect as early as March 28. Why did they not investigate him? Because they only had one suspect. They had the sole suspect memo. That was Mr. DeJesus. Everyone else is excluded.

4RP-XXIX 5104-05. He noted the presence of the unidentified black man the day before. 4RP-XXIX 5105. Then he launched into a discussion of the texts and his theories regarding Houston:

“I’m pissed.” Heather Kelso. “H-y,” I guess that’s “hi.” I’m not sure what that is. “My bank rejected my check again, and now I have to wait until Tuesday or Wednesday or my next paycheck, and there’s nothing I can do about it. I can’t talk about” -- I don’t know what that is.

She then continues. I assume that’s “I’m.” “I’m in front of the babysitter. Call when I can.”

“Well, if you’re going to come here and cause a big scene, let me know now so I can tell my neighbors now that my” -- I’m going to suggest that that’s drug dealer or possibly just dealer -- “that my drug dealer is on his way to fight with me.”

To which Mr. Houston says, “I never threatened you little girl. Don’t be making shit up. You will pay me my money you borrowed, though,” space, “period.”

We know what “period” means in this jury. “You will pay me my money you borrowed, though,” space, “period.”

Look at the text. I’m not exaggerating the space and the period. By the way, there’s not a single period in any of this text exchange until you get to Mr. Houston. “You will pay me my money.” That’s what he says. I apologize. I put March 27. The testimony was that it was actually March 26.

So they know, as of March 28, that Mr. Houston is a possible person of interest. They know that a tall black man was seen lurking outside of Space 21 on March 27. And they find out very quickly in the investigation, from text

records, that Mr. Houston has threatened Ms. Kelso.

So they go to interview him on April 29, a month and one day after the shooting. What's the one question they should ask him? Where were you on March 28 at 2:18? That's the one question we want to know. Right? They don't even ask him that question.

Mr. DeJesus, in his recorded statement on March 28, referring to a conversation he had with Ms. Kelso, he told her, "You need to get away from these people who are doing drugs." Mr. Houston is apparently a drug dealer who has a connection to Ms. Kelso.

4RP-XXIX 5105-07. At this point the State again objected, which was sustained. 4RP-XXIX 5107. The State then asked to be heard on the "entire slide." The thrust of the State's objection was "the inferences he's trying to draw, that Heather Kelso is somehow a drug user" 4RP-XXIX 5107. The two slides discussed were as follows:

Kelso's Secret Other Life	Question
<ul style="list-style-type: none">• Per DeJesus (recorded statement of March 28) – "You [Kelso] need to get away from these people that are doing drugs."• Wallet had between \$600-800 cash in it at the time of Kelso's murder (per Liz Forrester)• Kelso was concerned her "drealdear" was "on his way to fightwme"	<ul style="list-style-type: none">• How do we reconcile Kelso's statement her check bounced and she cannot pay her drug dealer the money she borrowed with the fact she had between \$600-800 cash in her wallet?• September 3, 2014 – "Can you pawn your gun?"• Houston: "You will pay me my money you borrowed though."• Where is the gun on March 28??

CP 428. The State indicated that its biggest concern was the third bullet point of the first slide. 4RP-XXIX 5108.

With regard to the second slide the court's concern was that DeJesus was "using as substantive evidence a text message that was not admitted for substantive evidence," apparently in reference to the third

bullet point. 4RP-XXIX 5109. It determined that the first bullet point was permissible. *Id.* It initially found, however, that the second point was an improper inference “because of the time delay.” *Id.*

Ultimately, however, the court ruled that counsel could argue the pawn point, but not the Houston quote:

I’m going to have you -- you can -- that slide is impermissible except for the quote about can you pawn your gun, because that was admitted as -- so I’m going to allow you to use the text on the slides that were admitted for substantive evidence.

But the Houston quote, that was not admitted for substantive evidence. That was admitted for a limited purpose with regards to the investigation by law enforcement.

4RP-XXIX 5110-11. The court further clarified its ruling:

So, Mr. Weaver, before we bring the jury back in, I guess I just want to make sure we’re on the same page. I think you can certainly -- there was a motion in limine with regards to Heather Kelso’s alleged drug use. That was excluded. I think argument with regards to her secret life or another life, I think that encroaches on the motion in limine.

So I think you can use text messages that were admitted for the purpose of why they were admitted, and that was to the nature and extent of the investigation but not as substantive evidence. I guess I want to make sure that your argument makes that clear to the jury. ...

And I think you did -- at the outset of talking to Mr. Houston, you did make it clear to the jury that you’re not saying he’s the shooter, and I appreciate that. That’s consistent with what we talked about.

4RP-XXIX 5111-12. Counsel indicated that he had altered the second slide to delete the first and third bullet points and the entirety of the first

slide. 4RP-XXIX 5112; *see also* CP 413.

Counsel then continued his argument:

So I think where I was at is discussion of where the gun is. Of course, the State takes the position that Mr. DeJesus has gotten rid of the gun in some manner. I'm going to suggest to you that it's not that clear.

We have a text message from Heather Kelso on September 3, 2014, suggesting that she wanted to pawn the gun. At that time, Mr. DeJesus was opposed to it. So where is the gun on March 28, after 2:18? Mr. DeJesus was asked that question by the detectives. And what was his answer? "When I left, the gun stayed."

4RP-XXIX 5113-14. Counsel continued:

Let's quickly go through the sequence here. On February 24, Mr. DeJesus is served with a temporary no-contact order. He consults with an attorney on February 25. You heard from her yesterday. And then, on March 5, they appear for a hearing in front of Commissioner Lowans.

Commissioner Lowans makes the temporary order -- he puts into place a one-year no-contact order at that time, and Mr. DeJesus leaves the home. And he tells the detectives, "When I left, the gun stayed." Now, he had a clear motive to leave the gun behind. The no-contact order prohibits him from possessing the firearm.

And, you know, the State, they make a big deal of the fact that -- when he sent over the list of things that he wanted Liz Forrester to pick up for him, they make a big deal out of the fact that he didn't list the gun. Their speculation is, he didn't list it because he already had it.

I'm going to suggest otherwise. The reason he didn't want Liz Forrester to pick up the gun for him is because he knew that it would be a crime for him to have the firearm.

So where is the gun? We don't know. The last -- according to Mr. DeJesus -- and you have to decide whether this is believable or not -- the last person to have

the firearm is Ms. Kelso, and we don't know what she did with it.

4RP-XXIX 5114-15. Counsel then switched to a lengthy discussion of the science of tool mark identification. 4RP-XXIX 5115-23. Then he discussed what he termed "misdirection" regarding DeJesus's relationship with Kelso and the fake robbery incident. 4RP-XXIX 5123-30. He concluded by returning to the question of DeJesus's whereabouts on the day of the crime and the reliability of tool mark evidence. 4RP-XXIX 5131-32.

This Court reviews a trial court's decision to limit closing argument for an abuse of discretion. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). A trial court abuses its discretion only if no reasonable person would adopt the view taken by the trial court. *State v. Wooten*, 178 Wn.2d 890, 897, 312 P.3d 41 (2013). The trial court has broad discretion over the scope of closing argument. *Perez-Cervantes*, 141 Wn.2d at 474-75. The Supreme Court has emphasized that the trial court should restrict the argument of counsel to the facts in evidence and the law as set forth in the instructions to the jury. *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007), *cert. denied*, 552 U.S. 1145 (2008).

The State would first question, regardless of counsel's decision regarding the editing of the slide, whether the trial court in fact limited the argument as DeJesus claims. Its ultimate ruling was that counsel could not

use non-substantive evidence for substantive argument. And indeed it ruled, separately, that both the first and second bullet points were individually proper. Having done so, that counsel mistook the ruling when editing the slide cannot be placed at the feet of the trial court.

Further, an erroneous limitation of the scope of closing argument is subject to a harmless error analysis. *Frost*, 160 Wn.2d at 781–82. To find harmless error, the Court must be “convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Here, as the foregoing discussion of DeJesus’s closing argument demonstrates, he cannot be reasonably claimed that he was unable to advance his theory of the case. The pawning claim was a very small piece of his case, which based primarily on the alleged failure of the police to adequately investigate the crime, and on his attempts to debunk tool mark identification. Indeed, the pawning claim was tenuous at best. The comment was made some none months before the murders. There was no evidence other than from DeJesus, who was shown to be a repeated liar, that Kelso ever had the gun. There was no evidence what the gun’s pawn value was. And perhaps most importantly, the forensic evidence showed that the gun was the murder weapon. The notion that Kelso pawned the gun and it then somehow came into the hands of the murderer borders on

absurd. There simply is no chance that the court's ruling, even if improper, affected the outcome of the proceedings. This claim should be rejected.

D. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT DEJESUS FABRICATED A KIDNAPPING AND ROBBERY OF HIMSELF IN ORDER TO DIVERT POLICE ATTENTION WHERE THE EVIDENCE SHOWED THAT THE ROBBERY WAS LIKELY FABRICATED AND FURTHER SHOWED, BY DEJESUS'S OWN STATEMENTS, THAT THE INTENT WAS MAKE IT LOOK LIKE A THIRD PARTY WAS THE KILLER.

DeJesus next claims that the trial court erred in admitting evidence that DeJesus fabricated a kidnapping and robbery of himself in order to divert police attention from himself. This claim is without merit because the evidence showed that the robbery was likely fabricated and further showed, by his own statements that the intent was make it look like a third party was the killer.

This Court reviews evidentiary rulings for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). A trial court abuses its discretion when the decision was manifestly unreasonable or based upon untenable grounds or reasons. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

Evidence of “resistance to arrest, concealment, assumption of a

false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime.” *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001); *see also*, *State v. Messinger*, 8 Wn. App. 829, 509 P.2d 382 (1973). In this case, DeJesus’s attempt to create a suspect for the murder for which he was under investigation was evidence of his consciousness of guilt and was properly admitted for that purpose.

To be admissible, the trier of fact must be able to reasonably infer the defendant’s consciousness of guilt of the charged crime. *Freeburg*, 105 Wn. App. at 497-98. The probative value of such evidence “as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.” *Freeburg*, 105 Wn. App. at 498. Fundamentally, this type of evidence requires evidence of volitional behavior by the defendant, not another person. *Freeburg*, 105 Wn. App. at 498.

Here, the evidence showed that DeJesus reported that he was kidnapped and robbed. However, when the police investigated the report,

they learned the burn mark on his cheek that he attributed to the robber was not yet there in the video of him withdrawing money from the ATM. CP 684. The same video also showed that contrary to his claim, there was no one in the backseat holding a gun to him at the time. CP 695.

When confronted with these inconsistencies, DeJesus changed his story twice. CP 697, 718. In his third version of the events he attempted to tie the robbery to the murders. CP 721. He also tied the robbery to the murders in his conversations with his friend Nicholson. 4RP-XVIII 3101. This evidence meets the four inferences discussed in *Freeburg*. As such the trial court did not abuse its discretion in allowing the evidence.

DeJesus also faults the trial court for not making an on the record finding that the event occurred. However, the court's ruling came after extensive argument by the parties and in light of the State's memorandum, which included as part of the offer of proof the lengthy interview of DeJesus by Detective Deatheridge. CP 653-725. At that time, the court stated:

I'm satisfied that, as an offer of proof -- the reported robbery as an offer of proof, the prosecution will be able to at least examine in their case in chief whether or not Mr. DeJesus attempted to create another suspect for the murder he was being investigated for.

4RP-I 30.

When the State seeks admission of evidence under ER 404(b), the

trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). The trial court's decision is reviewed for an abuse of discretion. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

A trial court may determine that uncharged crimes probably occurred based solely on the State's offer of proof. *Kilgore*, 147 Wn.2d at 295. Where a trial court rules on the admissibility of ER 404(b) evidence immediately after both parties have argued the matter and the court clearly agrees with one side, an appellate court can excuse the trial court's lack of explicit findings. *See State v. Pirtle*, 127 Wn.2d 628, 650, 904 P.2d 245 (1995); *see also State v. Stein*, 140 Wn. App. 43, 66, 165 P.3d 16, 28 (2007) (findings sufficient where trial court orally ruled "I'm satisfied that the allegations regarding the Lund homicide and the description of the [sic] or at least the offer of proof by the State does allow for 404(b)

evidence.”). The trial court’s findings here meet these standards. This claim should be rejected.

E. DEJESUS FAILS TO MEET HIS BURDEN OF ESTABLISHING CUMULATIVE ERROR.

DeJesus next claims that he is entitled to a new trial under the doctrine of cumulative error. The cumulative error doctrine applies when several errors occurred at the trial court level, 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 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994)

DeJesus asserts that his three claims combined require reversal. However, DeJesus offers nothing beyond a boilerplate contention that there is cumulative error. He fails to show how these alleged errors combined to prejudice his right to a fair trial. This claim should be rejected.

F. THE EVIDENCE WAS SUFFICIENT TO SUPPORT A FINDING THAT THE MURDER OF KADEN AND THE ATTEMPTED MURDER OF JALISA WERE PREMEDITATED WHERE IT WAS A REASONABLE INFERENCE THAT DEJESUS INTENDED TO SHOOT JALISA TO PREVENT HER FROM CALLING FOR HELP AND/OR TO ELIMINATE A WITNESS, AND FURTHER, DEJESUS'S PREMEDITATED INTENT TO KILL DEAN TRANSFERRED TO HIS ATTACK ON JALISA AND KADEN.

DeJesus next claims that there was insufficient evidence of premeditation to support his convictions for the first-degree murder of Kaden (Count IV) and the attempted first-degree murder of Jalisa (Count VIII). This claim is without merit because the evidence supports the conclusion that DeJesus intended to shoot Jalisa to prevent her from calling for help and/or to eliminate a witness, and further, DeJesus's premeditated intent to kill Dean transferred to his attack on Jalisa and Kaden.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

To establish premeditation, the State must show "the deliberate formation of and reflection upon the intent to take a human life and involves the mental processes of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Hoffman*, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991).

Thus, in *State v. Condon*, 182 Wn.2d 307, 315, 343 P.3d 357, 361 (2015), the Supreme Court recently rejected a claim that the evidence of

premeditation was insufficient where the defendant entered the house intending an armed robbery. The Court found instructive *State v. Miller*, 164 Wash. 441, 447, 2 P.2d 738 (1931):

When the appellant entered the express office [intending to rob it] and saw two men present, he may have very hastily concluded that it was advisable to dispose of Ivester so he would have but one man to contend with.

Condon, 182 Wn.2d at 315 (editing the Court's) (*quoting Miller*, 164 Wash. at 447).

Similarly, here, before DeJesus entered Jalisa's room, Dean was yelling for her to call 911. As such, "he may have very hastily concluded that it was advisable to dispose of" her to prevent her from calling the for help while he continued to pursue Dean.

Moreover, evidence was presented that he knew other individuals would be in the house. Several witnesses testified that he knew Kelso had a roommate. DeJesus had even gone so far as to call the property manager to warn the property manager about the new roommate.

Additionally, DeJesus knew there was at least one other person in the home. Dean's car, with which DeJesus was familiar, was parked outside. And a neighbor, Hall, testified that moments before the shooting, she could hear both Dean and Kelso inside the home, talking. Their voices were clear.

Thus, DeJesus waited until Kelso walked onto the back porch before he started shooting. If he believed Kelso was alone, he would have likely just entered the home. If DeJesus's only intention was to kill Kelso, it would have made more sense to have fled after shooting her.

The continued shots that occurred prior to the shot that killed Kaden are also indicative of DeJesus's premeditated intent to kill all the witnesses in the home. Before DeJesus made it to Jalisa's bedroom, he had fired over 6 shots at the other residents in the home.

Additionally, to shoot Jalisa, DeJesus had to turn position and point in a downward direction to where Jalisa was huddled on the floor. From there, he fired one shot. It is clear from the circumstantial evidence presented in this case that DeJesus intended to kill all the residents or possible witnesses based on his actions inside the residence. This inference is drawn, not just from motive, but from the physical evidence provided to the jury.

DeJesus contends that his intent to kill Jalisa is belied by his failure to shoot her again after he missed her. But the jury could reasonably have discounted such an argument. The room was dark, he could have assumed his shot went true. Further he was also intent on catching Dean, who was fleeing the scene, before Dean could summon help.

Finally, the evidence also supports a finding of a premeditated

intent to kill Dean, which intent is also transferable to his shooting of Kaden and at Jalisa. The jury was instructed:

If a person acts with the intent to kill another, but the act harms a third person, the actor is also deemed to have acted with intent to kill the third person.

CP 378. *See also* RCW 9A.32.030(1)(a). This instruction was not limited to a premeditated intent to kill Jalisa transferring to the murder of Kaden. The jury could have easily concluded that when DeJesus ran into the bedroom in pursuit of Dean, he thought the person huddled on the floor in the dark was Dean and shot Kaden with his preformed intent to kill Dean.¹²

The evidence was more than sufficient to find a premeditated intent to kill Jalisa and Kaden. The jury's verdict should be respected and upheld.¹³

¹² Notably DeJesus does not allege that the evidence of premeditation was insufficient with regard to the attempted murder of Dean (Count VII).

¹³ DeJesus does not discuss the remedy he seeks beyond dismissal of these two counts. However, he does not challenge the sufficiency of the evidence to support the jury's finding that he committed the first-degree felony murder of Kaden. *See* CP 403. Thus, even if the Court accepts DeJesus's argument and remands for dismissal of Counts IV and VIII, it should also order the reinstatement of Count v. and sentencing thereon. *See State v. Turner*, 169 Wn.2d 448, 465, 238 P.3d 461 (2010).

IV. CONCLUSION

For the foregoing reasons, DeJesus's conviction and sentence should be affirmed.

DATED March 12, 2018.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal flourish extending to the right.

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APPENDIX A



Association of Firearm and Tool Mark Examiners

Response to PCAST Report on Forensic Science October 31, 2016

In September, 2016 the President's Council of Advisors on Science and Technology (PCAST) issued a report titled "Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods." As the leading professional organization for practitioners of forensic firearm identification, the Association of Firearm and Tool Mark Examiners (AFTE) acknowledges the challenge faced by the PCAST to understand the scientific field of comparative sciences from their stated brief review of the literature. AFTE strongly agrees with the premise that additional ongoing structured research strengthens the foundational and applied validity of firearm identification, as well as endeavors to reduce the effects of cognitive bias and subjectivity. However, we cannot overstate our disappointment in the PCAST's choice to ignore the research that has been conducted.

Decades of validation and proficiency studies have demonstrated that firearm and toolmark identification is scientifically valid, and that despite the subjective nature of the final comparison stage of analysis, competent examiners employing standard, validated procedures will rarely, if ever, commit false identifications or false eliminations. The foundational literature of the science has been presented to bodies such as the PCAST and the National Academy of Science (NAS) on multiple occasions and can be found at these links on the AFTE website: <https://afte.org/resources/afte-position-documents> , <https://afte.org/resources/swggun-ark>. The PCAST report is highly critical of any research that is not considered a "black box" study; and while this type of research is valuable and should be utilized more going forward, AFTE believes it is not the sole standard by which good science is measured.

The PCAST report references one such black box study conducted in 2014 by the Midwest Forensics Resource Center (MFRC) at the Ames Laboratory, Iowa State University, as the solitary study that can be utilized to accurately determine the error rate for firearm identification. The results of the Ames study were consistent with previous research demonstrating a very low error rate among properly trained examiners. However, the PCAST recommendation that any and all court testimony should refer to this one study as the singular foundational research of firearm and tool mark examination is irresponsible and inaccurate, and suggests a fundamental lack of understanding about the range of analyses done in this forensic discipline. While a global and numerically precise average of accuracy (error rate) would be useful in evaluating the value of an analytical technique, of greater relevance is the performance of the individual examiner as demonstrated by their participation in proficiency testing and similar testing. It should be noted that when foundational black-box type studies have been conducted in the past, the reported errors tend to be clustered among individuals or small groups

AFTE Response to PCAST Report on Forensic Science

October 31, 2016

of participants rather than generally distributed amongst the population of all examiners participating in the study. Moreover, the technical and quality review processes utilized by laboratories for casework are not applied in these studies.

The PCAST report's assessment of the AFTE Theory of Identification as circular further illustrates the lack of adequate investigation and understanding on the part of the PCAST. First, the Theory of Identification has been in existence since 1992, not 2011 as cited.^(p.59) Second, the report erroneously defines sufficient agreement as "the examiner being convinced that the items are extremely unlikely to have a different origin."^(p.104) This characterization is utterly incorrect. The AFTE Theory of Identification clearly defines for the examiner when sufficient agreement does exist and how it is related to the significant duplication of random toolmarks. Only after sufficient agreement has been established does an examiner conclude that the two items are extremely unlikely to have a different origin. It has been consistently demonstrated that when the AFTE Theory of Identification is properly applied, examiners are able to conduct quality, accurate analysis.

Finally, the PCAST insistence on independent inquiry of our field in validation studies and matters of peer review implies a fatal limitation or bias within our community that can only be cured by an outside source. It is true that the majority of past research has been conducted by AFTE members, because while DNA and fingerprints have applications outside of forensics (such as medicine and biometrics), firearm identification has few profit-making applications and does not garner research attention from the private sector. Fortunately, in recent years a great diversity of academics, scientific professionals and agencies have joined in research on firearm and tool mark examination, but they require the input and participation of qualified forensic practitioners. We welcome the attention and ongoing collaboration of such organizations as the National Institute of Standards and Technology (NIST) and the newly-formed Center for Statistics and Applications in Forensic Evidence (CSAFE) in current and future research. Meanwhile, AFTE remains dedicated to the exchange of information, methods and best practices, and the furtherance of research in support of its members world-wide.

APPENDIX B

SUFFOLK, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
SUCR 2015-10363

COMMONWEALTH

vs.

JAMARE LEGORE
Defendant.

**RULING AND ORDER ON DEFENDANT'S
MOTION FOR DAUBERT/LANIGAN HEARING
ON ADMISSIBILITY OF FIREARM ANALYSIS**

By motion filed October 22, 2016, the defendant challenges the admissibility of expert testimony comparing ballistics evidence to a recovered firearm. The motion is based on a September, 2016 report by the President's Council of Advisors on Science and Technology ("PCAST"), entitled, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*. The report reviews the scientific validity of forensic feature comparison methods, including firearm toolmark analysis and makes recommendations to Federal courts and authorities regarding further steps to "strengthen forensic science and promote its more rigorous use in the courtroom." *Id.* at 2. For the reasons set forth below, the motion is denied.

Forensic ballistics or firearms identification involves the comparison of bullet and cartridge case evidence to a known firearm, seeking to determine whether the ballistics evidence was likely fired from a particular firearm. Evidence of a ballistics comparison, when performed by a properly trained and qualified analyst following an established methodology, has been

admissible in Massachusetts courts for well over a century. See, e.g., Commonwealth v. Barbosa, 457 Mass. 773,780 (2010); Commonwealth v. Best, 180 Mass. 492, 495-496 (1902). In Commonwealth v. Heang, 458 Mass. 827 (2011), the Supreme Judicial Court considered the admissibility of such evidence in light of a comprehensive legal and scientific review of forensic evidence contained in a report of the National Research Council (an arm of the National Academy of Science) entitled, *Strengthening Forensic Science in the United States: A Path Forward* (2009). After reviewing the scientific underpinnings and methodology applicable to the forensic comparison of ballistics evidence to connect it to a suspect firearm, the Court concluded, "where defense counsel is furnished in discovery with the documentation needed to prepare an effective cross-examination, where a jury are provided with the necessary background regarding the theory and methodology of forensic ballistics, and where an opinion matching a particular firearm to recovered projectiles or cartridge casings is limited to a 'reasonable degree of ballistic certainty', a jury will be assisted in reaching a verdict by having the benefit of the opinion, as well as the information needed to evaluate the limitations of such an opinion and the weight it deserves." Heang, 458 Mass. at 850.

The issue now before this court is whether, based on the recent PCAST report, there are grounds to revisit the SJC decision in Heang. After a non-evidentiary hearing and argument, and upon review of the PCAST report (and in particular, pages 104-114), there is no basis to disturb settled law permitting a properly qualified firearms expert from offering opinion evidence under Mass. G. Evidence § 702 relating to a comparison and match between a bullet recovered from the

alleged victim, and a bullet test-fired from a firearm allegedly associated with the defendant.¹

The PCAST report echos the concerns articulated by the National Research Council in 2009, regarding the scientific (foundational) validity of comparative ballistics analysis, noting the lack of scientifically rigorous and peer-reviewed studies on the uniqueness of class, sub-class, and individual characteristics imparted on projectiles or cartridge casings when fired from a known firearm, and limitations on the subjective nature of an examination of ballistics evidence. It notes, however, that since the 2009 NRC report, additional studies have been conducted that support the claim that reliable ballistics comparisons can be achieved, including one study by an independent laboratory designed to test the foundational validity of ballistics comparison testing. See Baldwin, D.P., Bajic, S.J., Morris, M., and D. Zamzow. "A study of false-positive and false-negative error rates in cartridge case comparisons." Ames Laboratory, USDOE, Technical Report #IS-5207 (2014); at afte.org/uploads/documents/swggun-false-positive-false-negative-usdoe.pdf.

Although the PCAST report is critical of the methodology employed in some of the studies conducted since 2009 and notes that the Ames Laboratory study, while following appropriate scientific protocols, has not been subject to a peer review, nonetheless it acknowledges that no study has undermined the claimed reliability of comparative ballistics evidence.

In short, the PCAST review does not significantly alter the findings and conclusions of the NRC report - indeed, the Council concluded, "[W]hether firearms analysis should be deemed admissible based on current evidence is a decision that belongs to the courts . . ." *Id.* at p. 12.

¹ The instant motion is based solely on the claim that there is an insufficient scientific foundational validity for ballistics comparison evidence. The defendant is not challenging whether the ballistics analysis here was valid as applied, nor for present purposes is he challenging the qualifications of the firearms examiner.

The report recommends, however, that if such evidence is admitted, it should be accompanied by testimony regarding the known error rates as found in Ames Laboratory's "black-box study". Based on the Supreme Judicial Court's comprehensive consideration of the issues relating to comparative ballistics evidence, and the Court's determination that such evidence, properly presented may aid a fact-finder at trial, this Court sees no reason to conduct a formal Daubert/Lanigan hearing based on the report issued by the President's Council.

ORDER

The Defendant's motion is **DENIED**. The Commonwealth shall be permitted to present expert testimony regard a forensic ballistics examination and comparison, subject to the conditions and limitations outlined in Commonwealth v. Heang, *supra*, and further subject to the requirement that the Commonwealth shall elicit testimony regarding known error rates based on studies identified in the PCAST report. Moreover, nothing herein shall limit defendant's counsel from cross-examining any firearms expert witness based on the findings and content of the PCAST report.


Justice of the Superior Court

Dated: November 17, 2016

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
GREGORY CHESTER,)	No. 13 CR 00774
ARNOLD COUNCIL,)	
PARIS POE,)	Judge John J. Tharp, Jr.
GABRIEL BUSH,)	
WILLIAM FORD, and)	
DERRICK VAUGHN,)	
)	
Defendants.)	

ORDER

For the reasons stated below, defendants’ second joint renewed motion to exclude expert testimony regarding firearm toolmark analysis [838] is denied. The related motion in limine [837] is also denied.

STATEMENT

I. Renewed *Daubert* Motion [838]

Defendants renew their motions to exclude toolmark analysis¹ in light of the September 20, 2016 release of the President’s Council of Advisors on Science and Technology’s (“PCAST”) report entitled “Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods.” Def. Mot. 2, ECF No. 838. The report “discusses the role of scientific validity within the legal system; explains the criteria by which the scientific validity of forensic feature-comparison methods can be judged; applies those criteria to six such methods in detail . . . and offers recommendations on Federal actions that could be taken to strengthen forensic science and promote its more rigorous use in the courtroom.” Ex. A. at 2.² Firearm toolmark analysis, which the government’s experts used, is one of the six methods discussed in the report. The report is clear that “[j]udges’ decisions about the admissibility of scientific evidence rest solely on legal standards; they are exclusively the province of the courts and PCAST does not opine on them.” *Id.* at 4. Rather, the report provides foundational scientific background and recommendations for further study.

¹ See Motions to Exclude, ECF Nos. 333, 699; Orders, ECF Nos. 464, 781.

² Page numbers refer to the internal numbering of the pages of the report, not ECF page numbers.

As such, the report does not dispute the accuracy or acceptance of firearm toolmark analysis within the courts. Rather, the report laments the lack of scientifically rigorous “black-box” studies needed to demonstrate the reproducibility of results, which is critical to cementing the accuracy of the method. *Id.* at 11. The report gives detailed explanations of how such studies should be conducted in the future, and the Court hopes researchers will in fact conduct such studies. *See id.* at 106. However, PCAST did find one scientific study that met its requirements (in addition to a number of other studies with less predictive power as a result of their designs). That study, the “Ames Laboratory study,” found that toolmark analysis has a false positive rate between 1 in 66 and 1 in 46. *Id.* at 110. The next most reliable study, the “Miami-Dade Study” found a false positive rate between 1 in 49 and 1 in 21. Thus, the defendants’ submission places the error rate at roughly 2%.³ The Court finds that this is a sufficiently low error rate to weigh in favor of allowing expert testimony. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 594 (1993) (“the court ordinarily should consider the known or potential rate of error”); *United States v. Ashburn*, 88 F. Supp. 3d 239, 246 (E.D.N.Y. 2015) (finding error rates between 0.9 and 1.5% to favor admission of expert testimony); *United States v. Otero*, 849 F. Supp. 2d 425, 434 (D.N.J. 2012) (error rate that “hovered around 1 to 2%” was “low” and supported admitting expert testimony). The other factors remain unchanged from this Court’s earlier ruling on toolmark analysis. *See* ECF No. 781.

This order does not, of course, prevent the defendants from cross-examining the government’s experts regarding the error rate of toolmark analysis, and the PCAST report may provide them with fodder for cross-examination. The defendants may, for example, inquire whether the government’s experts have complied with other best practices for firearm and toolmark analysis described in the PCAST report, such as the expert having “undergone rigorous proficiency testing” and whether the examiner “was aware of any other facts of the case” when he or she performed the analysis. *See* Ex. A. at 113. For its part, the government may bring out other best practices its experts have engaged in, such as independent secondary review of the examiner’s results. *See* Resp. at 2.

In short, the PCAST report does not undermine the general reliability of firearm toolmark analysis or require exclusion of the proffered opinions in this case. Questions about the strength of the inferences to be drawn from the analysis of the examiners presented by the government may be addressed on cross-examination. For these reasons, the defendants’ renewed motion to exclude is denied.

II. Motion in Limine [837]

The ruling to allow expert testimony on firearm toolmark analysis necessitates consideration of the defendants’ joint motion to exclude, pursuant to Fed. Rs. Evid. 402 and 403, evidence and testimony about a shooting that occurred on October 25, 2005. That shooting is not charged or referred to in the Superseding Indictment.

³ Because the experts will testify as to the likelihood that rounds were fired from the same firearm, the relevant error rate in this case is the false positive rate (that is, the likelihood that an expert’s testimony that two bullets were fired by the same source is in fact incorrect).

The government gave notice of its intent to introduce evidence that bullet casings recovered from the scene of the October 2005 shooting—both 9mm and .40 caliber—were fired from the same two guns as casings from shots fired during (1) the murder of Wilbert Moore in January 2006 (the .40 caliber); and (2) the shooting of Cordell Hampton and Antoine Brooks in April 2006 (the 9mm). In short, the government seeks to prove through expert testimony that one of the firearms from the October 25, 2005, shooting was used in the shooting of Moore and another was used in the shooting of Hampton and Brooks.

The defendants object that the October 25, 2005 shooting is not relevant because it is not probative of any fact needed to meet the government's burden, and further, that the probative value of the evidence is outweighed by a risk of juror confusion and unfair prejudice. As to the relevance question, the defendants assert: "The government has never charged or otherwise alleged any of the defendants as being involved in the October 25, 2005." Mot. 2, ECF No. 837. They argue that the shooting is unrelated to "the government's larger case" in that it is apparently "a shooting unrelated to the Hobos." *Id.* Responding orally, the government argued that the evidence is relevant because it tends to show that firearms connected to two separate alleged Hobos shootings (those of Moore and of Hampton and Brooks) were used together in the same place just months earlier.

The evidence is relevant and the objection based on Rule 402 is not well-founded. The ballistics evidence establishes a connection between the separate shootings of Moore on the one hand and of Hampton and Brooks on the other. A connection between the two events is probative of the government's allegation that the Hobos enterprise operated with a purpose of "preserving and protecting the power, territory, operations, and proceeds of the enterprise through the use of threats, intimidation, destruction of property, and violence, including, but not limited to, acts of murder, attempted murder, assault with a dangerous weapon, and other acts of violence."⁴ As the defendants have argued on numerous prior occasions, the government must prove an "agreement" and a "pattern" of racketeering activity; linking two murders by the weapons used is relevant evidence to meet that burden. It is also probative of an association-in-fact between the alleged perpetrators of the two 2006 shootings, whether or not the same individuals were also involved in the 2005 shooting.

The government does not offer this ballistics evidence to prove anything about who participated in the October 25 shooting, or that it was a "Hobos shooting." The ballistics testimony at issue will be used for the sole purpose of supporting the proposition that two 2006 shootings are connected to each other by means of firearms that had a common history. The jury will not hear any testimony regarding the events of October 2005, including about the alleged

⁴ Count One of the Superseding Indictment also alleges that the Hobos, as part of their illegal agreement, "committed illegal acts, including murder, solicitation to commit murder, attempted murder, aggravated battery, and assault with a dangerous weapon"; that they "obtained, used, carried, possessed, brandished, and discharged firearms in connection with enterprise's illegal activities; and that they "managed the procurement, transfer, use, concealment, and disposal of firearms and dangerous weapons within the enterprise."

perpetrators and alleged victims,⁵ and therefore there is a minimal risk that it will be confused or misled by the mere reference to a shooting.

That is also the reason that this evidence is not unduly prejudicial under Rule 403. The only specific prejudice the defendants identify is the risk that “the October 2005 shooting may well be viewed by the jury as a Hobos-related shooting when there is no evidence to support that proposition.” Mot. 2, ECF No. 837. But it is precisely because of this dearth of evidence about the October 2005 shooting that reference to the firearms used is not unfairly prejudicial (in addition to not being confusing, as noted above). The jury would have no basis for making the inference that the defendants fear, and the government has disavowed any intent to argue that inference (and will not be permitted to do so). Moreover, the evidence does not pertain to any particular defendant. It is dry forensic evidence that attempts to prove that the same firearms used in separate murders in 2006 had been used together on a previous occasion, by some unknown individuals. Of the many fertile areas for potential cross examination and argument on this point will be the lack of evidence that the guns were owned or possessed by the same individual(s) in October 2005 and 2006. Indeed, the fact that the guns were used in different shootings in 2006 could support the inference that ownership had changed hands since 2005.

The defendants’ motion in limine is, therefore, denied.



John J. Tharp, Jr.
United States District Judge

Date: October 7, 2016

⁵ To the extent the defendants seek to preclude any evidence or testimony about the October 25, 2005, shooting *other than* the ballistics match, which is relevant to linking two 2006 shootings, their motion is granted (or mooted because no such evidence is anticipated).

KITSAP CO PROSECUTOR'S OFFICE

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