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In the
Court of Appeals for the State of Washington
Division Two

In Re the Personal Restraint of:

VERNON CURRY,
Petitioner.

**PERSONAL RESTRAINT PETITION WITH LEGAL ARGUMENT
AND AUTHORITIES**

Pierce County Superior Court No. 14-01-03668-1;
Court of Appeals No. 49026-9-II

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I. STATUS OF PETITIONER

Vernon Curry (“Curry”) is currently in the custody of the Department of Corrections, serving a sentence of 570 months for convictions of murder in the first degree and unlawful possession of a firearm in the first degree. *See Appendix, Attachment “A,” Felony Judgment and Sentence.*

II. GROUNDS FOR RELIEF

Curry's continued restraint is unlawful because his conviction and sentence violates the Constitutions of the United States and Washington and the laws of the State of Washington. RAP 16.4(c)(2). Curry seeks relief from his restraint based on the following legal claims:

GROUND ONE: Curry’s continued restraint is unlawful and unconstitutional because he was deprived of his right to effective assistance of trial counsel under the Sixth amendment to the United States Constitution and article I, § 22 of the Washington State Constitution when his trial counsel (1) failed to challenge the State’s expert’s firearm ballistics testimony, (2) failed to move for a mistrial on the basis of Karin Curry’s hearsay testimony, (3) failed to object to Karin Curry’s 911 call on Confrontation Clause grounds, (4) failed to seek a limiting instruction regarding the 911 call, and (5) failed to seek a limiting instruction regarding the State’s “Y Gang” evidence.

GROUND TWO: The trial court erred and caused a miscarriage of justice by admitting Karin Curry’s 911 call.

GROUND THREE: Curry’s conviction and sentence is unlawful and unconstitutional because the cumulative effect of the errors raised herein deprived him of his rights to due process and a fair trial.

GROUND FOUR: Curry's conviction and sentence is unlawful and unconstitutional because his appellate counsel was ineffective for failing to appeal the issues set forth herein.

III. STATEMENT OF THE CASE

1. The shooting.

On September 7, 2014, at approximately 4:00 a.m., Michael Ward, junior, was shot multiple times and killed while he sat in his vehicle near an after-hours club in Tacoma, Washington. *See, Appendix, Attachment "B," Combined Verbatim Report of Trial Proceedings¹* ("VRP"), at 242-46, 276. While multiple witnesses were present in the area, there were no eyewitnesses to the shooting and no witnesses identified Curry as having been in the area of the shooting. VRP.

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

¹ Appendix Attachment "B" is bookmarked by volume and page number in electronic format.

the first gunshots. VRP 178, 182. Lt. Maule stopped his chase of the person and returned to the scene of the shooting. VRP 182.

Aaron Brown, a friend of Ward's, testified that on the night Ward was killed, both men were at an after-hours club "shooting dice". VRP 312, 315-16. Before the shooting, two women at the club began fighting, and law enforcement arrived to stop the fight. VRP 317. Later, about ten minutes before the shooting, Brown had a conversation with Ward while Ward sat in his parked vehicle. VRP 317. When the conversation ended, Ward drove down the street and Brown went back to shooting dice. VRP 322. Brown then heard more than three nearby gunshots and got on the ground to avoid being hit. VRP 325. About thirty seconds later, Brown saw Ward's vehicle go into reverse and park on the side of the street. VRP 327-328. Brown then saw another vehicle come up the street and heard more gunshots. VRP 330. In response, Brown ran and hid in some nearby bushes. VRP 333.

Another friend of both Ward and Curry, Isaiah Campbell, likewise testified he was present near the after-hour club on the night Ward was killed. VRP 363-64, 396. He spoke with Ward as Ward was driving by in his vehicle sometime after 3:00 a.m. VRP 366-367. Minutes later, he saw a tall black male wearing gloves walking down the center of the street in the direction of Ward's vehicle. VRP 372-76. Then, about thirty seconds

after seeing the man, he heard five or six gunshots down the block and saw four or five people scatter from the area of Ward's vehicle. VRP 370, 378-79. He then saw Ward's vehicle reverse and park near him, at which point Ward said to Campbell that Ward had been shot. VRP 380.

When Ward parked his vehicle near him, Campbell observed a firearm in Ward's vehicle and observed another vehicle driving down the street driven by the gloved man he observed previously. VRP 383. Campbell then retrieved the firearm from Ward's vehicle and began firing it in the direction of the other vehicle driving by. VRP 383.

Xavior Henderson, another man who described himself as a friend of both Ward and Curry, saw Ward's vehicle in the area of the after-hours club on the night of September 7 but did not see Ward on that occasion. VRP 432. As he was shooting dice with Campbell and Brown, Henderson likewise heard gunshots. VRP 426, 435. In response, he ran to a brick wall for cover and began shooting in the direction of the shots. VRP 437, 441. Henderson previously told law enforcement that he saw a man in a ski mask commit the shooting, but during his trial testimony denied witnessing the shooting or seeing the shooter. VRP 450-51, 469. The firearms that Campbell and Henderson used were never recovered. VRP 1093-1094.

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

Detective Jeffrey Katz was the lead detective in this case. VRP 1220. His investigation revealed that no one in the club saw the shooting that led to Ward's death.² VRP 1226. However, surveillance video captured the suspect walking towards Ward's vehicle. VRP 1303-04. The video depicted a black male wearing a dark t-shirt, black jeans, Jordan style shoes,³ and gloves, and showed him pulling down a mask over his face. VRP 1304. Henderson was the initial suspect, and a bulletin was put

² Det. Katz testified also that there was no evidence to suggest that Campbell or Henderson were involved in the homicide. VRP 1238. The defense objected that this testimony went to the ultimate issue of guilt and moved for a mistrial. VRP 1243-48, 1272-81. The court was uncomfortable with this line of questioning, but denied the motion for a mistrial, instead providing a limiting instruction to the jury. VRP 1274.

³ The defense called Edward Baker, a private consultant on video surveillance, image analysis, and professional instructor in the forensic sciences, who worked in the Tacoma Police Department for 24.5 years. VRP 1452-1485. He was asked to do a comparison of three pairs of shoes that were in custody, shoes that were shown worn by a subject in photographs, and photos of the suspected shooter obtained from the surveillance video in this case. VRP 1455. He testified that the suspect's shoes were not the same as Curry's shoes seized by police. VRP 1467-77.

out requesting help in locating him. VRP 1246. He was ultimately picked up and detained by the Gang Unit and brought to police headquarters. VRP 1246.

2. Curry's alibi defense.

Curry testified on his own behalf. VRP 1557-1582, 1690-1710. He testified he did not own or possess a gun on September 7, 2014, and stated that he knew Ward since they grew up together. VRP 1574. He testified that, on the evening of September 6, flowing into the early morning of September 7, he went to a club in Seattle with his then-girlfriend Marissa Woods. VRP 1565-66. The two of them left Seattle in two different cars, arriving back to Curry's residence in Tacoma between 3:00 and 3:30 a.m. VRP 1565-66. The two of them and they did not leave his house until the next morning. VRP 1565-1566. When they woke up, Curry and Woods went back to the Seattle area together, but they got in an argument so Curry departed and went back to Tacoma. VRP 1611. Curry testified that he heard about the shooting of Ward when someone called or texted him that morning. VRP 1566.

Woods also testified, corroborating Curry's testimony that the two of them were at a club in Seattle celebrating Woods' birthday until approximately 2:30 a.m. VRP 1419. This testimony was corroborated further by a photograph showing Woods and Curry at the Seattle club on

September 7. VRP 1419. She testified that after the club closed, they left for Tacoma and went to Curry's house, had sex, and went to sleep. VRP 1420-21, 1429, 1432. The two of them remained at Curry's house until the following day. VRP 1420-21, 1429, 1432. She could not be certain of the time she woke up but thought it was 7:00 or 7:30 in the morning. VRP 1437.

She testified that she and Curry then went back to Seattle the next day and spent the day together until 5:00 p.m. the following Sunday. VRP 1439, 1445. Curry testified that Woods had her days mixed up, as it was actually Friday that the two of them spent the day together in Seattle, and that they parted company on Sunday following an argument in the morning. VRP 1611.

3. YLyfe and gang evidence.

Curry was involved in a business venture called YLyfe. VRP 1592. YLyfe was identified as a record, video and media company involved with hip hop music. VRP 1592. Curry denied that this hip-hop music condoned street violence when cross-examined by the State. VRP 1592. The State also asked Curry if he had other business dealings with entities called YG Entertainment or Young Gangster Entertainment, which Curry denied. VRP 1593. The State then sought to impeach Curry with evidence of a hip-hop video produced by YLyfe that allegedly promoted street violence.

VRP 1600- 1601, 1616. The defense objected, indicating that it was a backdoor method to improperly introduce alleged gang evidence. VRP 1595. Curry made an offer of proof that the referenced video was a political one about the death of Trayvon Martin. VRP 1620. The court excluded the video, but allowed a photo showing Curry associated with the term "Y Gang". VRP 1623. The court mistakenly believed that Curry had denied involvement with Y Gang, when in fact he was only questioned about YG Entertainment or Young Gangster Entertainment. VRP 1623. Curry then identified a photo of him posing in a "Y Gang Entertainment" photo. VRP 1698-1699. Curry's counsel declined a limiting instruction regarding the gang evidence.

4. The mask and gun.

Karolina Henson and Cory Foote, a mother and son, lived together at 3816 South Park Avenue. VRP 711, 728-44. In the early morning hours of September 7, 2014, Foote saw a person run in front of a neighbor's house. VRP 711-12. He described the person as a black male, between 5'10" - 6'2", 180-220 pounds, wearing jeans and a t-shirt, with hair 1" long or shorter. VRP 711-712. Foote observed some moving vehicles around the time of the shooting, one that he described as a red Acura that stopped near his house. VRP 714-715. He observed a different person get out of

the Acura.⁴ VRP 716. He described the man exiting the Acura as shorter, black, wearing sweat pants and a baseball cap, and he observed the man looking for something in the bushes. VRP 715, 718.

Hours after the shooting, Henson discovered a hat, described as a beanie, in her yard. VRP 733-34. Det. Katz searched the area where the beanie was discovered, but did not find any other possible evidence. VRP 1231. On September 17, 2014, ten days after the shooting, Henson found a gun on the right side of the house in plain view near the fence line and reported it to the police. VRP 736-737.

Jennifer Hayden testified that she is a Forensic Scientist with the Washington State Patrol Crime Laboratory in the DNA Unit. VRP 956-1003. Hayden testified that the “beanie” Henson discovered in her yard, which Hayden described as a “mask,” contained DNA that matched a reference sample obtained from Curry. VRP 975.

At the request of defense on February 16, 2016, additional testing for the presence of saliva was conducted with defense expert, Mr. Milne, present. VRP 976. The defense DNA expert found a second profile on the back side of the mask. VRP 1001.

⁴ Foote did not notice any front or rear damage to the Acura. VRP 716. Curry later testified that his Acura had front and rear damage. VRP 1562.

Curry testified that his black Dodge Challenger had been broken into and a theft occurred around June 2014, in the area of the after-hours club. VRP 1571, 1575. A diamond necklace, a watch, his iPad, his iPod, and a container containing merchandise from the company was taken. VRP 1572. Curry testified that the mask recovered by police was probably one of the masks he is seen wearing during a YLyfe photo shoot, but that it would have been in the merchandise container previously stolen from his car. VRP 1581, 1695.

No DNA profile was obtained from the gun, a .40 caliber Sig Sauer, because the amount of DNA recovered was insufficient testing. VRP 994. There were also no latent fingerprints found on the gun or the magazine. VRP 940. Police ran a “trace” on the recovered firearm, which revealed that it was stolen during a burglary in 2012. VRP 1298. Curry was not linked to the burglary or the owner of the weapon. VRP 1298.

Det. Katz obtained a search warrant to search Curry’s residence for evidence related to the murder. VRP 1291. No clothing or other items linked to the murder was recovered from Curry's home in executing the search warrant. VRP 1291. A noticeable amount of blood was located on the outside of Ward's vehicle following the shooting, but no items of clothing taken from Curry’s home were tested for blood splatter. VRP

1341-42; *see Appendix, Attachment “C,” State’s Powerpoint Presentation* at 42, 67.

5. Expert ballistics testimony

At trial, the State’s ballistics expert witness, Brenda Walsh, testified definitively that the bullets that killed Ward came from the .40 caliber Sig Sauer that was retrieved from the yard at 3816 South Park. See VRP 1007-1045. She stated that she has the ability to conduct comparisons of bullets and cartridge cases to bullets and cartridge cases test fired from a given firearm to “determine” if the firearm fired the bullets. VRP 1007. She testified that she has performed such comparisons “thousands” of times. VRP 1008. She proceeded to explain how she compares spent bullets and cartridges, telling the jury that markings on .40 caliber shell casings are “unique”. VRP 1011-15, 1033-34. She explained the manufacturing processes, such as sanding and tumbling:

leave random microscopic imperfections on the items that produced by those tools, and those are the marks that I’m looking at that [are] unique. Other individual characteristics occur during use and abuse and wear of the firearm itself. All of those things can work together to produce marks that are unique to a particular firearm.

VRP 1035. Based on her analysis, she testified “[m]y conclusion is that Plaintiff’s Exhibits 16, 17, 18, 19, 20, 21, 23 [the casings from the bullets fired at Ward] were fired in Plaintiff’s Exhibit 12.” VRP 1035.

Doing a fragment or jacket analysis of other exhibits, Walsh testified that she “concluded” and “determined” that the casings “were fired from” the .40 caliber Sig Sauer. VRP 1037-40.

Walsh also received bullets from the medical examiner containing biological material, and testified that she was “able to determine affirmatively” that the bullets came from the Sig Sauer, Plaintiff’s Exhibit No. 12, stating further without equivocation that “Plaintiff’s Exhibit No. 12 is the firearm that fired Plaintiff’s Exhibit 44, 46 and 47 [the bullets recovered from Ward’s body].” VRP 1040-41.

Walsh also identified other casings, Plaintiff’s exhibits 25-33, which were fired from a different .40 caliber firearm, believed to have been that fired by Campbell. VRP 1045. However, the firearm that Campbell fired during the incident was never recovered, and thus unavailable for performing microscopic comparison analysis. VRP 1092-93. Police also did not recover the firearm that Henderson fired during the incident. VRP 1094-95.

Det. Katz reiterated Walsh’s testimony, telling the jury:

[t]he seven .40 caliber shell casings in the north end of the street were determined to have been fired from a single gun. The bullets that were recovered from the A-pillar of Michael Ward’s car and also from Michael Ward’s body were determined to have been fired from this same gun. These shell casings held these bullets and fired them out of one gun. These shell casings down

here, which are the same caliber, were determined to have been fired from a different gun.

VRP 1241. Det. Katz further testified that the gun that was recovered in the yard at 3816 South Park was “subsequently determined to be the weapon that was used to murder Mr. Ward”. VRP 1295.

The prosecutor then emphasized this testimony in his closing argument, stating in his powerpoint presentation “Ballistics Expert (Walsh) *confirms* these casings fired from same Sig Sauer recovered near defendants flight path”. Attach. C at 16 (emphasis added). He argued further that Walsh:

said that she could tell by looking at the toolmarks on the[] casings that all those casings, all seven of those casings, were fired from the same gun. Not only were they fired from the same gun, they were fired from this gun, Plaintiff’s Exhibit No. 12, our Sig Sauer. This is the gun that killed Michael Ward. This is the gun that fired those seven casings.

VRP 1775.

6. Karin Curry’s testimony and 911 call.

Karin Curry (“Ms. Curry”), Curry’s stepmother, called 911 in the evening of September 7, 2014, following Ward’s murder, after having heard about the homicide in the news that morning. VRP 576. When she saw Curry that afternoon, Curry told her he was not feeling well because he drank too much at the club with Woods in Seattle the prior night. VRP 578. Ms. Curry did not notice anything unusual about his demeanor, other

than that he appeared to still be drunk. VRP 578. Ms. Curry testified that her grandson's mother (Curry's ex-girlfriend, Uta Martinez) "was saying that there was speculation that [Curry] could possibly be involved" in Ward's death. VRP 579. Following this testimony, defense counsel objected on hearsay grounds, and that court sustained. VRP 579-80. Defense counsel did not move to strike the prior testimony. VRP 579-80.

The prosecutor subsequently asked Ms. Curry if her reason for calling 911 was because Curry was involved in Ward's murder. VRP 586. Ms. Curry denied that this was her reason for calling 911. VRP 586. In response, the prosecutor asked to play Plaintiff's Exhibit No. 86, a recording of Ms. Curry's call to 911. VRP 586-87; *see Appendix, Attachment "D," Plaintiff's Exhibit No. 86*. Defense counsel initially did not object. VRP 587. However, after some portion of the recording was played, defense counsel asked to stop the video and conference with the court outside the hearing of the jury. VRP 588. At that point, he objected to Exhibit No. 86 on hearsay grounds. VRP 588.

Subsequent to making her 911 call, Ms. Curry advised Det. Katz that Martinez contacted Ms. Curry after the shooting and "expressed concern that Vernon Curry, Junior might have been somehow involved in the shooting." VRP 589; Attach. D. Ms. Curry stated further "she did not know why Martinez thought Vernon Curry, Junior, was involved in the

shooting because she told Martinez not to talk about it any more and then called the police.” VRP 589; Attach. D. Because Ms. Curry’s 911 call merely relayed what Martinez told her, defense counsel asserted this constituted inadmissible hearsay. VRP 589.

In the 911 call itself, however, Ms. Curry stated Curry was possibly involved in the shooting, but did not provide the basis for that assertion. VRP 589-90. Defense counsel asserted the 911 call nonetheless constituted hearsay because, based on Ms. Curry’s subsequent statements, it was clear that she was merely repeating hearsay information. VRP 590-91. Defense counsel therefore reasserted his objection that the 911 call is inadmissible hearsay, not relevant, and prejudicial. VRP 590. The court overruled the objection, admitted Exhibit No. 96, and allowed the State to play the entire 911 call in which Ms. Curry advised that Curry was probably involved in Ward’s death. VRP 590-91.

7. Cell phone evidence.

At the time Curry was arrested, two phones associated with him were recovered, one was an iPhone and one was a flip phone. VRP 1332. Detective John Bair testified that he is employed as a cell phone forensic analyst with the City of Tacoma Police Department. VRP 1149- 1209. Det. Bair extracted and analyzed data contained within Curry’s cell phone obtained in the course of his arrest using a tool called Cellebrite. VRP

1154-55, 1166. Det. Katz testified regarding a search on the iPhone for "Tacoma crime" on September 7 of 2014 at 6: 15 and 21 seconds in the morning. VRP 1318. He testified there was another search on the phone for "Tacoma shooting" on September 7, 2014, at 6:15 and 47 seconds. VRP 1320.

Detective Jack Nasworthy testified that cell phones "communicate" with cell towers both actively and passively, and that, using a program called Cell Hawk Analytics, law enforcement is able to create maps showing what cell tower a given cell phone was near at specific times when the phone was used. VRP 1114-55.

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

Det. Katz asked Det. Nasworthy to conduct an analysis of iPhone use between approximately 2:00 a.m. until 3:00 p.m. on September 7, 2014 using Cell Hawk Analytics. VRP 1357. Around 2:43 a.m., the cell

phone was in the South Seattle area. VRP 1357-58. Around 3:34 and 4:34 a.m., the cell phone was communicating with cell tower 1156, located on the 3700 block of Pacific Highway East, indicating that the phone was in an area that encompassed both Curry's residence at 1417 East Harrison and the scene of Ward's death. VRP 1253, 1358-60. The distance from Curry's residence to the Tower is approximately 1.5 miles. VRP 1413. The distance between tower 1156 and the murder scene was not measured. VRP 1401. The 3:34 and 4:34 connections were data communications such as searching the internet. VRP 1361.

Curry made phone calls at 7:37 a.m., 8:37 a.m., and 9:20 a.m., through towers located in Tacoma and Fife. VRP 1736. Curry then made a call to Woods at 12:01 p.m., during which his phone communicated through towers in Tacoma and Woods' phone communicated through towers near her home in Burien. VRP 1739. By 12:29 p.m., Curry's phone and Woods' phone were both communicating with towers in the Burien area. VRP 1740-1741.

Larry Karstetter testified regarding Det. Nasworthy's report and the iPhone records as the defense's digital forensics expert. VRP 1485-1535. With respect to calls from Curry's phone at 7:14 a.m., 9:40 a.m., and 9:42 a.m., Karstetter testified that the phone company was moving the calls between towers due to load balancing rather than suggesting that

Curry was travelling during these times. VRP 1501-1502, 1529. With respect to the 9:20 a.m. call, he testified that Curry's phone was not within the radius of towers near the homicide location. VRP 1505. He also testified, in contrast to Det. Nasworthy's testimony, that Curry's 7:14 a.m. call would not have been made from the area of the homicide. VRP 1503, 1534.

Karstetter testified that there is a cell tower other than tower 1156 on the other side of the interstate with which Curry's phone connected at 4:34 a.m. VRP 1505. He testified that the distance between Curry's residence and tower 1156 was 1.19 miles, and the distance from the homicide location to that tower was 2.41 miles. VRP 1508. He would not expect Curry's phone to have connected to tower 1156 if he were at the homicide location at that time. VRP 1506. He concluded that on September 7, 2014 at 3:34 and 4:34 a.m., the strongest signal for Curry's phone to connect with would be the one closest to his residence. VRP 1520. He confirmed that there were no data connections between 3:34 and 4:34. VRP 1531.

8. Verdict, sentencing, and appeal.

Following presentation of evidence and closing arguments, the jury found Curry guilty of murder in the first degree and unlawful possession

of a firearm in the first degree. Vol. XIX VRP 13-15. The court sentenced him to 570 months in prison. Attach. A.

On direct appeal, Curry argued the trial court erred by (1) denying his motion to dismiss based on government misconduct, (2) denying his motion for a mistrial based on improper opinion testimony, (3) admitting improper impeachment evidence, and (4) refusing to instruct the jury on the lesser included offense of first degree manslaughter. *See Appendix, Attachment “E,” Court of Appeals Unpublished Opinion, Case No. 49026-9-II*. Curry also argued that (5) the prosecutor committed misconduct during closing argument by improperly vouching for the credibility of its witnesses and relying on evidence outside the record. Attach. E. This Court disagreed with Curry’s arguments, and found that Curry waived any argument regarding admission of the “Y Gang” impeachment evidence by failing to request a limiting instruction. Attach. E. Accordingly, the Court affirmed Curry’s convictions and sentence. Attach. E. The final mandate issued on November 27, 2018, and this timely Personal Restraint Petition follows.

IV. STANDARD OF REVIEW

“A petitioner may request relief through a PRP when he is under an unlawful restraint.” *In re Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884, 890 (2010) (citing RAP 16.4(a)-(c)). “Generally, in a PRP, the

petitioner must demonstrate by a preponderance of the evidence that a constitutional error resulted in actual and substantial prejudice or a nonconstitutional error resulted in a complete miscarriage of justice.” Id. (citing In re Pers. Restraint of Davis, 152 Wash.2d 647, 672, 101 P.3d 1 (2004)). “But when a petition ‘raises issues that were afforded no previous opportunity for judicial review, ... the petitioner need not make the threshold showing of actual prejudice or complete miscarriage of justice.” In re Pierce, 173 Wn.2d 372, 377, 268 P.3d 907, 909 (2011) (quoting In re Pers. Restraint of Gentry, 170 Wash.2d 711, 714-15, 245 P.3d 766 (2010)). “It is enough if the petitioner can demonstrate unlawful restraint under RAP 16.4.” Id. (citing In re Pers. Restraint of Gentry, 170 Wash.2d at 715).

“‘Unlawful restraint’ includes restraint accomplished in violation of state laws or administrative regulations.” In re Turner, 74 Wn. App. 596, 598, 875 P.2d 1219, 1221 (1994) (citing In re Cashaw, 123 Wash.2d 138, 148-49, 866 P.2d 8 (1994) (internal citation omitted). In re Monschke, 160 Wn. App. at 488 (citing RAP 16.7(a)(2)(i)). “[A] hearing is appropriate where the petitioner makes the required prima facie showing ‘but the merits of the contentions cannot be determined solely on the record.’” In re Yates, 177 Wn.2d 1, 18, 296 P.3d 872, 880-81 (2013) (quoting Hews v. Evans, 99 Wn.2d 80, 88, 660 P.2d 263, 268 (1983) and

citing RAP 16.11(b)). “Granting the petition is appropriate if the petitioner has proved actual prejudice [from a constitutional violation] or a fundamental defect resulting in a complete miscarriage of justice.” In re Yates, 177 Wn.2d 1 at 18.

V. ARGUMENTS AND AUTHORITY

A. Curry was Denied his Right to Effective Assistance of Counsel Due to Counsel’s Failures to Challenge the State’s Firearm Ballistics Testimony, to Move for a Mistrial Following Karin Curry’s Hearsay Testimony, to Object to Karin Curry’s 911 Call on Confrontation Clause Grounds, and to Request a Limiting Instruction Regarding the 911 Call and the State’s Gang Evidence.

At trial, due to defense counsel’s errors, the jury heard numerous pieces of highly prejudicial evidence that should never have been admitted. Specifically, the jury heard that the Sig Sauer recovered at 3816 South Park Avenue was definitively the murder weapon and they heard that Martinez had information that Curry was involved in the murder, despite Martinez not appearing as a witness. The jury was also left to infer that Curry was the murderer because of his involvement in gang activity. Curry was denied his constitutional right to effective assistance of counsel due to defense counsel’s failures to (1) challenge the State’s firearm ballistics testimony, (2) move for a mistrial due to Ms. Curry’s hearsay testimony, (3) object to the admission of the 911 call on Confrontation Clause grounds, (4) seek a limiting instruction

regarding the 911 call, and (5) seek a limiting instruction regarding the State's gang evidence. But for these errors, there is a reasonable probability that Curry would not have been convicted.

“Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings.” In re Davis, 152 Wash. 2d 647, 672, 101 P.3d. 1, 16 (2004). To successfully challenge the effective assistance of counsel:

Petitioner must show that ‘(1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

Id. at 672-73. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” In re Crace, 174 Wn.2d 835, 840, 280 P.3d 1102, 1105 (2012) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

“Appellate review of counsel’s performance starts from a strong presumption of reasonableness.” State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, 777 (2011) (citing State v. Bowerman, 115 Wash.2d 794, 808, 802 P.2d 116 (1990)). An appellant can “rebut this presumption by proving that his attorney’s representation was unreasonable under

prevailing professional norms and that the challenged action was not sound strategy.” In re Davis, 152 Wn.2d at 673 (citations omitted). “The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Id.

The United States Supreme Court in Strickland emphasized the importance of representation by a counsel in criminal matters and recognized that defense counsel has the “duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. 668 (citing Powell v. Alabama, 287 U.S. 45, 65 (1932)). A defendant claiming ineffective assistance based on counsel’s failure to object must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

1. Defense counsel was ineffective for failing to challenge the State’s ballistics expert testimony.

Based on the testimony of Walsh, in response to which defense counsel failed to object under ER 702 or effectively cross-examine, the jury was left to believe that the bullets that killed Ward, without doubt, were fired from the Sig Sauer recovered 10 days later at 3816 South Park

Avenue. Walsh’s testimony that she can conclusively determine the firearm from which spent casings and bullets were fired using toolmark analysis has been recognized as improper for at least the past decade. *See Appendix, Attachment “F,”* National Research Council of the National Academies, Ballistic Imaging (2008) (excerpted) (“2008 NRC Report”) (“Firearms identification ultimately comes down to a subjective assessment[;] specifically, a subjective probability statement[.]”); *Appendix, Attachment “G,”* National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009) (excerpted) (“2009 NRC Report”) (“the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates.”); *Appendix, Attachment “H,”* President’s Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016) (excerpted) (“PCAST Report”) (“firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability.”).

ER 702 addresses expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education, may testify thereto in the form of an opinion or otherwise.

Washington has adopted the Frye standard for the admissibility of novel scientific evidence. Frye v. United States, 293 F. 1013, 1014, 34 A.L.R. 145 (1923); State v. Copeland, 130 Wn.2d 244, 261, 922 P.2d 1304 (1996). Under that standard, scientific evidence is admissible only if it has achieved general acceptance within the relevant scientific community. Frye, 293 F. at 1014. The proposed evidence must be "based on established scientific methodology." State v. Cauthron, 120 Wn.2d 879, 889, 846 P.2d 502 (1993). "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." Id. at 887.

Where general acceptance is reasonably disputed, the proponent of the evidence must establish acceptance by a preponderance of the evidence. State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 404 (2000). The Frye inquiry involves two questions: (1) whether the underlying theory is generally accepted in the appropriate scientific community and (2) whether the technique used to implement that theory is also generally accepted. Cauthron, 120 Wn.2d at 889. Even where the Washington Supreme Court has previously determined a scientific theory or principle has achieved general acceptance, "trial courts must still undertake the Frye analysis if

one party produces new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community." Cauthron, 120 Wn.2d at 888 n.3.

“Toolmarks” are marks “generated when a hard object (tool) comes into contact with a relatively softer object” - as, for example, “when the internal parts of a firearm make contact with the brass and lead that comprise ammunition.” 2009 NRC Report at 150. “The marks left by an implement . . . depend largely on the manufacturing processes - and manufacturing tools - used to create or shape it.” Id.

“The underlying principle of firearm identification is that each firearm will transfer a unique set of marks, known as "toolmarks," to ammunition fired from that gun.” See United States v. Monteiro, 407 F. Supp. 2d 351, 359 (D. Mass. 2006) “By using a ‘comparison microscope’ to compare ammunition test-fired from a recovered gun with spent ammunition from a crime scene, a trained firearms examiner determines whether the recovered ammunition was fired from that particular gun.” Id.

Though it is the foundation on which virtually all firearms analysis rests, the Association of Firearm and Toolmark Examiners’ (“AFTE”) “Theory of Identification is not a protocol, standardized procedure, or a proper scientific theory.” William A. Tobin & Peter J. Blau, Hypothesis Testing of the Critical Underlying Premise of Discernible Uniqueness in

Firearms-Toolmarks Forensic Practice, 53 *Jurimetrics J.* 121, 124 (2013) ("Tobin & Blau") (footnotes omitted); see also Jennifer E. Laurin, Criminal Law's Science Lag: How Criminal Justice Meets Changed Scientific Understanding, 93 *Tex. L. Rev.* 1751, 1764-65 (2015) ("Forensic-science disciplines have traditionally been, and remain, technically and professionally rooted not in the scientific field but rather within law enforcement."). The identification of potentially matching features is entirely subjective, "held in the mind's eye of the examiner and ... based largely on training and experience in observing the difference between known matching and known non-matching impression toolmarks." Monteiro, 407 F.Supp.2d at 362-63 (quoting Grzybowski et al., Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards, 35 *AFTE J.* 209, 213 (2003)).

No scientifically acceptable standard or protocol dictates or even suggests how many characteristics the examiner must find in agreement to declare a match (or, alternatively, to exclude a match). Instead, firearms examiners utilize a subjective pattern-matching methodology that allows them to set their own criteria. See United States v. Taylor, 663 F. Supp. 2d 1170, 1177-78 (D. N.M. 2009). "[P]erhaps most troubling, there are 'no standards in the field whatsoever' for differentiating class and sub-class from individual characteristics," that is, between marks "which appear on

all casings from the same type of weapon ('class characteristics')," "those manufactured at the same time ('sub-class characteristics')," and those which are ostensibly "unique to a given weapon ('individual characteristics')." United States v. Green, 405 F. Supp. 2d 104, 107, 117 (D. Mass. 2005). This approach is not scientific. Cf. United States v. Hines, 55 F. Supp. 2d 62, 69 (D. Mass. 1999) ("There are no peer reviews of [handwriting comparisons]. Nor can one compare the opinion reached by an examiner with a standard protocol subject to validity testing, since there are no recognized standards. There is no agreement as to how many similarities it takes to declare a match, or how many differences it takes to rule it out.").

Also, firearms examiners claim a positive identification (individualization) even when there are substantial differences between the marks on spent bullets and casings and those on the firearm in question. Such identifications are made with some undefined amount of agreement (and disagreement), often on only a portion of the bullet or casing. One prominent study found that only 21-38 percent of the marks will match up on bullets fired from the same gun. See Monteiro, 407 F. Supp. 2d at 362. Moreover, when bullets fired by two different .38 special Smith & Wesson revolvers of the same make and model were compared, 15-20 percent of the lines still matched up. Id. This study concluded that, "[a]s frequently

happens in actual practice, when there is a preponderance of non-matching lines and only a few land and groove marks available for comparison, the total number of matching lines is often no higher or even less than the number which could occur as the result of chance." A. A. Biasotti, A Statistical Study of the Individual Characteristics of Fired Bullets, 4 J. of Forensic Sciences 34, 39-40 (1959). And "even when different examiners correctly conclude paired test samples to be of common origin in proficiency tests and purported validation studies, there is limited or no accord among respondents about exactly which characteristics comprised their 'matches.'" Tobin & Blau, 53 Jurimetrics J. at 127.

Based on the foregoing deficiencies in toolmark testing, the scientific community has rejected the sort of conclusory testimony proffered by Walsh during Curry's trial. In 2008, the National Research Council ("NRC") called the accuracy of toolmark analysis into question: "Firearms identification ultimately comes down to a subjective assessment[;] specifically, a subjective probability statement[.]" 2008 NRC Report at 54. Moreover, the report cast doubt on whether toolmark analysis is susceptible to objective, quantitative standards: "[T]here is an incredible amount of difficulty attached to the development of a statistical basis for evidence evaluation in forensic fields like firearms examination." Id. Thus, the 2008 NRC Report goes on to state that "[t]he validity of the

fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated. . . . A significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness.” Id. at 3.

In the 2009 NRC Report, the NRC asserts that “the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates.” 2009 NRC Report at 153-54. Although the authors of the 2009 NRC Report admit that “[i]ndividual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source” (id. at 154), the authors contend: “[b]ecause not enough is known about the variabilities among individual tools and guns, we are not able to specify how many points of similarity are necessary for a given level of confidence in the result.” Id.

Most recently, in 2016, the President’s Council of Advisors on Science and Technology further called the validity of toolmark analysis into question. PCAST Report. The PCAST Report criticizes AFTE’s “sufficient agreement” approach as “circular” and “clearly not a scientific theory”, and characterizes the “sufficient agreement” approach as merely “a claim that examiners applying a subjective approach can accurately

individualize the origin of a toolmark.” PCAST Report at 60; see also Taylor, 663 F. Supp. 2d at 1177 (“An examiner may make an identification when there is sufficient agreement, and sufficient agreement is defined as enough agreement for an identification.”). The PCAST Report concludes that “firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability.” PCAST Report at 112.

Prior to these reports, courts generally accepted toolmark identification testimony without limitation. Since then, however, courts have precluded toolmark identification experts from expressing their opinions in terms of absolute scientific certainty. See, e.g., United States v. White, No. 17 CR. 611 (RWS), 2018 U.S. Dist. LEXIS 163258, 2018 WL 4565140, at *3 (S.D.N.Y. Sept. 24, 2018) (prohibiting expert from testifying “to any specific degree of certainty as to his conclusion that there is a ballistics match between the firearms seized . . . and those used in various shooting[s],” but permitting the expert to state his personal belief as to his degree of certainty if asked on cross-examination); United States v. Ashburn, 88 F. Supp. 3d 239 (E.D.N.Y. 2015) (precluding expert from testifying that he was “certain” or “100%” sure of his conclusions that certain items match, or that a match is identified to “the exclusion of all

other firearms in the world,” or that it is a “practical impossibility” that any other gun could have fired the recovered ballistics evidence).

In Curry’s case, Walsh asserted her conclusions with unequivocal certainty, which was then echoed by Det. Katz and the prosecutor. See VRP 1007-1045, 1241, 1295, 1775; Attach C. at 16. She testified repeatedly that she “conclude[ed],” “determined,” and “determine[d] affirmatively” that the casings and bullets used in the murder were fired from the Sig Sauer, stating also that the Sig Sauer “is the firearm that fired” the bullets that killed Ward. VRP 1035-41.

Det. Katz and the prosecutor further represented to the jurors that Walsh’s opinion that the Sig Sauer was the murder weapon was a matter of scientifically established fact, “confirm[ed]” by Walsh’s testimony. VRP 1241, 1295, 1775; Attach C. at 16. Walsh’s testimony, left unchallenged by defense counsel and bolstered by the detective and prosecutor, gave the jury the patently false impression that toolmark analysis is an exact science, every bit as reliable, for instance, as DNA comparisons. Indeed, her testimony also gave this Court that false impression, as evidenced by the Court’s statement in its decision on direct appeal that “[f]orensic testing *confirmed* that the firearm was the murder weapon.” Attach. E at 4 (emphasis added). As set forth above, toolmark analysis has no capacity to “confirm” that a weapon was the murder

weapon.

Because science and case law at the time of Curry's trial had seriously called the objectivity of toolmark analysis into question, objectively reasonable counsel would have challenged the testimony by (1) seeking to exclude or limit it under ER 702 and Frye and/or (2) presenting the flaws and uncertainty inherent in toolmark analysis to the jury through effective cross-examination and/or use of a rebuttal witness. The failure to challenge Walsh's improper testimony in any way fell below an objective standard of reasonableness.

Curry was prejudiced by this deficient performance. Experts overstating forensic results has been recognized as a leading cause of wrongful convictions. See Innocence Project, Probative Value of Forensic Science Conclusions Should be Based on Empirical Data, Not Subjective Impressions, (Jan. 23, 2019).⁵ Specifically, misapplication of forensic science contributed to 45% of the 362 wrongful convictions in the United States proven through DNA evidence. Id. The records from the National Registry of Exonerations, which tracks both DNA and non-DNA exonerations, reveal that false or misleading forensic evidence was a contributing factor in 24% of all wrongful convictions nationally. Id.

⁵ Available at <https://www.innocenceproject.org/probative-value-forensic-science-conclusions/> (accessed on August 7, 2019)

These statistics show the powerful effect a forensic expert can have in the minds of jurors, causing them to render guilty verdicts when they may not have done so otherwise.

In this case, the connection between the Sig Sauer recovered on September 17, 2014, and the killing of Ward was a crucial link in the prosecution's case. Having already linked the mask to Curry by virtue of his DNA, there was still a reasonable probability that the jury would have found reasonable doubt in the absence of a definitive murder weapon. Walsh's testimony filled this hole by telling the jury, falsely, that the Sig Sauer found 10 days later near the location of the mask was without doubt the murder weapon. This improper testimony linked the mask to the murder weapon, thereby linking Curry to the murder.

Compounding the prejudice, Det. Katz and the prosecutor emphasized Walsh's testimony, telling the jury that forensic science "confirms" the casings came from the Sig Sauer, that the bullets recovered from Ward's car and body "were determined to have been fired from" the Sig Sauer, and that the Sig Sauer "is the gun that killed Michael Ward." VRP 1241, 1295, 1775; Attach C. at 16. Illustrating the prejudicial impact of this testimony, even this Court was misled by Walsh's improper testimony, stating in its decision on direct appeal that "[f]orensic testing

confirmed that the firearm was the murder weapon.” Attach. E at 4 (emphasis added).

For the reasons set forth above, the most that Walsh’s analysis actually shows is that the Sig Sauer could have been the murder weapon, to some degree of probability that cannot be precisely determined. To assert definitively that the Sig Sauer was the murder weapon, as Walsh, Det. Katz, and the prosecutor all did at trial, is precisely the type of misapplication of forensic science testimony that has led to wrongful convictions in hundreds of cases nationwide.

Furthermore, the bare fact that the Sig Sauer was recovered in the area of the murder ten days later does little, if anything to link it to the murder in the absence of Walsh’s testimony. The facts of this case make quite clear that there is an abundance of firearms in the neighborhood in which Ward was murdered, as the shooting of Ward was met immediately with return fire from two bystanders, including one with another .40 caliber firearm. That a gun was found in plain sight ten days later, despite not being seen during a search on the morning of the homicide, does not link that gun to Ward’s homicide.

If defense counsel raised legitimate questions as to whether the Sig Sauer was the murder weapon, as reasonable counsel would have done, there is a reasonable probability that the jury would have acquitted.

Therefore, Curry was prejudiced by counsel's failure to challenge Walsh's grossly overstated testimony, thereby depriving Curry of his constitutional right to effective assistance of counsel and warranting a new trial.

2. Defense counsel was ineffective for failing to move for a mistrial on the basis of Karin Curry's hearsay testimony.

Martinez did not testify at trial. Nonetheless, the jury heard from Ms. Curry that Martinez "was saying that there was speculation that [Curry] could possibly be involved" in Ward's death. VRP 579. They then heard that Ms. Curry called 911 because she believed Curry was involved in the shooting. VRP 589-91. This was perhaps the most damning evidence against Curry at trial, and the jury should not have heard it. Defense counsel's failure to move for a mistrial following this improper hearsay testimony fell below an objective standard of reasonableness.

To prevail on his claim that he received ineffective assistance of counsel because defense counsel failed to request a mistrial, a defendant "must show that had defense counsel requested a mistrial, the outcome would have been different, i.e., that the trial court would have granted the motion for a mistrial." State v. Lozano, 189 Wash. App. 117, 126, 356 P.3d 219, 223 (2015) (citing State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).

A trial court should grant a mistrial when the defendant has suffered prejudice such that nothing short of a new trial will ensure that

defendant a fair trial. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (quoting State v. Kwan Fai Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986)). Whether an irregularity justifies a mistrial depends on (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other evidence; and (3) whether the irregularity could effectively be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

In this case, the seriousness of the irregularity was substantial. The jury heard from Ms. Curry that Martinez believed Curry was the murderer. This clearly constituted hearsay, and the court accordingly sustained defense counsel's hearsay objection. ER 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") The testimony was also far more prejudicial than probative in violation of ER 403. Indeed, much of our system of criminal procedure is designed to prevent precisely such untestable rumors from infecting the process.

As to the second issue, the improper hearsay testimony was cumulative to the 911 call, but, as detailed below, the 911 call also should not have been admitted on hearsay, relevance, and Confrontation Clause grounds. Ms. Curry's testimony on this point was not cumulative to any

other admissible evidence.

As to the third factor, some improper testimony is so damaging that no limiting instruction could cure it. See, e.g., State v. Echevarria, 71 Wash. App. 595, 860 P.2d 420 (1993) (finding no limiting instruction could undo prejudice caused by prosecution's improper war on drugs rhetoric). Hearing that someone close to the defendant, who did not testify, believed the defendant was the killer is as prejudicial as improper testimony could possibly be.

Therefore, had defense counsel moved for a mistrial, it should have been granted. Defense counsel's failure to move for a mistrial following Ms. Curry's hearsay testimony deprived Curry of his right to effective assistance of counsel.

3. Defense counsel was ineffective for failing to object to Karin Curry's 911 call on Confrontation Clause grounds.

Defense counsel objected to the introduction of Ms. Curry's 911 call on hearsay and relevance grounds, as the record was clear that the basis of Ms. Curry's allegation was Martinez's out of court statement. VRP 589-91. However, defense counsel failed to raise a Confrontation Clause challenge to the introduction of Martinez's out of court statement. The failure to raise this ground for excluding the 911 call constituted deficient performance and caused great prejudice to Curry's defense.

Ms. Curry's statement in her 911 call saying that Curry was involved in the shooting was based solely on what Martinez said to her. Martinez did not testify at trial. The 911 call was plainly inadmissible under the Sixth Amendment's confrontation clause, pursuant to Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In confrontation analysis, the State bears the burden of proving that challenged statements are non-testimonial. State v. Lui, 179 Wn.2d 457, 476, 315 P.3d 493 (2014); State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

The Sixth Amendment confrontation clause provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. Amend. VI. The confrontation clause prohibits the admission of testimonial statements against a defendant unless the witness making the statements appears at trial or the defendant has a prior opportunity for cross-examination. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). A witness is a declarant who makes a factual statement to a tribunal. Lui, 179 Wn.2d at 482. And, if the witness's statements help to identify "or inculcate the defendant," then the witness is a "witness against" him. Lui, at 482. Thus in Melendez-Diaz, the Supreme Court found a confrontation violation in the admission of a document containing

statements that a substance was “cocaine,” where the laboratory analyst did not testify. Melendez-Diaz, 557 U.S. at 308, 310-11.

The contents of Ms. Curry’s 911 call was clearly testimonial, as it directly inculpated Curry in the murder of Ward. See Attach. D. Furthermore, Det. Katz’s police report reveals that the basis of Ms. Curry’s inculpatory statement was what Martinez told her. Under these circumstances, Martinez was a witness against Curry by virtue of the introduction of the 911 call recording. Because she was unavailable at trial, this violated Curry’s confrontation rights. However, “[w]hen a defendant’s confrontation right is not timely asserted, it is lost.” State v. O’Cain, 169 Wn. App. 228, 240, 279 P.3d 926 (2012) (citing Melendez-Diaz, 557 U.S. at 326). Accordingly, defense counsel was ineffective for failing to assert a confrontation clause objection to the introduction of Plaintiff’s Exhibit No. 86. Curry was severely prejudiced by this violation because it constituted possibly the most harmful evidence against him. But for the introduction of this evidence, there is a reasonable probability that the jury would have acquitted.

4. Defense counsel was ineffective for failing to seek a limiting instruction regarding Karin Curry’s 911 call.

The trial court did not clarify whether it was allowing the 911 call for impeachment purposes or as substantive evidence. VRP 589-91. However, it did state in overruling defense counsel’s hearsay objection

that the contents of the 911 call are “clearly different than what she just testified to.” VRP 589-90. Because the trial court apparently allowed the 911 call as impeachment evidence, defense counsel should have sought a limiting instruction. His failure to do so harmed Curry’s defense, allowing the jury to hear from his stepmother that his ex-girlfriend believed he was the murderer and consider it as substantive evidence.

When impeachment evidence is permitted, an instruction cautioning the jury to limit its consideration to that intended purpose is both proper and necessary. See ER 105; State v. Price, 126 Wn. App. 617, 648-49, 109 P.3d 27 (2005). The jury would be presumed to follow such an instruction, State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982), which would have precluded the State’s use of Ms. Curry’s prior statements as substantive evidence of Curry’s guilt. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

The ideal such instruction would have been given as a cautionary instruction, given by the court contemporaneously with the State’s introduction of the impeachment material. See State v. Lavaris, 41 Wn. App. 856, 860-61, 707 P.2d 134 (1985). The jury could additionally have been instructed on the law in the form of a concluding general limiting instruction regarding proper use of any impeachment evidence. ER 105; see 11 Washington Pattern Jury Instructions: Criminal 5.30, at 180 (3d ed.

2008) (pattern instruction regarding limit or caution on use of evidence for a single purpose). Either or both forms of instruction would have prevented the jury from using the impeachment material as substantive evidence supporting the crime charged. But where no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider prior statements as it sees fit, including as substantive evidence. See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

In many circumstances, the absence of objection or a request for a limiting instruction regarding evidence admitted to impeach has been characterized as a tactical choice. See State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). Such cases generally involve damaging evidence such as ER 404(b) prior acts, and the defendant is presumed to have decided that a limiting instruction would merely re-emphasize the damaging evidence. See Barragan, 102 Wn. App. at 762 (failure to limit prior act evidence in assault trial to impeachment use was presumed to be tactical to avoid reemphasizing damaging evidence). However, tactical decisions must always be reasonable and legitimate. State v. Powell, 150 Wn. App. 139, 153-54, 206 P.3d 703 (2009) (tactical decision which is not legitimate cannot excuse apparently deficient performance under rule that ineffective

assistance doctrine cannot be used to remedy negative outcome of legitimate trial strategy).

There can be no conceivable tactical reason for allowing the jury to consider Ms. Curry's 911 call as substantive, rather than merely impeachment, evidence. Accordingly, defense counsel's performance fell below an objective standard of reasonableness in failing to seek a limiting instruction. Curry was prejudiced by this failure because it allowed the jury to consider Ms. Curry's statement, based on Martinez's statement, that Curry was the killer as substantive evidence. This was the most harmful evidence against Curry and, in its absence, there is a reasonable probability he would have been acquitted.

5. Defense counsel was ineffective for failing to seek a limiting instructions as to the State's gang evidence.

On direct appeal, Curry argued that the trial court erred in admitting impeachment evidence in the form of pictures associating Curry with an entity called the "Y Gang". Attach. E; *see Appendix, Attachment "I," Trial Exhibits 174A and 175A*. This Court rejected this argument because defense counsel waived it by failing to request a limiting instruction. Attach. E at 11.

Prior to presenting the photographs, the State proposed a limiting instruction that informed the jury that the photographs and associated line of questioning may be considered "for assessing the defendant's

credibility and for no other reasons.” VRP at 1686. Defense counsel stated he did not want the instruction because he did “not want argument that he’s part of a gang and it’s a gang shooting” and did not want the court to “give an instruction on we’re about to show you a picture of the defendant in a gang - -.” VRP 1687-88. He added that giving the instruction is tantamount to “saying don’t consider this gang evidence, except for credibility.” VRP 1688.

In this case, nothing in the State’s proposed instruction referred to the photographs as gang evidence or otherwise characterized the evidence. Rather, the proposed instruction would have simply instructed the jurors to consider exhibits 174A and 175A “for assessing the Defendant’s credibility and for no other reason.” VRP at 1686. Nothing about the proposed instruction would have described the evidence as “gang” evidence. Therefore, defense counsel’s reasons for refusing the limiting instruction were patently unreasonable.

Curry was prejudiced by defense counsel’s unreasonable rejection of a limiting instruction because the jury was thereby permitted to make the impermissible inference that Curry was a gang member and thus likely to commit violent crime. See Myers, 133 Wn.2d at 36 (when no limiting instruction is sought, the jury may consider evidence as it sees fit, including as substantive evidence). Had the jury been properly instructed,

they would not have been permitted to make that prejudicial inference. State v. Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009) (courts presume the jury follows the trial court's instructions.). Therefore, Curry was denied effective assistance of counsel on this ground as well.

B. The Trial Court Erred and Caused a Miscarriage of Justice by Admitting Karin Curry's 911 Call.

The court erred in admitting Plaintiff's Exhibit No. 86 (the 911 call recording) because it constituted double hearsay and its prejudicial impact substantially outweighed its probative value. This error caused a miscarriage of justice because it allowed the jury to hear Curry's stepmother repeating allegations from Curry's ex-girlfriend that Curry murdered Ward, evidence that is highly prejudicial and which the jury should never have heard.

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. The use of hearsay impinges on a defendant's constitutional right to confront and cross-examine witnesses. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001). Pursuant to ER 801 Whether or not statements introduced at trial constitute hearsay is a question of law reviewed de novo on appeal. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

The 911 recording in this case consisted of an out of court statement from Ms. Curry repeating what she heard in an out of court statement from Martinez. Thus, the recording constituted double hearsay. In admitting the evidence, the court ruled it was not hearsay because Ms. Curry did not specifically state that Martinez told her that Curry may have been involved in the shooting, instead stating only that Curry may have been involved in the shooting. This reasoning is flawed on multiple counts. First, the recording was itself an out of court statement, regardless of whether it contains additional hearsay. State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) (“An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, even if the statement was made and acknowledged by someone who is an in-court witness at trial.”) Second, the evidence was clear that the basis of Ms. Curry’s statements to dispatch was what Martinez told her. VRP 589-91. Therefore, the 911 recording should have been excluded on hearsay grounds. See ER 802.

Additionally, the recording should not have been allowed as impeachment evidence under ER 801(d)(1). “[A] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” State v. Babich, 68 Wn.App. 438, 444, 842 P.2d 1053 (1992) (quoting United States v. Silverstein, 737 F.2d 864, 868

(10th Cir.1984)), *rev. den.*, 121 Wn.2d 1015, 854 P.2d 42 (1993). Under federal court decisions the portions of the statement that the proponent seeks to admit must be relevant to an issue in the case. Even then, the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received. See United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir., 1992) and United States v. Sweiss, 814 F.2d 1208, 1211 (7th Cir., 1987). As noted in a Washington practice treatise:

Occasionally, counsel has a potentially damaging statement at hand that the witness has not yet given any testimony that is contrary to the statement. In this situation, the courts do not allow counsel to ask the witness whether the witness made the prior statement and then, upon denial, to introduce the statements into evidence under the guise of impeachment. The statement is objectionable as hearsay and inadmissible unless it is within some exception to the hearsay rule. If the rule were otherwise, a party could reveal virtually any out-of-court statement to the trier of fact, whether or not admissible, simply by demanding to know whether the witness made such a statement.

K. Tegland, SA WASH. PRAC, Evidence Law & Practice, Sec. 613.4, p.585 (5th Ed. 2007 w/2015 Supp). In this case, Ms. Curry's reasons for calling 911 were entirely collateral to any issue in the case. The prosecutor had no legitimate reason for inquiring into the contents of that call other than to induce Ms. Curry to make an inconsistent statement and then introduce the recording as impeachment evidence. Accordingly, the trial

court erred to the extent it admitted the recording under ER 801(d)(1).

Even if a hearsay exception applied to the evidence, it should nonetheless have been excluded under ER 403. Even if evidence is relevant, it is inadmissible if its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”. ER 403. Here, the only possible relevant purpose for the 911 call was to impeach Ms. Curry’s testimony that she did not call 911 to report her stepson. Ms. Curry’s credibility was not an important issue in the case, nor was the fact that she called 911. The prejudicial impact of the recording, on the other hand, was substantial, allowing the jury to hear that Martinez believed Curry was the killer. Under these circumstances, the recording should have been excluded under ER 403 even if it were not barred by hearsay rules. The decision to admit the recording caused a miscarriage of justice and deprived Curry of a fair trial.

C. The Cumulative Errors Deprived Curry of His Right to a Fair Trial.

“Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless.” State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). In this case, most of the errors described above would, individually, warrant reversal. The accumulation of error, however, was all the more prejudicial. Curry was denied his right

to a fair trial and this Court should reverse his conviction and remand for a new trial.

D. Curry Received Ineffective Assistance of Appellate Counsel

Curry also received ineffective assistance at the appellate stage following remand. Article 1, § 22 (amend. 10) states, in pertinent part: “In criminal prosecutions the accused shall have ... the right to appeal in all cases.” In Evitts v. Lucey, the United States Supreme Court held that a defendant is entitled to effective assistance of counsel in an “appeal as of right.” Evitts v. Lucey, 469 U.S. 387, 397, 105 S.Ct. 830, 83 L.Ed.2d 821, reh’g denied, 470 U.S. 1065, 105 S.Ct. 1783, 84 L.Ed.2d 841 (1985). Thus, on appeal Curry also had a Sixth Amendment right to the effective assistance of counsel.

To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel’s representation fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel’s unprofessional errors, appellant would have prevailed on appeal. See In re Brown, 143 Wn.2d 431, 452, 21 P.3d 687 (2001) (“[T]o prevail on the appellate ineffectiveness claim, [Petitioner] must show the merit of the underlying legal issues his appellate counsel failed to raise”). Appellate counsel’s failures to raise meritorious issues, each of which

would have resulted in a lesser sentence for Curry, constitutes deficient performance. In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012).

As set forth hereinabove, each of these issues raised herein has merit, and entitle Curry to relief. Because each of these issues have merit, failing to raise them on appeal falls below an objective standard of reasonableness. Curry was prejudiced by this deficient performance because his convictions and sentence should have been reversed on direct appeal had these meritorious issues been raised.

VI. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant this Petition, reverse Curry's convictions and sentence, and remand this matter for further proceedings. A reference hearing on the issues raised herein is also requested.

Respectfully submitted this 20th day of November, 2019.

LAW OFFICE OF COREY EVAN PARKER


Corey Evan Parker, WSBA #40006
Attorney for Petitioner, Vernon Curry

OATH

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

Respectfully submitted this 20th day of November, 2019.

LAW OFFICE OF COREY EVAN PARKER

By Corey Evan Parker
Corey Evan Parker, WSBA #40006
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on November 20, 2019, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names:

Attorney for Respondent:

Pierce County Appellate Unit
PCpatcecf@piercecountywa.gov

- By First Class Mail
- By Fed Express
- By Facsimile
- By Hand Delivery
- By Messenger
- By Email

Corey Evan Parker

Corey Evan Parker

LAW OFFICE OF COREY EVAN PARKER

November 20, 2019 - 11:58 AM

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Trial Court Case Number: 14-1-03668-1
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Signing Judge:
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