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

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN JENNINGS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gerald Costello

No. 17-1-01867-0

Brief of Respondent

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

1. In his motion in limine, did defense counsel's offer of proof demonstrate the relevance of the victim's methamphetamine usage?
2. Did the trial court act within its broad grant of discretion when it determined that evidence of the victim's methamphetamine consumption would have been more unfairly prejudicial than probative?
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7. Has defendant demonstrated to this Court that the challenged testimony of Mr. Tongedahl was not “otherwise admissible?”
8. Should this Court decline to exercise its RAP 2.5(a) discretion to hear petitioner’s evidentiary claim raised for the first time on appeal?
9. Has petitioner demonstrated that his evidentiary claim amounts to manifest constitutional error sufficient to justify review pursuant to RAP 2.5(a)?
10. Is any error in admitting Mr. Tongedahl’s statement harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Justin Jennings (hereinafter “defendant”) was charged with murder in the second degree (intentional murder) in count one, felony murder in the second degree in count two, and unlawful possession of a firearm in the first degree in count three. CP 5-6. Defendant pled guilty to the unlawful possession of a firearm in the first degree count.¹

¹ See CP-46-55 (statement of defendant on plea of guilty) and CP 127-41 (judgment and sentence).

At trial, defendant was found guilty of manslaughter in the first degree in count one and murder in the second degree (felony murder) in count two. CP 113, 115. Each count carried a firearm enhancement. CP 111, 115; CP 5-6. The manslaughter finding of guilt was later vacated because it merged into the felony murder charge. CP 144-45.

2. FACTS

Gary Tongedahl described the motor home where the killing occurred. 4 VRP 762-66, 775-76. Lance Redman had moved out of the mobile home the day before the shooting occurred. 5 VRP 782. Mr. Tongedahl went to the mobile home on the day of the shooting to help Amber Mecklenburg, an occupant of the mobile home, who had been badly beaten up. 5 VRP 785. Mr. Tongedahl came over to the residence with Chris Burton. 5 VRP 787. Mr. Tongedahl said that he and Mr. Burton were working on a truck located at the residence. 5 VRP 787. Mr. Tongedahl said that along with Mr. Burton and Ms. Mecklenburg, Albert Duane² and Roxanne [Headley].³ Mr. Tongedahl said that he saw two people with bandannas over their faces coming through the back gated area in the back side of the mobile home. 5 VRP 791-93. After they took their bandannas down and pulled them down around their neck, Mr.

² Mr. Tongedahl testified that he knew Mr. Duane as "Tom." 5 VRP 789.

³ Ms. Headley did not testify.

Tongedahl recognized those two people as Lance Redman and defendant.
5 VRP 793.

Mr. Tongedahl testified that Mr. Redman started asking about where his car was. 5 VRP 793-94. While Mr. Redman was asking about where his car was, Mr. Redman and defendant each had a can of bear mace in one hand and a gun in the other hand.⁴ 5 VRP 794. Mr. Tongedahl testified about what Mr. Redman said "I don't remember the whole conversation, but he said, "Well, we need to go inside and figure this out." 5 VRP 794. Mr. Tongedahl did not feel he had much choice in the matter. 5 VRP 795. Mr. Tongedahl, Mr. Redman, and defendant went into the house. 5 VRP 796.

Mr. Tongedahl testified about Mr. Redman and defendant coming into contact with Mr. Burton in the home. 5 VRP 797-99. Mr. Tongedahl described a verbal argument between Mr. Redman and Mr. Burton. 5 VRP 799-802. Both Mr. Redman and defendant were holding bear spray and firearms at that time. 5 VRP 800-01. Defendant did not participate in the argument. 5 VRP 802. "He was just standing there" *Id.* Mr. Burton was not armed. 5 VRP 803.

⁴ There was some uncertainty about when Mr. Tongedahl saw Mr. Redman and defendant with the bear spray and the gun in hand, but no uncertainty about seeing each with holding bear spray and gun.

Mr. Tongedahl testified that the argument became more and more heated. 5 VRP 802. Mr. Tongedahl testified that he told Mr. Burton to “calm down, just leave it be,” then “right after that the defendant came up behind [Mr. Burton] and sprayed him with bear mace.” 5 VRP 803. Mr. Burton then turned around (toward defendant) with a look of shock on his face. 5 VRP 804, 806. Defendant was five feet away from Mr. Burton when he sprayed Mr. Burton. 5 VRP 804.

Mr. Tongedahl testified about Mr. Burton’s reaction: “He was just kind of -- I don't know what he was doing exactly, whether just kind of looking around for something. I think he might have been looking for something to throw or something.” 5 VRP 806. Defendant then backed away from Mr. Burton. 5 VRP 507. Defendant then fired two shots very quickly into Mr. Burton. 5 VRP 808-09. Defendant then “yelled to [Mr. Redman] that they got to get out of there and they ran out the back door.” 5 VRP 809-10. Mr. Tongedahl caught Mr. Burton as he was falling down. 5 VRP 810.

Mr. Duane, present in the room, testified that Lance Redman “charged” Mr. Burton “in an aggressive manner. 6 VRP 984. He kind of ran towards him.” 6 VRP 984. Mr. Redman and Mr. Burton got into a scuffle. Mr. Duane did not see any blows thrown. *Id.* Mr. Duane testified that defendant “came from around behind the counter, raised his hand and

shot a quick one-second burst of bear mace, which I believe struck both Chris and Lance.” 6 VRP 986. The mace appeared to strike the front of Mr. Burton and the back of Mr. Redman. *Id.* At that point, Mr. Redman and Mr. Burton moved apart. 6 VRP 987. “The defendant, after spraying the bear mace, fired two rounds from the semi-automatic handgun in his hand.” 6 VRP 988. Defendant fired those shots at Mr. Burton. *Id.* At the time defendant fired the shots “[i]t was a one-hand firing like this because he still had the bear mace in his other hand, so it was a one-hand firing.” 6 VRP 989. Mr. Duane said that defendant looked at him and said “I got you dog,” then defendant went out the back door and Mr. Redman went out the front door. 6 VRP 990.

Amber Mecklenburg lived in the mobile home. 6 VRP 1039. Ms. Mecklenburg was in a bedroom in the mobile home when the killing happened. 6 VRP 1061-62. She had recent experience being sprayed with bear spray. 6 VRP 1049-52. She testified:

Q: So what's the next thing you recall happening?

A: I recall hearing Lance's voice.

Q: What do you recall hearing?

A: I heard him ask where the car was.

Q: After that what do you recall?

A: I recall Chris starting to answer the question. He was in mid sentence when I heard the bear-mace sound, which I know the sound of bear mace and it makes me extremely uncomfortable, so I was immediately uncomfortable.

Q: So you heard Chris Burton starting to talk, you had heard Lance, and then you heard the sound of bear spray?

A: Yeah. He didn't even let him finish the sentence, so he wasn't even able to tell him anything because he was bear maced immediately.

Q: And then after the sound of the bear spray that you heard, what's the next thing that you recall?

A: I heard the sound of a gun. It was quick.

Q: How many shots did you hear?

A: You know, I don't know how many shots. I'm guessing two to three.

6 VRP 1061-62.

Lyndi Greinke testified that Mr. Redman was her ex-boyfriend. 5 VRP 928. She testified that prior to the shooting she and Mr. Redman had moved out of Ms. Mecklenburg's mobile home. 5 VRP 930-31. When they left, Mr. Redman left his car and his belongings in the backyard of the mobile home. 5 VRP 931. On May 6, 2017,⁵ Ms. Greinke testified that Mr. Redman had learned that his Honda was missing. 5 VRP 932. Mr. Redman made a plan to go back and get information about the Honda. 5 VRP 532-33. Ms. Greinke drove Mr. Redman to the mobile home. 5 VRP 933. Defendant arrived at the mobile home in another car driven by another person. *Id.* 5 VRP 934. The four of them met up at a gas station

⁵ 5 VRP 530.

less than a mile away from the mobile home, then drove to the mobile home. *Id.* Defendant was there as “backup” to Mr. Redman. 5 VRP 935. The plan was “[j]ust to figure out where [Mr. Redman’s] car was.” *Id.*

Ms. Greinke testified that when they arrived at the mobile home, Mr. Redman and defendant got out of the vehicles and proceeded into the backyard. 5 VRP 937. Ms. Greinke saw Mr. Redman and defendant go into the house along with two other people. 5 VRP 938. The next thing she heard was two gunshots. 5 VRP 938. Mr. Redman then came out the front door and then defendant came out the front door. *Id.* Mr. Redman was running. *Id.* Defendant was walking. 5 VRP 938-39. Mr. Redman got into Ms. Greinke’s car. 5 VRP 939. Defendant got into the other car. *Id.* They drove away right away. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT’S *IN LIMINE* RULING EXCLUDING EVIDENCE OF METHAMPHETAMINE IN THE VICTIM’S SYSTEM WAS CORRECT.

a. Defendant’s offer of proof did not establish the relevance of the proffered evidence of methamphetamine usage.

Defense counsel, prior to opening statement, sought to argue that the victim in this case “had been using meth[amphetamine].” 3 VRP 422. Defense counsel only sought to refer to the fact of methamphetamine

use—without any evidence relating to the amount of methamphetamine found in the victim’s system, without any evidence relating to the effect of that methamphetamine on the victim, and without any evidence relating to the effect of methamphetamine on people in general. 3 VRP 421-24.

Defense counsel made the following offer of proof:

When [defendant] walked in and took one look at Chris, there was no question in his mind that he was amped up and that he was on methamphetamine, and, in fact, Chris's -- he knows the look; he's been on the streets for many years -- that Chris's actions further fortified that opinion for two reasons. He saw Chris attack Lance relatively quickly into this process, physically attacked Lance. And not just attacked Lance, but attacked an armed Lance, and that gave him great pause for concern that this man would disregard all safety and that he was so zoned on whatever that he would do this. And then when the young man turned to him, the deceased, he, of course, was concerned about the look that he was seeing that he knew to be methamphetamine ingestion.

3 VRP 422.⁶

The trial court ruled that the proffered evidence of methamphetamine use was inadmissible, and articulated its basis:

This is problematic for multiple reasons on multiple levels. The Court of Appeals have said that even a qualified expert is unable to offer an opinion on the effects of methamphetamine on a person who is deceased because it would not be helpful to the trier of fact because they're unable to offer an opinion on how methamphetamine would

⁶ At trial it later developed that defendant first met the victim in this case on the day that he shot him dead. 8 VRP 1284.

have affected the individual, so therefore even a qualified expert is not allowed to speculate in front of the jury.

Well, what I'm being asked to permit here is essentially an unqualified expert, meaning the defendant, to offer essentially the same opinion, to ask the jury to agree with the defendant that methamphetamine affected the deceased in a way that made him volatile and aggressive, and a qualified expert is not even able to say that. So that is the import of the connection -- that's the only reason that it would be relevant for the jury to know that there was methamphetamine in the deceased's body. The only reason for that to be relevant in this particular case would be for the defendant to attempt to have the jury connect those dots, that the defendant connected them in his mind, that methamphetamine caused the deceased to be aggressive and violent. So if a qualified expert is not able to say that, I'm not going to permit the defendant to say that indirectly by way of offering into evidence what the toxicology results were.

I am very concerned that such evidence, the toxicology results, would invite speculation, that it would be unfairly prejudicial to the plaintiff within the meaning of Evidence Rule 403. It misleads the jury. It confuses the jury. There would be no supporting expert testimony to demonstrate that it really did have this effect, so I just cannot see the relevance of this testimony.

Now, Mr. Jennings, as I've said before, will have full opportunity, if he chooses to testify, to describe what his observations were, what his conclusions were about what he observed, that he thought the deceased was amped up on meth, et cetera. He can speak to those personal experiences and what he observed. But to say that the toxicology report is merely corroborative of what Mr. Jennings will testify to and is therefore relevant, that only begins the inquiry. How can it be corroborative without inviting speculation by the jury, that unanswerable questions and confusion for the jury? So, Mr. Hershman, your opening statement can go up to the point of discussing toxicology results, but I'm not going to

permit you to do that. Everything else that you described and kind of outlined, that's fair game.

3 VRP 425-26.

The jury was instructed on the three elements constituting self defense:

- (1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
- (2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
- (3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

CP 95 (Instruction 16).

Two relevant evidentiary propositions were before the trial court as it considered defendant's motion *in limine*, presented before opening arguments: (1) the victim used methamphetamine; and (2) methamphetamine caused the victim to exhibit a relevant behavior. The former proposition is irrelevant absent proof of the latter. The offer of proof presented by defense counsel included no evidence that tended to show that methamphetamine caused the victim in this case to exhibit any particular behavior. The trial court properly denied defendant's motion for that reason.

Defense counsel argued that defendant would testify that he believed that methamphetamine caused Mr. Burton to act aggressively. 3 VRP 422. Defense counsel maintained that evidence of the presence of methamphetamine in Mr. Burton's body would corroborate ("fortify") defendant's testimony:

I do believe under that scenario it's appropriate to tell the jury, not the tox levels, but that, in fact, the deceased had been using meth because that's exactly what my client saw. So I'm not talking about enough to kill a horse or whatever it is the toxicologist is going to say, but the fact that my client -- you know, one of the things we have to do here is determine not just my client's subjective mind, but was it reasonable. Well, objectively now we can fortify his opinion about this young man.

3 RP 422-23.⁷ Defense counsel did not proffer an expert on the effect of methamphetamine consumption on Mr. Burton.⁸ Nor did defense counsel proffer a foundation sufficient to allow defendant to render a lay opinion

⁷ This Court should note that, Contrary to Appellant's Brief at 10, that defense counsel did not seek to introduce testimony from the medical examiner establishing that Mr. Burton "did indeed have a high level of methamphetamine in his system at the time of the shooting." *Id.* As noted in the quotation above, defense counsel was not seeking to introduce evidence about the "tox levels." 3 VRP 422.

⁸ Defense counsel stated "Well, again, I'm not asking the toxicologist how it affected this person." 1 VRP 97. Expert testimony relating to the effect of methamphetamine consumption on Mr. Burton would have been inadmissible had defense counsel attempted to introduce it. *State v. Richmond*, 3 Wn. App. 2d 423, 435-36, 415 P.3d 1208 (2018); *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786, 802 (2007).

as to the effect of methamphetamine consumption on Mr. Burton.⁹

Defendant's competence as a witness on this issue was only before the court (*in limine*) as it pertained to the "reasonable belief" elements of self defense. 3 VRP 421-29. "Reasonable belief" is what defense counsel explicitly argued. 3 VRP 421-23, 424, 429.

The trial court could not assume, based upon the information it had when the *in limine* motion was heard, that the defendant's proffered self-defense "reasonable belief" methamphetamine testimony was admissible for the truth of the matter asserted. A defendant claiming self-defense need not assert a factually supportable "reasonable belief."

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger

Actual danger is not necessary for a homicide to be justifiable.

CP 99 (Instruction 20). "Reasonable belief" evidence is not admitted because it is true, it is admitted because it is evidence of the defendant's

⁹ A layperson's opinion pursuant to ER 701 that a person's behavior was caused or influenced by methamphetamine requires a foundation. ER 701; *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Such an opinion must be based from the witness' own perceptions and from which a reasonable person could rationally infer the subject matter of the offered opinion." *State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 (1999). If such a foundation could have been laid (extremely unlikely given *Richmond* and *Lewis, supra*), defense counsel did not attempt it.

belief. *Id.*, CP 95. The jury then evaluates that belief to determine whether it is reasonable. *Id.* The jury is not even compelled to evaluate the truth or falsity of a defendant's "reasonable belief" testimony. *Id.*

Defense counsel's *in limine* proffer of evidence failed to demonstrate the necessary foundation for the introduction of evidence that Mr. Burton had consumed methamphetamine. Because there was no evidence that methamphetamine consumption affected Mr. Burton's behavior in any way, there was no relevance in admitting evidence of Mr. Burton's methamphetamine consumption. The simple fact of drug consumption did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Defendant argues that his constitutional rights were violated because the jury did not get to hear that the victim had methamphetamine in his system. However, "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Maupin*, 128 Wn.2d 918, 924–25, 913 P.2d 808 (1996) (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); ER 402.

For the first time on appeal, defendant argues that the fact that Mr. Burton had a high¹⁰ amount of methamphetamine in his system was relevant to assessing defendant's state of mind. However, the discovery of methamphetamine in Mr. Burton's system could have played no role in the formation of defendant's belief at the time defendant killed Mr. Burton because the methamphetamine in Mr. Burton's system was discovered only after defendant killed Mr. Burton. Defendant's theory depends entirely upon the admission of defendant's testimony regarding the effects of methamphetamine consumption not merely as evidence of defendant's pertinent beliefs at the time of the killing, but also as substantive evidence of the effects of methamphetamine consumption on the behavior of a person he had never met before. The latter proposition was not substantiated by an offer of proof.

State v. Duarte Vela, 200 Wn. App. 306, 402 P.3d 281 (2017)

addressed the following facts:

Duarte Vela proffered the testimony of his brother, Alphonso, who would testify that he had a telephone conversation while Menchaca was in prison two or three years earlier during which Menchaca threatened to return to Okanogan and kill Duarte Vela's entire family. Alphonso also would testify that he told Duarte Vela of this threat.

¹⁰ Defense counsel stated: "I do believe under that scenario it's appropriate to tell the jury, not the tox levels, but that, in fact, the deceased had been using meth because that's exactly what my client saw." (emphasis added) 3 VRP 422.

Duarte Vela, 200 Wn. App. at 313. *Duarte Vela* is not particularly helpful to defendant in this case because the facts of *Duarte Vela* present a clear chain of logical relevance:

Here, Duarte Vela sought to introduce Menchaca's threat to kill Duarte Vela's family and Menchaca's past domestic violence not to prove they were true, but for the very relevant purpose of showing the reasonableness of his fear of Menchaca.

State v. Duarte Vela, 200 Wn. App. at 320. *Duarte Vela* is about the insertion of facts (maybe true, maybe false) into the slayer's mind before the slayer killed. This case involves information—a toxicology result—which was unavailable to the slayer when he killed Mr. Burton.

Duarte Vela was about proving what the defendant believed based upon what the defendant heard. The trial court in this case was careful *in limine* not to limit any testimony defendant relating to defendant's beliefs. 3 VRP 426-27. The defendant in this case sought to use the methamphetamine found in Mr. Burton's system to establish not what defendant believed, but rather the truth of what defendant believed.

Defendant's argument on appeal is that he was frustrated in his attempt to prove that his opinion that Mr. Burton was high on methamphetamine really was true. This argument is explicitly made:

However evidence establishing the accuracy of a fact Jennings testified contributed to his fear of mortal injury tended to make the existence of a fact that was of

consequence to the determination of the action (i.e., the reasonableness of Jennings' fear) more probable.

(emphasis added) Appellant's Brief at 16. A hypothetical might be useful in this instance:

The slayer testifies that he arrived at the victim's home and immediately formed the belief that the victim was acting agitated as a result of cookie intoxication. That belief, defendant testifies, contributed along with other variables to create the fear that caused the slayer to kill the victim. At trial the slayer produces no evidence that cookies actually intoxicated the victim, but seeks to introduce the testimony of the medical examiner to prove that the victim had a very great amount of cookies in his system at the time of his death.¹¹

The mere presence of methamphetamine, or cookies, in the body of a person slain, does not make the reasonableness of the slayer's fear more probable. Those substances are just stuff, and unless that stuff causes something relevant, that stuff remains irrelevant stuff.

Defendant asserts: "Without the introduction of the fact that Burton had methamphetamine in his system, Jennings' testimony that

¹¹ Defense counsel clearly sought to exploit the emotional power behind the concept of methamphetamine:

MR. HERSHMAN: No disrespect to the bench. Is there anybody in this courtroom who's going to suggest that methamphetamine doesn't make a person agitated and aggressive? I mean, is there any one of us who would choose to make that argument?

MS. WAGNER: As the Court said, it's one effect; it's one possible effect.

THE COURT: It depends very much on the person. That's my understanding.

1 VRP 99.

Cookies are freighted with much less negative emotional affect.

Burton was high and acting irrationally aggressively [sic] appeared speculative and self-serving.” Appellant’s Brief at 16-17. Appearances reflect plain reality in this instance. Defendant’s testimony was self-serving—he was testifying about his own beliefs in a self defense case. More importantly, defendant’s testimony was unambiguously speculative because his proffered testimony connecting Mr. Burton’s methamphetamine consumption to Mr. Burton’s behavior could not be factually supported by the mere fact of Mr. Burton’s methamphetamine consumption.

Defense counsel at trial sought to avoid the difficulties involved in presenting expert methamphetamine intoxication testimony related in *State v. Richmond*, 3 Wn. App. 2d 423, 435-36, 415 P.3d 1208 (2018) and *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786, 802 (2007) by avoiding expert testimony altogether.¹² This left methamphetamine as just one more substance in the victim’s system. Defendant’s belief—admissible only as his belief—did not serve to “connect the dots,” and connecting the dots is necessary when a proponent seeks to admit evidence of methamphetamine consumption. *State v. Richmond*, *supra*; *State v. Lewis*, *supra*. The trial court did not err when it denied

¹² Nor was non-expert testimony relating to the effect of methamphetamine on Mr. Burton proffered. Defendant proffered no evidence that defendant himself had any knowledge of Mr. Burton prior to the day he shot Mr. Burton dead. 3 VRP 421-29.

defendant's *in limine* motion to admit testimony that Mr. Burton had methamphetamine in his system at the time of his death.

2. ALTERNATIVELY, THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY REGARDING METHAMPHETAMINE IN MR. BURTON'S SYSTEM PURSUANT TO ER 403.

ER 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of misleading the jury. "A trial judge has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact." *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239, 1257 (1997) (citing *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996)). "A trial court abuses its discretion if the decision is manifestly unreasonable such that no reasonable mind could come to that decision, if the decision is not supported by the facts, or if the judge applied an incorrect legal standard. Absent an abuse of discretion, we will not reverse a trial court's decision, even if we may have reached a different conclusion on de novo review." (citations and internal quotation omitted) *State v. Burns*, ___ Wn.2d ___, 438 P.3d 1183, 1188 (2019).

The trial court properly recognized that introduction of evidence that might mislead the jury by falsely suggesting that there was a factual¹³ basis for believing that methamphetamine “amped up” and made Mr. Burton aggressive. 3 VRP 422 (defense counsel’s argument); 425-26 (court’s ruling).

3. THE EVIDENCE IN THIS CASE WAS
SUFFICIENT TO SUPPORT A FELONY
MURDER VERDICT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d

¹³ By “factual,” respondent means supported by some evidence. No such factual basis was proffered *in limine*.

632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

In this case, there was sufficient evidence admitted to establish felony murder in the second degree as the jury was instructed. Defendant committed the crime of assault in the second degree by spraying Mr. Burton with bear spray. The elements of the offense are set forth in Jury Instruction 23 (CP 102).

- a. The incident happened in Pierce County, Washington.

The location where the relevant events happened is located in Pierce County, Washington. 3 VRP 521.

b. Defendant sprayed Mr. Burton with bear spray.

Mr. Duane and Mr. Tongedahl each testified that defendant sprayed Mr. Burton with bear spray. 5 VRP 803 (Tongedahl); 6 VRP 986-87 (Duane).

c. Bear spray is a noxious substance.

Ms. Mecklenburg testified about the extremely debilitating effects of bear spray. 6 VRP 1049-52. Mr. Duane testified that it did appear that it looked like Mr. Burton had been affected by the bear spray.¹⁴ 6 VRP 1032-33. Mr. Tongedahl testified that the bear spray defendant sprayed had rendered it very difficult for him to breathe. 6 VRP 811. Deputy Groat testified that Mr. Burton had been dragged outside to get away from the bear spray that was inside. 3 VRP 523. Deputy Groat testified that there was an irritant coming from the residence which was making people cough—it reminded him of Capsicum spray. 3 VRP 536-37. Defendant himself knew that bearspray was a very powerful noxious substance. 9 VRP 1348. Defendant testified:

Q: You knew what effect it would have certainly on bears, right?

A: I've actually been -- had bear mace deployed on myself.

¹⁴ Mr. Duane also testified that it looked like Mr. Burton was wiping his eyes. 6 VRP 1033.

Q: You couldn't see after you were sprayed, could you?

A: It is most certainly an irritant to both respiratory and eyes that I experienced.

Q: You couldn't see after you were sprayed?

A: I could initially for a few seconds before. I was outside. It would make a huge difference between inside and outside.

Q: It would, wouldn't it?

A: Yes.

Q: It's more concentrated inside, isn't it?

A: It is.

9 VRP 1348. The facts of this case, taken in the light most favorable to the state demonstrate that bear spray is, alternatively, hurtful, offensive, or offensive to the smell—a noxious substance. CP 104.

d. Defendant sprayed Mr. Burton with intent to inflict bodily harm.

Defendant had a gun in one hand and bear spray in the other. 6 VRP 989 (Duane); 5 VRP 800-01 (Tongedahl). Defendant assaulted Mr. Burton with the pepper spray immediately before he assaulted him with the pistol. 5 VRP 808-09; 6 VRP 1061-62; 6 VRP 988. These two acts of violence happened in the course of a verbal argument between the defendant's similarly armed companion and Mr. Burton. 5 VRP 799-802. This evidence is sufficient to establish that defendant intended to inflict bodily harm upon Mr. Burton with the bear spray.

- e. Defendant caused the death of Mr. Burton in the course of and in furtherance of such crime, or in immediate flight from such crime.

Defendant shot Mr. Burton. 5 VRP 808-09 (Tongedahl); 6 VRP 988 (Duane). Mr. Burton was dead when the paramedics arrived. 3 VRP 557. Mr. Burton died as a result of his bullet wounds. 5 VRP 911.

- i. **A rational juror could have found that defendant caused the death of Mr. Burton in the course of and in furtherance of the crime of assault with a noxious substance.**

Defendant shot Mr. Burton immediately after he sprayed him with bear spray. 5 VRP 808-09 (“very quickly”) Tongedahl); 6 VRP 1061-62 (“it was quick”) Mecklenburg); 6 VRP 988 (“The defendant, after spraying the bear mace, fired two rounds from the semi-automatic handgun in his hand.” Duane). A rational juror could have found that the bear mace assault was not complete prior to the shooting.

Assault in the second degree is a “course of conduct” crime. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 986, 329 P.3d 78, 83 (2014). In this case, assault in the second degree was committed when the noxious bear spray was “administered to” Mr. Burton. Instruction No. 23 (CP 102). Such an assault did not happen when defendant pulled the trigger of the bear spray cannister--it happened when the bear spray contacted—was administered to—Mr. Burton. A rational finder of fact could have found

that the bear spray was administered to Mr. Burton over a period of time, from before defendant shot Mr. Burton through the time Mr. Burton was dragged out into cleaner air,¹⁵ and until Mr. Burton died.¹⁶ The testimony of Mr. Duane was clear evidence of the continuing administration of the bear spray indoors:

Q: Did you try and render first aid to Chris Burton at that time?

A: Actually, we did, and because of the bear mace, it was almost impossible to do, so at that point Gary and I picked him up and took him out to the front porch.

6 VRP 982.¹⁷ A rational finder of fact could have readily concluded that the bear spray attack was, to use the language of *Villanueva-Gonzalez*, an “assaultive episode” and that defendant shot Mr. Burton in the course of that assaultive episode. *Villanueva-Gonzalez*, 180 Wn.2d at 986.

Defendant relies upon the implicit (and false) assumption that a completed assault necessarily forecloses the possibility of succeeding “assaultive episodes” joining that completed assault as one course of conduct. *State v. Villanueva-Gonzalez, supra*. The bear spray attack in this case can readily be analogized to a machine gun attack. A one-second

¹⁵ 6 VRP 1066-67.

¹⁶ The bear spray continued to be “administered” to a sheriff’s deputy who later entered the mobile home. 3 VRP 536-37.

¹⁷ Add to this the fact that defendant knew that the confined area of a room would render a bear spray attack more intense. 9 VRP 1348.

trigger pull on a machine gun can spray a large number of bullets into a human being. The first bullet strike in that instance does not “complete” that assault. Every bullet strike gets taken into account. See *State v. Villanueva-Gonzalez*. Similarly, the administration of bear spray in this case had a continuous effect which also must be taken into account. *Id.* A rational finder of fact could readily conclude that Mr. Burton was shot as he was continuously administered bear spray.

A rational juror could also readily have concluded that the shooting of Mr. Burton was in furtherance of defendant’s noxious substance assault of Mr. Burton. Defendant’s shots put Mr. Burton on the ground in the apartment,¹⁸ where he was forced to continue to inhale the bear spray with which defendant had polluted the room.¹⁹ Defendant knew that the bear spray was more intense in a closed room than outside.²⁰ The shooting was plainly an act which continued and intensified the suffering defendant had already imposed upon Mr. Burton. By continuing and intensifying the suffering defendant had already inflicted upon Mr. Burton, defendant acted in furtherance of his noxious substance assault on Mr. Burton.

¹⁸ 5 VRP 810-11.

¹⁹ 3 VRP 523; 3 VRP 536-37; 6 VRP 811; 6 VRP 1032-33; 6 VRP 1049-52; 9 VRP 1348.

²⁰ 9 VRP 1348.

ii. Alternatively, a rational juror could have concluded that defendant shot Mr. Burton in the immediate flight from the bear spray assault.

Defendant shot Mr. Burton immediately after spraying him (and the interior of the mobile home) with bear spray, and he left the mobile home immediately after that. A rational juror could have found that pausing to shoot the same person defendant just sprayed with bear spray did not interrupt defendant's immediate flight from the scene of his assault—it facilitated that flight. Furthermore, a rational finder of fact could have simply rejected the idea that defendant shot Mr. Burton and then decided to flee. A rational finder of fact could have concluded that defendant and Mr. Redman pre-planned their flight from the mobile home from the beginning because they entered the home with weapons in hand and bandannas over their faces—and with two getaway drivers prepositioned and ready to go.²¹ Defendant's contrary argument is not an argument the jury was compelled to accept.

f. Mr. Burton did not participate in getting himself sprayed with bear spray.

Mr. Burton was shocked that defendant sprayed him with bear spray. 5 VRP 804, 806. Defendant came up from behind Mr. Burton to

²¹ The testimony of one of the getaway drivers (Ms. Greinke) is summarized in the fact section of this brief.

spray him with bear spray. 5 VRP 803 (Tongedahl); 6 VRP 986. Mr.

Burton did not participate in his own assault. *Id.*

- g. The evidence in this case was sufficient to prove felony murder predicated upon assault with a noxious substance.

A rational finder of fact, viewing all of the evidence in the light most favorable to the State, could have found that defendant shot Mr. Burton in the course of his bear spray assault of Mr. Burton and in furtherance of that attack. Alternatively, a rational finder of fact could have found that defendant shot Mr. Burton in the course of fleeing from his assault of Mr. Burton. The arguments made by defendant do not view the evidence in the light most favorable to the State, do not draw all reasonable inferences from the evidence in favor of the State, and do not interpret those inferences most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

- 4. THE TRIAL COURT DID NOT ERR BY FAILING TO STRIKE A PORTION OF MR. TONGEDAHL'S TESTIMONY BECAUSE NO REASONABLY SPECIFIC OBJECTION WAS MADE.

The "objection" presented in this case was the most general objection conceivable:

Q: I want to go back to the seconds before the shooting. Do you agree with the statement that it was as Lance -- strike that -- as Chris turned and made a throwing motion in Justin's direction, that Justin fired two shots from a handgun?

A: Okay.

Q: Do you agree with that statement?

A: Yes.

Q: Do you agree with the statement that you were not even aware that Justin had a handgun until that moment?

A: I agree that I said that at that time? Yeah.

Q: It's a two-part question then. Thank you for the clarification. Do you agree that you made that statement to law enforcement on the day in question?

A: I agree that upon that day I just witnessed my closest friend being murdered. I just announced to his mother about the incident. I had been outside for six to eight hours --

Q: I didn't ask you any of this, sir.

A: -- in the cold without being able to take a jacket or a cigarette.

MS. WAGNER: Your Honor, I'm moving to strike.

A: I was under a lot of stress at that moment. I didn't remember every detail.

MR. HERSHMAN: **Moving to strike, Your Honor.**

THE COURT: I'm going to deny that motion. The witness has been given an opportunity to explain what he said at an earlier time and he has just done so. Next question, please.

(emphasis added) 5 VRP 873-74.

- a. ER 103 precludes defendant from asserting his claim of evidentiary error.

The Rules of Evidence have not been constitutionalized.

Chambers v. Mississippi, 410 U.S. 284, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). States may permit any evidentiary objection to be forfeited or waived, whether there is a constitutional component to that objection or not.²² *Wainwright v. Sykes*, 433 U.S. 72, 86–87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327, 129 S. Ct. 2527, 2541, 174 L. Ed. 2d 314 (2009). ER 103(a) is such a rule:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context . . .

ER 103(a)(1). ER 103(a)(1) clearly bars defendant’s “right to jury trial” claim, and the State makes that argument *infra*.

RAP 2.5(a) does not supersede ER 103(a) in this case. Although RAP 2.5(a) authorizes this Court to review a constitutional argument presented for the first time on appeal,²³ the Supreme Court in *State v.*

²² “No procedural principle is more familiar to [the United States Supreme Court] than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L. Ed. 834 (1944).

²³ *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015); *Faust v. Albertson*, 167 Wn.2d 531, 547, 222 P.3d 1208, 1217 (2009).

Quaale, 182 Wn.2d 191, 340 P.3d 231 (2014) has already provided this Court with a template for addressing the evaluation of ultimate issue evidence claims when presented on direct appeal.

State v. Quaale conducted a two part analysis. The first part of the analysis was an evaluation of the testimony under the rules of evidence.

State v. Quaale, 182 Wn.2d at 198-199. There is no ambiguity in the Supreme Court's holding that admissibility under the evidence rules is a threshold question:

Under [*State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000)], the trooper's opinion was inadmissible, and the trial court should have excluded the testimony. We must now determine if the inadmissible testimony on the ultimate issue of Quaale's impairment while driving amounted to an improper opinion on guilt.

State v. Quaale, 182 Wn.2d at 199.

State v. Quaale differs from this case in that a timely objection was raised in *State v. Quaale* and no timely objection was raised in this case. *State v. Quaale*, 182 Wn.2d at 195. That difference should not matter in this case because the Supreme Court in *Quaale* relied upon its conclusion that “. . . the trial court should have excluded the testimony.”

State v. Quaale, 182 Wn.2d at 199. In this case, this Court cannot conclude that the trial court “should have excluded the testimony,” because defense counsel never presented a reasonably specific objection telling the trial court why it should have excluded the testimony. 5 VRP

873-74. *State v. Quaale* directs the appellate courts to apply the rules of evidence first and only address the ultimate issue constitutional question if the evidentiary analysis results in the conclusion that the trial court should have excluded the testimony. *Id.* In this case, ER 103(a) should act as a threshold bar.

“A party objecting to evidence must designate the particular portion of the evidence to which he objects and state why the evidence is improper, so as to afford the party offering the evidence an opportunity to obviate the objection or waive the testimony.” *State v. Parker*, 9 Wn. App. 970, 971, 515 P.2d 1307, 1308 (1973). This has been the rule for a very long time.

A general objection which does not specify the particular ground on which it is based is insufficient to preserve a question for appellate review. Objections must be accompanied by a reasonably definite statement of the grounds therefor so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect. 4 Jones on Evidence (5th ed.) 1836, § 976; *Marr v. Cook*, 51 Wn.2d 338, 318 P.2d 613 [(1957)]; *White v. Fenner*, 16 Wn.2d 226, 133 P.2d 270 [(1943)]; *United States v. Sessin*, [84 F.2d 667 (10th Cir. 1936)].

Presnell v. Safeway Stores, Inc., 60 Wn.2d 671, 675–76, 374 P.2d 939, 942 (1962). See also *State v. Owens*, 15 Wn. 468, 469–70, 46 P. 1039, 1040 (1896) *State v. Bridgham*, 51 Wash. 18, 22, 97 P. 1096, 1098 (1908); *Rowe v. Dixon*, 31 Wn.2d 173, 180, 196 P.2d 327, 332 (1948);

Lujan v. Santoya, 41 Wn.2d 499, 502, 250 P.2d 543, 545 (1952). The rule has been recently restated.

While Korum did raise the admissibility of the police report database evidence under ER 404(b) in his pro se brief at the Court of Appeals, defense counsel also raised its admissibility under ER 403 both in the Court of Appeals and in this court. However, at trial, Korum objected only to the admissibility of the evidence based on foundation, not on ER 403, and the trial court overruled his objection. When the trial court overrules a specific objection and admits evidence, we “will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.” *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 10, at 25 (2d ed.1982) and citing ER 103). Therefore, we decline to address the admissibility of evidence of the police report database link under ER 403. RAP 2.5(a).

State v. Korum, 157 Wn.2d 614, 648, 141 P.3d 13, 31 (2006).²⁴

Defendant argues “[i]ndeed from a constitutional standpoint, the trial court’s error here was no different than in [*State v. Black*, 109 Wn.2d 336, 349, 745 P.3d 12 (1987)].” *Black* does not advance petitioner’s argument for two reasons. First, *Black* explicitly applied ER 103—

²⁴ See also *State v. Burns*, ___ Wn.2d ___, 438 P.3d 1183, 1192 (2019): “Under ER 103(a)(1), “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless ... a timely objection or motion to strike is made, stating the specific ground of objection.” Applying ER 103 and requiring a defendant to object at trial “protects the integrity of judicial proceedings by denying a defendant the opportunity to sit on his rights, bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting his rights for the first time on appeal.” *O’Cain*, 169 Wn. App. at 243, 279 P.3d 926. Requiring an objection under ER 103 is also consistent with the discovery and disclosure process of criminal procedure.”

something defendant has not done in this case. *State v. Black*, 109 Wn.2d at 340-41. In *State v. Black*, the defense counsel did present a reasonably specific objection and that objection was presented on appeal. *Id.* In this case, no specific objection was presented. Second, in *State v. Black*, no constitutional provisions were addressed—the opinion testimony presented was addressed solely on non-constitutional evidentiary grounds. *State v. Black*, 109 Wn.2d at 341-350.

State v. Johnson, 152 Wn. App. 924, 933, 219 P.3d 958, 962 (2009),²⁵ decided before *State v. Quaale*, addressed “impermissible opinion” testimony. *State v. Johnson*, 152 Wn.2d at 930. The Court of Appeals, in evaluating the defendant’s constitutional claim, concluded that the opinion was “inadmissible,” even though no evidentiary objection was presented at trial. This approach should not survive *State v. Quaale*.

- b. Alternatively, defendant’s argument fails because defendant’s argument cannot survive the first prong of the *State v. Quaale* analysis.

The admissibility question in this case is not clean cut like the admissibility question presented in *State v. Quaale*. In *State v. Quaale*, an

²⁵ In *State v. Dunn*, 125 Wn. App. 582, 585, 105 P.3d 1022, 1024 (2005) a timely objection was presented. The record does not reveal whether or not an objection to vouching testimony was preserved in *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992). In *State v. Sutherby*, 138 Wn. App. 609, 158 P.3d 91 (2007) the record seems to suggest that no contemporaneous objection was made, but it is not clear.

opinion on an ultimate issue was expressly sought by the State. *State v. Quaale*, 182 Wn.2d at 195. In *State v. Johnson*, the Court of Appeals concluded that ultimate issue evidence “really tells us only what [the witness] believed—and the other witnesses thought [the witness] believed—about [the victim’s] accusations. *State v. Johnson*, 152 Wn. App at 933. In this case, in a finding that has not been challenged on appeal, the trial court admitted Mr. Tongedahl’s testimony on an entirely different theory:

THE COURT: I'm going to deny that motion. The witness has been given an opportunity to explain what he said at an earlier time and he has just done so. Next question, please.

5 VRP 874. Allowing a witness to explain an apparently inconsistent statement is a valid exercise of the trial court’s considerable evidentiary discretion. *State v. Ashley*, 186 Wn.2d 32, 44, 375 P.3d 673, 679 (2016); *State v. Magers*, 164 Wn.2d 174, 185-86, 189 P.3d 126 (2008); *State v. Nelson*, 131 Wn. App. 108, 116, 125 P.3d 1008 (2006).

Defendant presents Mr. Tongedahl’s testimony as an open and shut case of impermissible ultimate issue opinion testimony while ignoring the plainly valid basis upon which the trial court admitted the testimony. In other words, defendant asks this Court to ignore *State v. Quaale*. *State v. Quaale* requires an evidentiary admissibility analysis. *State v. Quaale*, 182 Wn.2d at 196-99. This Court cannot conduct an evidentiary

admissibility analysis in this case without addressing ER 403. This appeal should be denied because defendant has failed to present an ER 403 analysis.

Alternatively, if this Court decides to frame defendant's unmade trial objection and also decides to *sua sponte* consider evidentiary admissibility pursuant to ER 403,²⁶ this Court should find that defendant has failed to demonstrate that ER 403 barred admissibility of Mr. Tongedahl's testimony in this case. The trial court has considerable discretion in evaluating testimony implicating an ultimate issue. *State v. Quaaale*, 182 Wn.2d at 196-97. See also *State v. Nelson*, 152 Wn. App. 755, 759, 219 P.3d 100, 102 (2009); *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573, 575 (1995); *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Jones*, 59 Wn. App. 744, 751, 801 P.2d 263 (1990). To prevail in an ER 403 objection, an appellant must demonstrate that the trial court abused that discretion. *State v. Yates*, 161 Wn.2d 714, 768-69, 168 P.3d 359, 389 (2007). Defendant "cannot claim an abuse of discretion for denying his request on a theory never presented to the trial court." *State v. Lile*, 188 Wn.2d 766, 787 (n.14), 398 P.3d 1052, 1062 (2017).

²⁶ An unmade ER 403 objection is not preserved for appeal. *State v. Elmore*, 139 Wn.2d 250, 284, 985 P.2d 289, 310 (1999). That is another reason this Court should not consider defendant's ultimate issue question presented for the first time on appeal.

Alternatively, should this Court decide to proceed with consideration of defendant's unmade ER 403 objection, this Court must also consider "the probable effectiveness or lack of effectiveness of a limiting instruction." *State v. Renfro*, 96 Wn.2d 902, 913 (n.2), 639 P.2d 737, 743 (1982) (quoting the official comment to ER 403). Had defense counsel asked for a limiting instruction explicitly limiting admissibility to the trial court's stated relevant purpose, the trial court almost surely would have granted it.²⁷

This Court cannot conclude that the trial court abused its discretion in conducting an erroneous ER 403 prejudice-probativity balance because the trial court was never asked to exercise its discretion.²⁸

c. Alternatively, Mr. Tongedahl's testimony was "otherwise admissible."

State v. Quale stated:

The state correctly points out that, under Washington's rules of evidence, opinion testimony is not objectionable merely because it embraces an ultimate issue that the jury must decide. ER 704 states, "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

²⁷ Both the State and the defense sought to have Mr. Tongedahl's testimony struck. 5 VRC 873-74. Given that the trial court only saw Mr. Tongedahl's testimony as an explanation for his inconsistent testimony, a limiting instruction argument should have been successful.

²⁸ See *Bell v. State*, 147 Wn.2d 166, 182(n.2), 52 P.3d 503, 511 (2002) for a refusal of the Supreme Court to conduct a *de novo* ER 403 analysis. See also *State v. Rosalez*, 159 Wn. App. 173, 178, 246 P.3d 219, 221 (2010).

An opinion that embraces an ultimate issue, however, must be **otherwise admissible**. When opinion testimony that embraces an ultimate issue is inadmissible in a criminal trial, the testimony may constitute an impermissible opinion on guilt.

(emphasis added, internal quotation and citation omitted) *State v. Quaale*, 182 Wn.2d at 197. As discussed above, the testimony of Mr. Tongedahl was admitted to explain his inconsistent testimony. 5 VRP 873-74. That testimony is “otherwise admissible” for that reason. *State v. Quaale*, 182 Wn.2d at 197. Petitioner has failed the first prong of *State v. Quaale*.

- d. Alternatively, this Court should decline to exercise its RAP 2.5(a) discretion to review this claim.

Appellate review normally does not extend to arguments not raised in the trial court. RAP 2.5(a). Courts, however, have discretionary authority to consider issues of manifest constitutional error that were not raised in the trial court, provided that an adequate record exists to consider the claim. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

State v. Casimiro, ___ Wn. App. ___, 438 P.3d 137, 139 (2019). This Court should not consider this argument presented for the first time on appeal.

Defendant was represented by competent counsel²⁹ and a competent lawyer will sandbag with a non-specific objection if the rules

²⁹ Counsel is presumed competent. *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L. Ed. 2d 657 (1984); *State v. Garrett*, 124 Wn.2d 504, 518–19, 881 P.2d 185 (1994).

permit it. This case involves no prosecutorial overreach—the State lodged the first motion to strike the subject testimony in this case. 5 VRP 873-74. This case involves evidentiary complication which a reviewing court is not suited to review de novo. This case further involves the abuse of discretion standard where the trial court was not ever asked to exercise its discretion. 5 VRP 873-74.

This case can be analogized to the prosecutorial misconduct cases which only reverse in the absence of a contemporaneous objection if the conduct was so flagrant and ill-intentioned that no curative instruction would have obviated any prejudicial effect on the jury. *State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776, 800 (2018). In this case, Mr. Tongedahl’s testimony supported both a proper inference (explaining inconsistency) and an improper inference (the “murdered” opinion). A curative instruction would have obviated the whole issue because “jurors are presumed to follow instructions.” *State v. Greiff*, 141 Wn.2d 910, 923, 10 P.3d 390, 396 (2000).

Even if this Court decides that it may override ER 103 in this case pursuant to RAP 2.5(a), this Court should nevertheless exercise its discretion and conclude that it should not override ER 103. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

- e. Alternatively, no manifest constitutional error is presented in this case.

A manifest error is one which is “unmistakeable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1, 13 (2008). Mr. Tongedahl made the following statement:

Q: It's a two-part question then. Thank you for the clarification. Do you agree that you made that statement to law enforcement on the day in question?

A: I agree that upon that day I just witnessed my closest friend being murdered. I just announced to his mother about the incident. I had been outside for six to eight hours –

Q: I didn't ask you any of this, sir.

A: -- in the cold without being able to take a jacket or a cigarette.

MS. WAGNER [prosecutor]: Your Honor, I'm moving to strike.

5 VRP 873-74. While “my closest friend being murdered,” can be viewed in isolation as an objectionable opinion on guilt, when viewed in context it is evidence of a distracted person under perhaps the greatest stress of his life. The former inference could be manifest constitutional error but the latter inference is entirely appropriate. Both inferences can be supported with argument, but the latter inference—the inference that the trial court actually made—is the inference that should prevent this court from finding manifest constitutional error. 5 VRP 874. The trial court let Mr. Tongedahl’s testimony stand for a good reason. It is not “unmistakeable,

evident or indisputable” that the trial court made a mistake—especially given that a curative instruction, if requested, would have obviated every possibility of error.

- f. Alternatively, any error was harmless beyond a reasonable doubt.

Defendant testified that he shot Mr. Burton. 9 VRP 1331.

Everyone else present in the room and not invoking the Fifth Amendment testified that defendant shot Mr. Burton. 5 VRP 808-09 (Tongedahl); 6 VRP 988 (Duane).³⁰ The identity of the slayer was not an issue in this case. Appellant’s Brief vastly over-relies upon the supposed powerfulness of eyewitness testimony. While eyewitness testimony might warrant careful scrutiny in a case where the slayer’s identity was a significant issue at trial, this is not that case.

Mr. Tongedahl’s statement that he had just witnessed Mr. Burton’s murder was admitted to explain the inconsistency of Mr. Tongedahl’s recollection. 5 VRP 874. The “just witnessed my closest friend being murdered” statement weakened rather than buttressed the persuasive value of Mr. Tongedahl’s “murdered” statement. The opinion of a person who has just witnessed his best friend’s murder is more likely to be questioned by the finder of fact than the authoritative opinion testimony of a police

³⁰ Mr. Redman invoked the Fifth Amendment. 3 VRP 597-600.

officer (*State v. Quaale, supra*) or a wife's emotionally charged opinion of her husband's guilt (*State v. Johnson, supra*). If Mr. Tongedahl's statement expressed an opinion, it expressed a weak opinion.

Mr. Tongedahl's testimony was not admitted as a lay opinion on guilt. The trial court admitted the testimony as "an opportunity to explain what he said at an earlier time" 5 VRP 873-74. Nothing in the record suggests that the jury was led or encouraged to consider Mr. Tongedahl's testimony as an opinion on guilt.

The factual basis underpinning Mr. Tongedahl's "just witnessed my closest friend being murdered" statement was also available to the jury. Mr. Tongedahl testified that defendant and Mr. Redman each entered the mobile home with a bandanna over the face, a gun in one hand and pepper spray in the other. 5 VRP 793-94. He testified that he saw Mr. Burton in an argument with Mr. Redman³¹ and defendant was "just standing there."³² In the course of Mr. Burton's argument with Mr. Redman, defendant sprayed Mr. Burton with pepper spray and then fired two shots very quickly into Mr. Burton. 5 VRP 804-09. Given what Mr. Tongedahl testified to about the killing, it would be shocking if Mr. Tongedahl did not believe that his best friend had just been murdered.

³¹ 5 VRP 799-802.

³² 5 VRP 803.

The jury was instructed to evaluate those facts and come to their own conclusion. CP 78. If the jury considered Mr. Tongedahl's statement as an opinion at all, the jury rejected it. Defendant was not found guilty of intentional murder, but rather manslaughter in the first degree. CP 110, CP 88; CP 112.

Defendant's murder conviction was a felony murder conviction. CP 115; CP 102. Mr. Tongedahl's "just witnessed my closest friend being murdered" statement could not have reasonably influenced a felony murder conviction predicated upon defendant's causing the death of Mr. Burton in the course of or in furtherance of a bear spray assault on Mr. Burton or in immediate flight therefrom. CP 102. If Mr. Tongedahl's statement was an opinion about murder, and if the jury interpreted it as an opinion about murder, there remains is no reasonable way any juror would interpret such an "opinion" as anything relevant to felony murder predicated upon a bear spray assault. That is too farfetched.

The jury's rejection of intentional murder, combined with Mr. Tongedahl's admission that his ability to relate facts was compromised, combined with the lack of emphasis on any opinion aspect of Mr. Tongedahl's testimony all demonstrate that this Court should be convinced beyond a reasonable doubt that the jury would have reached the same felony murder verdict absent the admission of Mr. Tongedahl's

contested testimony. *State v. Romero-Ochoa*, ___ Wn.2d ___, 440 P.3d 994 (2019).

5. THE STATE AGREES THAT BOTH THE \$200.00 FILING FEE AND THE \$100.00 DNA FEE SHOULD BE STRUCK FROM THE JUDGMENT AND SENTENCE.

D. CONCLUSION.

Defense counsel proffered no connection between Mr. Burton's methamphetamine consumption and Mr. Burton's behavior. The trial court properly excluded the evidence of Mr. Burton's amphetamine consumption as irrelevant and as far more unfairly prejudicial than probative.

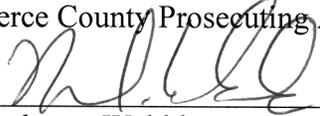
Sufficient evidence supported the felony murder charge in this case.

Mr. Tongedahl's testimony explaining his statement made after he had witnessed a killing was relevant evidence. It could be sanitized with a curative instruction, but defense counsel never sought one. No appellate issue is presented by that testimony. If this Court finds that an appellate issue is presented, this Court should find no error, or find that any error is harmless beyond a reasonable doubt.

The DNA fee and the criminal filing fee should be struck. In all other respects, the judgment in this case should be affirmed.

DATED: June 11, 2019

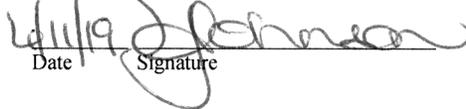
MARY E. ROBNETT
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

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



Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 11, 2019 - 1:49 PM

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