

NO. 31642-4-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

DAVID EMERSON NICKELS,

Appellant.

---

**FILED**  
**Mar 22, 2016**  
Court of Appeals  
Division III  
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF  
GRANT COUNTY, STATE OF WASHINGTON  
Superior Court No. 10-1-00322-6

---

BRIEF OF RESPONDENT

---

GARTH DANO  
Prosecuting Attorney

RANDALL A. SUTTON  
Special Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

**TABLE OF CONTENTS**

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT .....12

    A. ASSUMING THIS COURT CHOOSES TO FOLLOW *STATE V. SMITH*, ANY ERROR WOULD BE HARMLESS. ....12

        1. The to-convict instruction was the same as that in Smith.....12

        2. The error in this case was harmless. ....12

        3. The Court should decline to follow Smith.....14

    B. THE RECORD FAILS TO SHOW THAT JUROR BUNDY WAS BIASED.....18

    C. NICKELS WAS NOT PREJUDICED BY THE BAILIFF’S EX PARTE CONTACT WITH JURORS.....25

    D. BECAUSE POST-SELECTION CONTACTS WITH JURORS HAVE NOT HISTORICALLY BEEN OPEN TO THE PUBLIC, NICKELS CANNOT SHOW THAT HIS PERSONAL PUBLIC-TRIAL RIGHT HAS BEEN VIOLATED. ....28

    E. NICKELS FAILS TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION FOR DISMISSAL.....30

        1. Introduction.....30

        2. Cox’s statement was not exculpatory or material. ....31

        3. There is no evidence of bad faith on the part of the police.....33

        4. Nickels fails to show prejudice.....35

        5. Nickels fails to show dismissal was warranted.....37

    F. THE TRIAL COURT PROPERLY DENIED NICKELS’S MOTION TO SUPPRESS HIS DNA SWAB.....38

|    |   |    |
|----|---|----|
| 1. | The trap-and-trace was authorized by court order.....   | 38 |
| 2. | The trial court properly denied the Franks motion.....  | 41 |
| a. | Even striking reference to the Washington warrant, the affidavit provided ample probable cause to obtain Nickels’s DNA.....   | 42 |
| b. | There is no evidence Mlekush was under investigation at the time he applied for the warrant.....  | 42 |
| 3. | Any error would be harmless where a prior DNA sample from Nickels’s toothbrush also showed him to be a contributor to the DNA on the handcuffs.....                       | 43 |
| G. | THE TRIAL COURT ADMITTED MOST OF NICKELS’S PROFFERED HEARSAY STATEMENTS ATTRIBUTED TO LIBBY AND DID NOT COMMIT REVERSIBLE ERROR IN EXCLUDING A SMALL PORTION OF THEM..... | 44 |
| 1. | The trial court did not improperly hold Nickels’s proposed hearsay evidence to a higher standard.....   | 44 |
| 2. | The trial court properly found that certain of Tycksen’s statements were not adequately corroborated.....   | 45 |
| a. | Libby knew there were guns behind seat.....   | 46 |
| b. | Libby, Latimer and Cox shot guns night before the murder.....   | 47 |
| c. | Libby acted suspicious and Latimer told him to shut up.....   | 49 |
| d. | Morrison bought a gun for Libby.....  | 50 |
| e. | Libby was high and drunk when he murdered Munro.....  | 50 |
| 3. | The State did not open the door to admission of the statements.....   | 51 |

|    |  |    |
|----|--|----|
| 4. | Any error would be harmless.....   | 52 |
| H. | THE TRIAL COURT PROPERLY EXCLUDED<br>OTHER PROPOSED DEFENSE EVIDENCE<br>THAT WAS IRRELEVANT.....   | 57 |
| 1. | Other Libby evidence.....  | 58 |
| a. | Theft from Destiny Devyak. ....  | 58 |
| b. | Tycksen’s demeanor when reporting<br>the assault.....  | 59 |
| c. | Tycksen’s injuries. ....   | 61 |
| d. | Harmon testimony regarding<br>Munro’s guns. ....   | 62 |
| 2. | Munro’s involvement with Gomez &<br>Harmon .....   | 64 |
| 3. | Any error would be harmless.....   | 66 |
| I. | THE TRIAL COURT PROPERLY ADMITTED<br>ER 404(B) EVIDENCE THAT SHOWED<br>NICKELS’S OBSESSION WITH MESSICK AND<br>HIS HOSTILITY TOWARD OTHER MEN SHE<br>DATED. .... | 67 |
| 1. | Evidence that Nickels harassed and<br>threatened to harm the only other man<br>Messick dated besides Munro was relevant.....                                     | 67 |
| 2. | Evidence that Nickels sought to buy a gun<br>on craigslist five days before the murder was<br>relevant and properly admitted. ....                               | 70 |
| 3. | Nickels’s obsession with and harassment of<br>Messick was relevant to show why he killed<br>his perceived rival. ....  | 71 |
| 4. | The court properly admitted Rex Lain’s<br>testimony that Nickels asked him, a month<br>before the murder, if he would kill someone<br>for him.....               | 72 |
| 5. | Prejudice .....  | 76 |
| J. | NICKELS FAILED TO PRESERVE HIS CLAIMS<br>REGARDING THE DNA TECHNICIAN’S<br>TESTIMONY AND THE STATE’S CLOSING   |    |

DISCUSSION OF THAT EVIDENCE AND IN ANY EVENT FAILS TO SHOW IMPROPRIETY.....77

1. Nickels failed to object to the testimony regarding the DNA evidence at trial, and further fails to show that it was in any way improper for the lab tech to characterize his DNA as “included” in the mixed sample recovered from the handcuffs found at the murder scene. ....77
2. The prosecutor’s closing argument properly discussed the DNA evidence presented at trial. ....80

K. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN CONCLUDING THAT NICKELS HAD FAILED TO PRESENT NEWLY DISCOVERED EVIDENCE WARRANTING A NEW TRIAL.....85

1. The trial court did not abuse its discretion in finding that Latimer’s alleged statement to Travis Powell was not an excited utterance where there the only evidence of his behavior between the time of the murder and his contact with the Powells showed that he was not under the influence of stress caused by the murder. ....87
2. Nickels failed to meet his burden of showing that Latimer would be unavailable to testify, and as such his alleged statement to Travis Powell was merely impeaching. ....90
3. The Powells’ statements were not admissible under the open-door doctrine. ....91
4. The trial court properly found that Libby’s alleged confessions to jailhouse informants Rodriguez would not have changed the outcome of the trial. ....92
  - a. The trial court acted within its discretion in concluding that Perry’s statement was of limited evidentiary value. ....92

|     |   |     |
|-----|---|-----|
| b.  | The trial court acted within its discretion in finding that Rodriguez lacked credibility and that his statement was cumulative. ....  | 93  |
| 5.  | The anonymous declaration regarding Libby’s attempted sale of a gun with a laser sight two and a half years after the murder was not newly discovered material evidence where there was no evidence such a gun was ever in Munro’s truck..... | 94  |
| L.  | THE TRIAL JUDGE DID NOT VIOLATE THE APPEARANCE OF FAIRNESS BY FAILING TO DISCLOSE HIS STEPSON’S HIGH SCHOOL RELATIONSHIP WITH MUNRO WHERE THE JUDGE DID NOT MARRY THE STEPSON’S MOTHER UNTIL YEARS LATER.....                                 | 96  |
| M.  | CUMULATIVE ERROR.....   | 99  |
| IV. | CONCLUSION.....   | 100 |

## TABLE OF AUTHORITIES

### CASES

|   |                |
|---|----------------|
| <i>Almagamated Transit Union Local 587 v. State</i> ,<br>142 Wn.2d 183, 12 P.3d 603 (2000).....                     | 37             |
| <i>Arizona v. Youngblood</i> ,<br>488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).....                        | 34             |
| <i>Boyd v. California</i> ,<br>494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990).....                         | 17             |
| <i>Brady v. Maryland</i> ,<br>373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).....                             | 31, 32         |
| <i>California v. Trombetta</i> ,<br>467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).....                     | 33             |
| <i>Com. v. Caramanica</i> ,<br>729 N.E.2d 656 (Mass. 2000) .....  | 16             |
| <i>Com. v. Hammond</i> ,<br>504 A.2d 940 (Pa. 1986) .....   | 15             |
| <i>Com. v. Werner</i> ,<br>81 Mass. App. Ct. 689, 967 N.E.2d 159 (2012) .....                                       | 23             |
| <i>Court. See Grisby v. Herzog</i> ,<br>190 Wn. App. 786, 362 P.3d 763 (2015).....                                  | 14             |
| <i>Dyer v. Calderon</i> ,<br>151 F.3d 970 (9th Cir. 1998) .....   | 24, 25         |
| <i>Franks v. Delaware</i> ,<br>438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).....                           | 41, 42         |
| <i>In re Benn</i> ,<br>134 Wn.2d 868, 952 P.2d 116 (1998).....  | 26             |
| <i>In re Brown</i> ,<br>143 Wn.2d 431, 21 P.3d 687 (2001).....  | 85             |
| <i>In re Drexel Burnham Lambert Inc.</i> ,<br>861 F.2d 1307 (2d cir.1988) .....                                     | 97             |
| <i>In re Lord</i> ,<br>123 Wn.2d 296, 868 P.2d 835 (1994).....  | 19, 100        |
| <i>In re Yates</i> ,<br>177 Wn.2d 1, 296 P.3d 872 (2013).....   | 18             |
| <i>Kok v. Tacoma Sch. District</i> ,<br>No. 10, 179 Wn. App. 10, 317 P.3d 481 (2013).....                           | 96, 97, 98, 99 |
| <i>Leavitt v. Arave</i> ,<br>383 F.3d 809 (9th Cir. 2004) .....   | 16, 17         |
| <i>McDonough Power Equipment, Inc. v. Greenwood</i> ,<br>464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)..... | 19             |
| <i>Morgan v. Illinois</i> ,   |                |

|  |            |
|--|------------|
| 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992).....     | 22         |
| <i>Relying on Holmes v. South Carolina,</i>                      |            |
| 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....     | 44         |
| <i>Ross v. Oklahoma,</i>   |            |
| 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).....       | 22         |
| <i>Rushen v. Spain,</i>  |            |
| 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).....       | 26, 27, 28 |
| <i>Schlup v. Delo,</i>   |            |
| 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).....      | 87         |
| <i>Sherman v. State,</i>   |            |
| 128 Wn.2d 164, 905 P.2d 355 (1995).....                          | 97         |
| <i>Smith v. Phillips,</i>  |            |
| 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).....        | 23         |
| <i>Sofie v. Fibreboard Corp.,</i>                                |            |
| 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....            | 18         |
| <i>State ex rel. Carroll v. Junker,</i>                          |            |
| 79 Wn.2d 12, 482 P.2d 775 (1971).....                            | 85         |
| <i>State v. Aguirre,</i>   |            |
| 168 Wn.2d 350, 229 P.3d 669 (2010).....                          | 57, 61     |
| <i>State v. Anderson,</i>  |            |
| 112 Wn. App. 828, 51 P.3d 179 (2002), <i>review denied</i> , 149 |            |
| Wn.2d 1022 (2003).....   | 48, 50     |
| <i>State v. Atchley,</i>   |            |
| 142 Wn. App. 147, 173 P.3d 323 (2007).....                       | 41         |
| <i>State v. Athan,</i>   |            |
| 160 Wn.2d 354, 158 P.3d 27 (2007).....                           | 59         |
| <i>State v. Avendano-Lopez,</i>                                  |            |
| 79 Wn. App. 706, 904 P.2d 324 (1995).....                        | 91         |
| <i>State v. Bander,</i>  |            |
| 150 Wn. App. 690, 208 P.3d 1242 (2009).....                      | 80         |
| <i>State v. Barber,</i>  |            |
| 170 Wn.2d 854, 248 P.3d 494 (2011).....                          | 14         |
| <i>State v. Beskurt,</i>   |            |
| 176 Wn.2d 441, 293 P.3d 1159 (2013).....                         | 28         |
| <i>State v. Blackwell,</i>                                       |            |
| 120 Wn.2d 822, 845 P.2d 1017 (1993).....                         | 37         |
| <i>State v. Bourgeois,</i>                                       |            |
| 133 Wn.2d 389, 945 P.2d 1120 (1997).....                         | 18, 27     |
| <i>State v. Briscoeray,</i>                                      |            |
| 95 Wn. App. 167, 974 P.2d 912 (1999).....                        | 87         |
| <i>State v. Bruton,</i>  |            |
| 66 Wn.2d 111, 401 P.2d 340 (1965).....                           | 58         |
| <i>State v. Burke,</i>   |            |

|  |                |
|--|----------------|
| 163 Wn.2d 204, 181 P.3d 1 (2008).....                            | 86             |
| <i>State v. Caffey</i> ,   |                |
| 365 S.W.2d 607 (Mo. 1963) .....                                  | 15             |
| <i>State v. Carlson</i> ,  |                |
| 61 Wn. App. 865, 812 P.2d 536 (1991), <i>review denied</i> , 120 |                |
| Wn.2d 1022 (1993).....   | 85             |
| <i>State v. Chapin</i> ,   |                |
| 118 Wn.2d 681, 826 P.2d 194 (1992).....                          | 87             |
| <i>State v. Chenoweth</i> ,                                      |                |
| 160 Wn.2d 454, 158 P.3d 595 (2007).....                          | 41             |
| <i>State v. Cho</i> ,  |                |
| 108 Wn. App. 315, 30 P.3d 496 (2001).....                        | 18, 24, 25     |
| <i>State v. Clark</i> ,  |                |
| 139 Wn.2d 152, 985 P.2d 377 (1999).....                          | 77             |
| <i>State v. Copeland</i> ,                                       |                |
| 130 Wn.2d 244, 922 P.2d 1304 (1996).....                         | 34             |
| <i>State v. Cord</i> ,   |                |
| 103 Wn.2d 361, 693 P.2d 81 (1985).....                           | 42             |
| <i>State v. Davis</i> ,  |                |
| 141 Wn.2d 798, 10 P.3d 977 (2000).....                           | 77             |
| <i>State v. DeLeon</i> ,   |                |
| 185 Wn. App. 171, 341 P.3d 315 (2014), <i>review granted on</i>  |                |
| <i>other grounds</i> , 184 Wn.2d 1017 (2015).....                | 23             |
| <i>State v. Depaz</i> ,  |                |
| 165 Wn.2d 842, 204 P.3d 217 (2009).....                          | 18             |
| <i>State v. DeVincentis</i> ,                                    |                |
| 150 Wn.2d 11, 74 P.3d 119 (2003).....                            | 69             |
| <i>State v. Eder</i> ,   |                |
| 78 Wn. App. 352, 899 P.2d 810 (1995), <i>review denied</i> , 129 |                |
| Wn.2d 1013 (1996).....   | 86             |
| <i>State v. Foxhoven</i> ,                                       |                |
| 161 Wn.2d 168, 163 P.3d 786 (2007).....                          | 69             |
| <i>State v. Franklin</i> ,                                       |                |
| 180 Wn.2d 371, 325 P.3d 159 (2014).....                          | 44             |
| <i>State v. Freeburg</i> ,                                       |                |
| 105 Wn. App. 492, 20 P.3d 984 (2001).....                        | 58, 59, 70, 71 |
| <i>State v. Gee</i> ,  |                |
| 52 Wn. App. 357, 760 P.2d 361 (1988), <i>review denied</i> , 111 |                |
| Wn.2d 1031 (1989).....   | 48, 49         |
| <i>State v. Gonzales</i> ,                                       |                |
| 111 Wn. App. 276, 45 P.3d 205 (2002), <i>review denied</i> , 148 |                |
| Wn.2d 1012 (2003).....   | 23             |
| <i>State v. Guloy</i> ,  |                |

|  |        |
|--|--------|
| 104 Wn.2d 412, 705 P.2d 1182 (1985).....                         | 77     |
| <i>State v. Halstine,</i>  |        |
| 122 Wn.2d 109, 857 P.2d 270 (1993).....                          | 77     |
| <i>State v. Halvorson,</i>                                       |        |
| 176 Wn. App. 972, 309 P.3d 795 (2013).....                       | 29, 30 |
| <i>State v. Hernandez,</i>                                       |        |
| 85 Wn. App. 672, 935 P.2d 623 (1997).....                        | 76     |
| <i>State v. Hodges,</i>  |        |
| 118 Wn. App. 668, 77 P.3d 375 (2003), <i>review denied</i> , 151 |        |
| Wn.2d 1031 (2004).....   | 100    |
| <i>State v. Hutcheson,</i>                                       |        |
| 62 Wn. App. 282, 813 P.2d 1283 (1991).....                       | 86     |
| <i>State v. Irby,</i>  |        |
| 170 Wn.2d 874, 246 P.3d 796 (2011).....                          | 26     |
| <i>State v. Irby,</i>  |        |
| 187 Wn. App. 183, 347 P.3d 1103 (2015).....                      | 23     |
| <i>State v. Johnson,</i>   |        |
| 56 Wn.2d 700, 355 P.2d 13 (1960).....                            | 27     |
| <i>State v. Jones,</i>   |        |
| 139 P. 441 (Mont. 1914).....                                     | 16     |
| <i>State v. Jones,</i>   |        |
| 168 Wn.2d 713, 230 P.3d 576 (2010).....                          | 57     |
| <i>State v. Kilgore,</i>   |        |
| 147 Wn.2d 288, 53 P.3d 974 (2002).....                           | 76     |
| <i>State v. Lough,</i>   |        |
| 125 Wn.2d 847, 889 P.2d 487 (1995).....                          | 67, 68 |
| <i>State v. McCloud,</i>   |        |
| 891 P.2d 324 (Kan. 1995).....                                    | 15     |
| <i>State v. McDonald,</i>  |        |
| 138 Wn.2d 680, 981 P.2d 443 (1999).....                          | 45     |
| <i>State v. Mee Hui Kim,</i>                                     |        |
| 134 Wn. App. 27, 139 P.3d 354 (2006).....                        | 57     |
| <i>State v. Michielli,</i>                                       |        |
| 132 Wn.2d 229, 937 P.2d 587 (1997).....                          | 37     |
| <i>State v. Munoz,</i>   |        |
| 240 P.3d 311 (Colo. 2009).....                                   | 15     |
| <i>State v. Myers,</i>   |        |
| 133 Wn.2d 26, 941 P.2d 1102 (1997).....                          | 58     |
| <i>State v. Neely,</i>   |        |
| 113 Wn. App. 100, 52 P.3d 539 (2002).....                        | 37     |
| <i>State v. Pierce,</i>  |        |
| 155 Wn. App. 701, 230 P.3d 237 (2010).....                       | 86     |
| <i>State v. Rafay,</i>   |        |

|  |            |
|--|------------|
| 168 Wn. App. 734, 285 P.3d 83 (2012).....  | 64         |
| <i>State v. Rehak,</i>   |            |
| 67 Wn. App. 157, 834 P.2d 651 (1992).....  | 57         |
| <i>State v. Riofta,</i>  |            |
| 166 Wn.2d ¶ 38, 209 P.3d 467 (2009).....   | 87         |
| <i>State v. Roberts,</i>   |            |
| 142 Wn.2d 471, 14 P.3d 713 (2000).....   | 45, 48, 92 |
| <i>State v. Roden,</i>   |            |
| 179 Wn.2d 893, 321 P.3d 1183 (2014).....   | 38         |
| <i>State v. Russell,</i>   |            |
| 125 Wn.2d 24, 882 P.2d 747 (1994).....   | 18         |
| <i>State v. Russell,</i>   |            |
| 180 Wn.2d 860, 330 P.3d 151 (2014).....  | 38         |
| <i>State v. Saltarelli,</i>  |            |
| 98 Wn.2d 358, 655 P.2d 697 (1982).....   | 69         |
| <i>State v. Sanders,</i>   |            |
| 912 N.E.2d 1231 (Ill. 2009).....   | 15         |
| <i>State v. Scott,</i>   |            |
| 48 Wn. App. 561, 739 P.2d 742 (1987), <i>aff'd</i> , 110 Wn.2d 682<br>(1988).....  | 90         |
| <i>State v. Smith,</i>   |            |
| 174 Wn. App. 359, 298 P.3d 785 (2013).....   | 12         |
| <i>State v. Starbuck,</i>  |            |
| 189 Wn. App. 740, 355 P.3d 1167 (2015).....  | 80, 81, 84 |
| <i>State v. Strauss,</i>   |            |
| 119 Wn.2d 401, 832 P.2d 78 (1992).....   | 87         |
| <i>State v. Sublett,</i>   |            |
| 156 Wn. App. 160, 231 P.3d 231 (2010).....   | 86         |
| <i>State v. Sublett,</i>   |            |
| 176 Wn.2d 58, 292 P.3d 715 (2012).....   | 28         |
| <i>State v. Thomas,</i>  |            |
| 150 Wn.2d 821, 83 P.3d 970 (2004).....   | 13         |
| <i>State v. Valladares,</i>  |            |
| 99 Wn.2d 663, 664 P.2d 508 (1983).....   | 45         |
| <i>State v. Williams,</i>  |            |
| 96 Wn.2d 215, 634 P.2d 868 (1981).....   | 85         |
| <i>State v. Wilson,</i>  |            |
| 141 Wn. App. 597, 171 P.3d 501 (2007).....   | 29         |
| <i>State v. Witherspoon,</i>   |            |
| 171 Wn. App. 271, 286 P.3d 996 (2012), <i>aff'd</i> , 180 Wn.2d 875<br>(2014)..... | 96         |
| <i>State v. Wittenbarger,</i>  |            |
| 124 Wn.2d 467, 880 P.2d 517 (1994).....  | 33, 57     |

|  |                |
|--|----------------|
| <i>State v. Wolken</i> ,<br>103 Wn.2d 823, 700 P.2d 319 (1985).....  | 41             |
| <i>State v. Yates</i> ,<br>161 Wn.2d 714, 168 P.3d 359 (2007).....   | 71             |
| <i>Tatham v. Rogers</i> ,<br>170 Wn. App. 76, 283 P.3d 583 (2012).....   | 96, 97, 98, 99 |
| <i>Tidwell v. State</i> ,<br>118 So. 2d 292 (Ala. 1960).....   | 16             |
| <i>Torrence v. State</i> ,<br>574 So.2d 1188 (Fla. App. 1991).....   | 15, 16         |
| <i>Tyson v. State</i> ,<br>457 S.E.2d 690 (Ga. 1995).....  | 15             |
| <i>United States v. Edwards</i> ,<br>823 F.2d 111 (5th Cir. 1987), <i>cert. denied</i> , 485 U.S. 934<br>(1988)..... | 29             |
| <i>United States v. Gagnon</i> ,<br>470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).....                      | 26             |
| <i>United States v. Hamilton</i> ,<br>792 F.2d 837 (9th Cir. 1986).....  | 14             |
| <i>Williamson v. United States</i> ,<br>512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994).....                 | 45             |
| <i>Willingham v. Mullen</i> ,<br>296 F.3d 917 (10th Cir. 2002).....  | 14             |
| <i>Wong Sun v. United States</i> ,<br>371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....                       | 58             |
| <i>Wright v. State</i> ,<br>730 N.E.2d 713 (Ind. 2000).....  | 15             |

## STATUTES

|                        |    |
|------------------------|----|
| RCW 4.44.170(2)) ..... | 23 |
| RCW 4.44.190 .....     | 23 |
| RCW 9.73.260 .....     | 38 |

## OTHER AUTHORITIES

|   |    |
|---|----|
| Washington State Patrol, <i>Casework STR Analysis Procedures</i><br>(2015)..... | 79 |
|---|----|

## RULES

|                |                    |
|----------------|--------------------|
| CR 62 .....    | 14                 |
| ER 14: .....   | 22                 |
| ER 106 .....   | 91, 93             |
| ER 401 .....   | 69                 |
| ER 404(b)..... | 67, 69, 71, 72, 76 |

ER 609 ..... 75  
ER 803(a)(2) ..... 87  
ER 803(b)(3) ..... 44  
ER 804(b)..... 50, 52  
ER 804(b)(1) ..... 90  
ER 804(b)(3) ..... 45, 46  
Evidence Rule 404(b) ..... 73  
RAP 2.5..... 77

**CONSTITUTIONAL PROVISIONS**

U.S. Const.amend. VI ..... 28, 29

## **I. COUNTERSTATEMENT OF THE ISSUES**

Please see the argument headings in the table of contents as space constraints prevent listing the issues again here.

## **II. STATEMENT OF THE CASE<sup>1</sup>**

Thirty-five-year-old Ephrata resident Sage Munro had a routine: every morning he would get up, walk out of his house and go to a local gym. 9RP 34-35. That routine ended the morning of December 29, 2009.

Across the street from Munro's house, his neighbor Colleen Gibbons had been up since 5:45 that morning and had not heard anyone talking or any noise that morning. 9RP 36-38. Nor did she see anyone. 9RP 38. Then between 6:30 and 6:40 a.m., she heard a shot and looked up and saw Munro holding his chest and run into the house and shut the door. 9RP 39, 43. When Munro didn't re-emerge after about five minutes she became concerned, so she went over to his house and knocked on the door. 9RP 43. There was no response. 9RP 43. Then she called his phone and when he did not answer she called 911. 9RP 43.

The police were dispatched at 6:42 a.m. 8RP 941. They arrived three minutes later. 8RP 947. It was still dark, but not so dark one could

---

<sup>1</sup> The reports of the trial will be referred to by their volume numbers, e.g., 1RP, 2RP, etc. Four of the trial reports, covering July 16 and 18, and August 15 and 16, 2012, are labelled only by date, but nonetheless fall chronologically within the labelling scheme of the other trial volumes. They thus will be referenced as 5RP, 7RP, 23RP, and 24RP, respectively. The remaining (non-trial) reports will be referred to by hearing date, thus: RP (9/7/10).

not see someone across the street. 8RP 960, 1026. There was a light dusting of snow, between a quarter and half an inch. 8RP 1068. There were footprints in the street, but they stopped before the house. 8RP 962. They were not actually “prints” they were like scuffs, like kids make sliding in the snow. 8RP 1024.

Munro’s truck was parked in front of the house. 8RP 965. There were fresh footprints coming from the rear of the truck. 8RP 965, 967. The truck was unlocked and had there was snow on the ledges of both door windows. 8RP 1081, 9RP 149, 183. There were smudge marks by the door handle and along the edge of the door. 8RP 1082, 1086. There did not appear to be any sign of a struggle near the truck. 9RP 126. There were no firearms or .45 ammunition in or near the truck. 9RP 127, 16RP 29.

The officers looked in the front window of the house and could see Munro on the floor. 8RP 969, 1028. They went inside; the door was not locked. 8RP 970. There were no signs of a struggle or forced entry. 8RP 1029; 9RP 124-25. Munro’s gun cabinet was undisturbed. 10RP 145-46.

EMT were called, who determined that Munro was dead. 8RP 981, 973, 1030. By the time detectives arrived at 7:00, the EMTs had a lot of footprints and tire tracks between the house and the street. 9RP 120. Munro had a bullet hole in his chest. 9RP 124. His keys were near his

hand. 9RP 124.

The police taped off the area with crime scene tape. 8RP 975. A freshly-fired shell casing was located near the front walk. 8RP 1087, 130, 9RP 190. There was no snow on it. 9RP 190. A pair of handcuffs was found in the yard, near to the old car parked next to the house. 8RP 1091, 9RP 131, 196. There was no snow on the cuffs. 9RP 198. There were a few footprints near the cuffs and a single fresh set of footprints that ran around the side of the house between the old car and into the back yard and out through the back gate to the alley. 9RP 131, 133, 139, 10RP 92.<sup>2</sup>

After six months of intensive investigation, David Nickels was charged with the murder. CP 1. During their investigation, the police learned that the road to Munro's death began years earlier in 2004, when Munro's girlfriend Marita Messick was 15 years old and met Nickels, who at the time was 23. 11RP 14; 18RP 14.

Shortly after they met, Messick began dating Nickels. 11RP 14; 18RP 15. That continued for about two years. 18RP 15. During that time, if she did not quickly return his calls or texts, he would call her mother's house over and over. 18RP 16. When the relationship ended, Nickels constantly called and came to her work and was mad and crying. 18RP 17. They never really stopped talking and texting. 18RP 17.

---

<sup>2</sup> A video was taken at the scene, and shown to the jury. 10RP 204.

After she broke up with Nickels, but before she started dating Munro, she only had one other boyfriend. 18RP 18. Zeb Barber and Messick dated for about two years from 2006 through 2008. 13RP 99; 18RP 18..

Nickels did not react well to her dating Barber, which he discovered by snooping through her phone. 18RP 19. During that period he received a call from Nickels, who told him he should leave Messick alone, because Nickels was “still with her.” 13RP 101. The call made Barber feel threatened. 13RP 101. Nickels told him he and Messick had met at a hotel to have sex.<sup>3</sup> 13RP 101.

Nickels also told Messick that if she kept dating Barber, he would burn down Barber’s house with him and his family in it. 18RP 20. Nickels showed Messick a photo of Barber’s house, which was in another town three hours away when he made the threat. *Id.* After she broke up with Barber, continued to repeatedly call and text her. *Id.* If she did not respond, he would call her mother and family. 18RP 21. He told her that if she broke off with him, he would hurt the people she loved and ruin her life. 18RP 21.

In May 2009, when Messick and her mother moved to Ephrata,

---

<sup>3</sup> Although she initially cut off her sexual relationship with Nickels, it resumed later in her relationship with Barber. 18RP 19.

and then in September they moved to Wenatchee. 11RP 16; 18RP 23. The move did not stop Nickels from contacting her. 18RP 23. While they lived in Ephrata, Messick's mother received calls after midnight from Nickels. 11RP 16. On one occasion in August of that year, Nickels called her and informed her that Messick, who was in Spokane at her brothers' house was out partying and the brothers were not attending to Messick's baby. 11RP 18-19.

Messick had known Munro since childhood. 18RP 24. After she moved to Ephrata, they began dating. 18RP 25. Messick dated Munro for six months before he was killed. 18RP 25. After Nickels found out about it, he called Munro. 18RP 28. Messick was visiting family in Helena when Nickels showed up unexpectedly while she was on the phone with Munro. 18RP 29. He grabbed the phone and hung up on Munro. 18RP 30. Then he left with the phone. 18RP 30. When she caught up to Nickels, he had called Munro back and was talking to him. 18RP 31. Nickels hung up, threw the phone at her and left. 18RP 31. She was alarmed enough to report the incident to the police. 18RP 34.

In the early fall, Nickels showed up in Moses Lake and then came to Ephrata. 18RP 35. He said he had to pick up stuff there. 18RP 36. Again in the fall, she agreed to meet Nickels in Ritzville. 18RP 38. When she showed up in Munro's Jeep, Nickels searched the glovebox to

determine whose vehicle it was. 18RP 38. He became enraged when realized it was Munro's. 18RP 38.

In November, Messick was at Munro's house. 18RP 37. Later that evening, Nickels called her and asked what she had done that night. 18RP 36. When she stated that she had just hung out at home, Nickels responded that no she had been at Munro's house. 18RP 37. He then described exactly what they were doing. 18RP 37.

Rex Lain, who lived in Big Piney, Wyoming, met Nickels in April 2009, shortly after he was released from prison after serving a 16-year manslaughter sentence. 17RP 143-45. He told Nickels about the conviction. 17RP 145. Around Thanksgiving 2009, Nickels asked Lain if he would kills someone for him. 17RP 146. Lain said no. 17RP 57.

Nickels visited Wyoming again just before Christmas. 17RP 147. Although Nickels was supposed to be selling him a car, but Lain did not hear from him Nickels until January, when Nickels asked him to provide him an alibi. 17RP 148-49. Lain declined. 17RP 149.

In early to mid-December, Messick agreed to meet Nickels in Spokane. 18RP 39. She had told him she did not want to keep seeing him because it was interfering with the relationship she wanted with Munro. 18RP 39. He convinced her that if she just came and saw him and hung out one last time, he would stop and it would be done. 18RP 39. So she

went. 18RP 39.

When she arrived she was surprised that he had rented a “really fancy” hotel room with a huge hot tub. 18RP 41. She quickly became concerned because there only one king-size bed and she did not want to sleep with him. 18RP 41. She told him that she did not want sex, and said he did not either, although he attempted to initiate sex during the night. 18RP 41-42. The next day they went to the mall and he kept buying her expensive items, spending about \$1000. 18RP 42. He also showed her two large stacks of \$100 bills, which she took a picture of.<sup>4</sup> 18RP 43.

The next day, contrary to his promise, Nickels followed Messick to Moses Lake and had her rent a motel room for him. 18RP 46. She never went into the room. 18RP 47. Then she went back to Ephrata and hung out with Munro. 18RP 47. The next day Nickels said he had business in Seattle, but then claimed the weather was too bad, so he asked her to get him a hotel in Wenatchee. 18RP 47. She again did not go into the room. 18RP 48.

Later in December, she went to Helena with her mother to visit friends. 18RP 51. They were there for a week. 18RP 51. She ran into Nickels and Samantha Costigan at a restaurant. 18RP 52. He asked her to

---

<sup>4</sup> The FBI retrieved Messick’s cell. 11RP 120, 126. There were a number of pictures of Messick, mostly nude, on it. 11RP 121-22, 126. There was also a picture with a lot of cash in it. 11RP 122.

come by so he could give her something, but when she arrived he had nothing. 18RP 52. Instead he tried to kiss her and which she refused. 18RP 53. He wanted her to spend New Year's with him but she told him she was going home to be with Munro. 18RP 53. On December 23, she left without saying goodbye to him and spent the week with Munro until the day before the murder. 18RP 54.

The day Messick left, Nickels placed an ad on craigslist:

I am looking for a . 22 pistol. Not a revolver, though.  
Thanks

17RP 116. The ad was connected to his email address and phone number. 14RP 60-61; 17RP 115; 18RP 59-60. .

Costigan met Nickels when she was dating his friend Paul York about eight years before trial. 16RP 88. They were good friends at the time of the murder. 16RP 89. He usually stayed at her house when he was in Helena. 16RP 89. He stayed there from December 20 through 28, 2009. 16RP 89.

On the morning of December 28, Costigan saw Nickels before she went to an 11:00 a.m. appointment. 16RP 90. When she came home he was gone. 16RP 90. They talked on the phone and Nickels told her he had gone to Great Falls, which is northeast from Helena. 16RP 90. Later that evening he said his phone was about to die, but he was going to stay the night in Great Falls. 16RP 90-91.

The next morning she called him, and he told her he would have to call her back. 16RP 92. He called back and told her that Messick had called and told him that Munro had been killed. 16RP 93. He said he was in Great Falls and would come back that night. 16RP 93. He did not arrive. 16RP 93. She asked if he an alibi and he said he had stayed with a friend. 16RP 93.

A Homeland Security consultant analyzed the movement of Nickels by tracking the cell towers his phone connected to.<sup>5</sup> 14RP 81, 88, 91. On December 28, 2009, from 9:30 in the morning, Nickels visited various locations in Helena. 14RP 109. He made 67 between then and 4:23 that afternoon, all in Helena. 14RP 109-11. Then by 5:46, he was in Missoula, heading in a westerly direction. 14RP 113-14. By 6:12 p.m., he was in Frenchtown, Montana, and continuing west on or near I-90. 14RP 114. He proceeded from Montana through Idaho, to Spokane, where his phone went silent at 8:47 p.m. 14RP 115-18. He made a total of 89 calls that day.

Nickels's phone next appeared on the network at 8:51 a.m. on the 29<sup>th</sup>, again near Spokane. 14RP 118-19. He remained in the Spokane area until around noon, making 12 calls. 14RP 121. By 1:42 p.m., he was in Post Falls, Idaho, and proceeded from there along I-90 to Butte, Montana

---

<sup>5</sup> That information was supplied pursuant to a warrant executed through the FBI upon Verizon. 14RP 86.

by 6:11 p.m. 14RP 122-124. From there he proceeded south along I-15, where he ultimately stopped and remained through 11:47 a.m. on December 30. 14RP 125-27.

On the morning of the murder, Munro's sister called to tell Messick he had been killed. 11RP 20; 18RP 57. Messick immediately called Nickels; it was around 8:00 a.m. 18RP 57. She asked where he was and he again claimed to be in Great Falls. 18RP 57.

On January 9, 2010, Maquel Stankey,<sup>6</sup> Michelle Erb, Michael Kleeman, Davis Pellen and Eric Alsager all saw Nickels and Costigan at a bar called Miller's Crossing, in Helena. 15RP 7-8, 26-28, 37-39; 162, 166. Nickels was in a good mood and bought a bunch of "Washington Apple" shots. 15RP 28-29; 18RP 169. While they were there, Nickels and Alsager had a conversation. 15RP 40; 18RP 168. Nickels told him that he was a murder suspect. 18RP 170. Alsager asked why, and Nickels responded that he had shot some guy. 18RP 170. He said it was over in Washington, and he had shot him and he had not seen it coming. 18RP 170. He said he did it because the guy was dating Messick. 18RP 171. Alsager laughed and asked what would happen if he dated her, and Nickels responded, "oh, probably the same thing." 18RP 171.

---

<sup>6</sup> A few months later, after she learned that Nickels was a murder suspect, she called him. 15RP 10. He made jokes and told her to tell the investigators they had "had crazy monkey sex in the alleyway." 15RP 11.

A few weeks later, he heard from Messick. 18RP 179. She told him that her fiancé had been killed. 18RP 181.

The police retrieved Nickels's toothbrush from Costigan's apartment in Helena. 13RP 127, 136; 16RP 94. DNA technician Anna Wilson compared DNAs recovered from the toothbrush and from a buccal swab of Nickels to DNA extracted from the handcuffs. The toothbrush and the swab had identical profiles. 15RP 91. Although there handcuff extraction had multiple contributors, Nickels's entire profile was present in the mixture. 15RP 87-88. Wilson performed a statistical analysis, finding a 1 in 2300 people could have been included in the mixture. 15RP 87-88. All the other submitted profiles, including Libby's were excluded from the handcuffs. 15RP 91-94.

Neither the casing nor the handcuffs had any latent fingerprints on them. 16RP 48-50. One usable lifts were taken from Munro's truck. 16RP 55-56. They did not match Munro or Nickels, 16RP 56.

An FBI technician examined the shoeprints. He concluded they could have been made by a Texas Steer model 46560. 16RP 77. He was unable to determine the shoe size from the photos. 16RP 78. He further testified that in his "opinion there's no direct correlation between the physical length of a shoe print and what size shoe left it." 16RP 79.

The jury found Nickels guilty. CP 3921. The State will address

procedural and post-trial matters, along with the defense evidence, where relevant, in the argument portion of this brief.

### III. ARGUMENT

#### A. ASSUMING THIS COURT CHOOSES TO FOLLOW *STATE V. SMITH*, ANY ERROR WOULD BE HARMLESS.

##### 1. *The to-convict instruction was the same as that in Smith.*

Nickels argues that under *State v. Smith*, 174 Wn. App. 359, 298 P.3d 785 (2013), the trial court’s instruction to the jury that if it had a reasonable doubt it “should” return a verdict of not guilty, instead of that it had a “duty” to do so as set forth in WPIC 4.21 was reversible error.<sup>7</sup>

##### 2. *The error in this case was harmless.*

In *Smith* Court observed that at one point, the jury was deadlocked and it could not discern how unanimity was finally reached. But one possible reason was that “jurors concluded from the court’s instructions that while jurors with lingering doubts should return a verdict of not guilty, they did not have to.” *Smith*, 174 Wn. App. at 369. Thus, the Court held the erroneous instruction was structural error that required reversal, because of the difficulty of assessing the effect of the error. *Smith*, 174 Wn. App. at 368-69.

Here, the reasonable doubt instruction, in particular, explained to

---

<sup>7</sup> The instruction was given eight months before *Smith* was decided.

the jury the State's burden and the juror's duty:

The defendant is presumed to be innocent. This presumption requires a verdict of not guilty unless you find, during your deliberations, that the presumption has been overcome by the evidence beyond a reasonable doubt.

28RP 8. Further, Nickels has identified nothing in the record that suggests the jurors were confused about the instruction.

In addition, at trial the only element in contention was the identity of Munro's killer. The evidence that someone intentionally shot him, in Washington was undisputed. Thus, even if the Court were to assume the jury read the instruction as Nickels suggests, the error would only have affected the verdict if the jury somehow found reasonable doubt about the undisputed elements.

Despite the "should" language, it is difficult to see how it affected the verdict in this case. It neither relieved the State of its burden to prove every element beyond a reasonable doubt nor permitted the jury to find Nickels guilty without finding the evidence sufficient on each element of the crime. Accordingly, the Court should reject Nickels's claim of structural error. Further, any error in the instruction was harmless beyond a reasonable doubt because there is no discernible way in which the error contributed to the outcome of the trial. *See State v. Thomas*, 150 Wn.2d 821, 844–45, 83 P.3d 970 (2004) (jury instruction that misstates the law such that it relieves the State of its burden to prove every element of the

crime charged affects a constitutional right and therefore is subject to the rigorous constitutional harmless error standard).

**3. *The Court should decline to follow Smith.***

Technically, the Court of Appeals is not bound by even the same division of the Court and may decline to follow another opinion of the Court. *See Grisby v. Herzog*, 190 Wn. App. 786, 810, 362 P.3d 763 (2015). However, even were this Court subject to the Supreme Court’s *stare decisis* rule, *Smith* should be abrogated. Under that rule, the Court will overrule a prior decision the rule it announced is incorrect and harmful. *State v. Barber*, 170 Wn.2d 854, 863–65, 248 P.3d 494 (2011). *Smith* is both.

A substantial body of legal authority holds that use of the word “should” in the elements instruction is not error at all. *See e.g. Willingham v. Mullen*, 296 F.3d 917, 929 (10th Cir. 2002) (“the term ‘should,’ ... is defined as expressing an obligation or duty” (quoting *Willingham v. State*, 1997 OK CR 62, 947 P.2d 1074 (Okla. Crim. App. 1997)); *United States v. Hamilton*, 792 F.2d 837, 840 (9th Cir. 1986) (finding no plain error based on jury instructions where “[t]he jury was properly instructed that [the defendant] was presumed innocent and that he should be acquitted if there was a reasonable doubt as to his guilt”).

The state case law is even more compelling: several states use

“should” as part of their pattern elements instruction. *E.g.*, *State v. Munoz*, 240 P.3d 311, 315 (Colo. 2009) (rejecting challenge to pattern instruction because “the common meaning of ‘should’ conveys an obligatory command and not a permissive request.”); *State v. Sanders*, 912 N.E.2d 1231, 1234 (Ill. 2009) (same, with court finding no support for the contention that the word “should” diminishes the presumption of innocence or the burden of proof); *Torrence v. State*, 574 So.2d 1188, 1189 (Fla. App. 1991) (“the instruction [gave] the jury only two choices depending on whether they [had] ... a reasonable doubt and convey[ed] the clear meaning that an acquittal [was] the jury’s only choice if they entertain[ed] such a reasonable doubt.”).

Likewise, states without “should” in their pattern instructions have found no error in the use of the term. *Wright v. State*, 730 N.E.2d 713, 716 (Ind. 2000) (“you should give him the benefit of the doubt and find him not guilty”); *State v. McCloud*, 891 P.2d 324, 334 (Kan. 1995) (“the word ‘should’ as used in instructions conveys a sense of duty and obligation and could not be misunderstood by a jury”); *Tyson v. State*, 457 S.E.2d 690, 691 (Ga. 1995) (“the term ‘should acquit’ is language of command”); *Com. v. Hammond*, 504 A.2d 940, 941-42 (Pa. 1986) (“should” is defined “as implying a duty or obligation”); *State v. Caffey*, 365 S.W.2d 607, 611-12 (Mo. 1963) (“if you have a reasonable doubt of the defendant’s guilt,

you should acquit”); *Tidwell v. State*, 118 So. 2d 292 (Ala. 1960) (“The words ‘it is your duty’ are equivalent to the word ‘should,’ since ‘should’ as used in instructions to the jury conveys the sense of duty or obligation.”); *State v. Jones*, 139 P. 441, 447-48 (Mont. 1914) (“the average juror does not stop to speculate as to the distinctions in the meaning of such terms as ‘must,’ ‘ought’ and ‘should,’ all denoting moral obligation, but recognizes the obligation of his official duty enjoined by the use of one of them”).

Further, even in the cases relied upon in *Smith*, the words were found to be at most ambiguous and not requiring reversal. Indeed, one of the cases actually approved the use of “should” in the elements instruction, holding that the term “clearly inform[ed]” the jury of its obligations. *Torrence*, 574 So.2d at 1189. The other case expressed concerns with using “should” rather than “must,” but, as this Court’s opinion noted, that case did not hold that the error alone warranted reversal. *Smith*, 174 Wn. App at 367 (citing *Com. v. Caramanica*, 729 N.E.2d 656, 659 (Mass. 2000)).

The Court’s opinion cited another case which the Court read as supporting *Smith*’s position “more strongly.” *Id.* (citing *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004)). But the *Arave* declined to hold that use of the term “should” was error. *Arave*, 383 F.3d at 821-22 (disagreeing that

the “should” instruction was “confusing, ambiguous, and possibly misleading to the jury”; “*Whatever* error there was in [the ‘should’ instruction] was immediately cured”; “*even if* a layperson would have understood ‘should’ as precatory rather than mandatory, any such impression was promptly corrected.”) (emphasis added).<sup>8</sup>

Indeed, the court seemed dubious that the word “should” misstated the jury’s obligations at all, explaining that the notion that use of the term “should” misstated the jury’s obligation “is by no means clear, as common definitions of ‘should,’ ‘shall’ and ‘must’ include both an *obligatory* and an exhortatory connotation.” *Arave*, at 822 n.6 (emphasis added).

The great weight of authority is against the holding in *Smith*. No Washington precedent before or since it was decided has reached the same conclusion. Moreover there simply is no likelihood that a jury, having been told they “should” acquit a defendant if the State fails to meet its burden of proof, would willy-nilly take that command as license to convict anyway. Under these circumstances, reversing the result of a seven-week trial would be a gross waste of judicial resources. *Smith* is thus both incorrect and harmful. The Court should decline to follow it.

---

<sup>8</sup> In the same breath, the Ninth Circuit noted the Supreme Court had “caution[ed] against ‘technical hairsplitting’ of jury instructions.” *Arave* 383 P.3d at 822 (citing *Boyde v. California*, 494 U.S. 370, 381, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990)).

**B. THE RECORD FAILS TO SHOW THAT JUROR BUNDY WAS BIASED.**

Nickels next claims that he was entitled to a new trial because juror Bundy was biased. This claim is without merit because Nickels failed to meet his burden of establishing actual or implied bias, and failed to show any basis to excuse Bundy for cause.

In a criminal proceeding, “a new trial is necessitated only when the defendant ‘has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.’” *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a clear abuse of discretion. *Id.* An abuse of discretion occurs only “when no reasonable judge would have reached the same conclusion.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989). Further, claims of juror misconduct raised in a motion for a new trial require a showing of prejudice to support relief. *State v. Depaz*, 165 Wn.2d 842, 855, 204 P.3d 217 (2009). It is the defendant’s burden to demonstrate prima facie evidence of bias. *In re Yates*, 177 Wn.2d 1, 31, 296 P.3d 872 (2013). Additionally, to show prejudice, the defendant must show a basis to have challenged the juror for cause. *State v. Cho*, 108 Wn. App. 315, 323-24, 30

P.3d 496 (2001) (citing *In re Lord*, 123 Wn.2d 296, 313, 868 P.2d 835 (1994), and *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)).

Before addressing the legal aspects of this claim, Nickels's factual assertions must be addressed. First, he repeatedly claims that Bundy perjured herself at the hearing. The record does not support this attack on her character. She simply testified that she did not recall hearing any juror make such comments:

Q: Do you recall either before deliberations, during recesses or during your jury deliberations any juror saying something to the effect that, "I feel sorry for the Defendant?"

A: No.

Q: Do you recall, during that entire time of the trial and your deliberations, any juror saying something to the effect that, "This is a small town. The Defendant will be taken care of?"

A: No.

RP (1/16/12) 907-08. She was never asked if *she* made such comments. In a footnote, Nickels concedes that Bundy was never "confronted" with an allegation that she had made such statements. Brief of Appellant at 19, n.14. Nickels implies that this was the court's fault because it asked the questions. *Id.* Nickels fails to note that he bore the burden of establishing his claim, and more importantly, that the trial court specifically permitted the parties to propose questions, which Nickels took advantage of. RP

(1/16/12) 975, 983-84. He did not seek any further examination of Bundy, however. *Id.*

Additionally he grossly overstates the evidence of Bundy's alleged bias. The evidence, minimal that it is, primarily shows that Bundy was a chatty woman, commenting on the process, the attractiveness of the defense paralegal, and other matters. The bailiff only stated that she spoke to him a few times "about the trial process." CP 4128. She desisted after a few reminders. *Id.* Nothing about the incident suggests bias. Mere infractions of jury rules do "not manifest an inability to deliberate or consider the evidence impartially" *Depaz*, 165 Wn.2d at 856.

Nickels also claims that Bundy made "repeated comments." Nothing supports this claim. Only two jurors recalled anything about the alleged comments now in issues. Reese stated that Bundy made the comments when "the jurors were congregated in the jury room." The other juror did not recall any details, but immediately shut Bundy down, reminding her that such conversation was inappropriate:

Q: Okay. And do you remember anybody saying out loud a comment along the lines of, "I feel sorry for the Defendant. This is a small town. He'll be taken care of," or anything like that?

A: I, I think I recall a juror saying that, and I just said, "You know, we're not supposed to talk about it."

Q: Do you recall any specifics of what was said?

A: Just that maybe, oh... I can't recall specific wording.

Q: But you do recall that you sort of stepped up and said, “We’re not supposed to discuss it?”

A: Yeah. Uh-huh (affirmative).

RP (1/16/12) 962. She was not asked whether anyone else was present at the time. The record thus fails to establish that there was not a single comment heard by two jurors.

The remaining evidence was alternate juror Reese’s statement:<sup>9</sup>

After she commented on the paralegal’s appearance, she told me that she pitied the defendant. She then proceeded to state that the defendant was not going to last long; that this was a small town; and, they were going to take care of him.

CP 4086. Bundy’s reported comments, however, could have meant any number of things, including a negative opinion of the people of Grant County or of her fellow jurors, as opposed to her own opinion of Nickels’s guilt or innocence. The comments did not express any personal feelings of this juror as to her belief in Mr. Nickels’ guilt or innocence. Additionally, the comments were not comments on the actual trial or evidence presented at trial. Although Reese offered an opinion in his declaration (he did not testify) as to what he thought Bundy meant, there are no facts in the record on which to judge his opinion, and it therefore fails to support Nickels’s claim.

Thus contrary to Nickels’s contention, nothing in the record

---

<sup>9</sup> The bailiff, while confirming that Reese contacted him, did not recall that specific of the comments other than “some concerns about the defendant.”

demonstrates either that Bundy was biased or that Nickels was prejudiced, which, again, is his burden of showing. To the contrary, during voir dire, all of Bundy's responses indicated she would be fair and impartial.<sup>10</sup> In her first comment she noted the importance of basing her verdict only on the evidence:

JUROR NUMBER 14: I think that being a juror you're dealing with the evidence only.

MR. OWENS: Uh-huh.

JUROR NUMBER 14: Your personal opinions or whatever you think is something entirely different. ...

JUROR NUMBER 14: Again, I have to go back and say we are instructed to deal with the evidence only.

6RP 756-57. Her other responses similarly indicated a concern for understanding all the circumstances of a situation and reflected an ability to be fair. 7RP 232-35.<sup>11</sup>

A defendant is guaranteed a fair trial before an impartial jury by the Sixth and Fourteenth Amendments. *Yates*, 177 Wn.2d at 30 (*citing Ross v. Oklahoma*, 487 U.S. 81, 85, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)). This right is violated by the inclusion on the jury of a biased juror, whether the bias is actual or implied. *Id.* (*citing Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (inclusion of

---

<sup>10</sup> Bundy was designated as Juror Number 14 during voir dire. *See* CP 3566.

<sup>11</sup> Notably, Nickels apparently did not see a need to ask Bundy *any* questions during voir dire.

a single biased juror invalidates death sentence), and *Smith v. Phillips*, 455 U.S. 209, 221–24, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O’Connor, J., concurring) (noting that implied bias may violate a defendant’s Sixth Amendment rights)).

Actual bias is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.”<sup>6</sup> *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (quoting RCW 4.44.170(2)). Even then, however, a juror’s “opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.”<sup>7</sup> *Id.* (quoting RCW 4.44.190). The trial court has broad discretion when considering “all the circumstances”:

The trial judge is in the best position to evaluate whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor, and the like.

*State v. Gonzales*, 111 Wn. App. 276, 278, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). Finally, as this Court observed in *State v. DeLeon*, 185 Wn. App. 171, 218-19, 341 P.3d 315 (2014), review granted on other grounds, 184 Wn.2d 1017 (2015) (quoting *Com. v. Werner*, 81 Mass. App. Ct. 689, 697, 967 N.E.2d 159 (2012)) “attitudinal expositions”

on jury service, protracted trials and guilt or innocence do not warrant further inquiry.

Here, during voir dire, Bundy manifested a clear ability to be fair and impartial. Moreover, despite having the opportunity to do so, Nickels never sought to clarify the statement she was alleged to have made during trial. As such the trial court, which had the additional benefit of observing Bundy's demeanor was within its discretion in not finding that she had actual bias.

Nor does the record establish implied bias. Nickels relies on *Cho*. However, that case is not analogous. In *Cho*, a juror did not disclose that he was a former police officer, which "raise[d] a troubling inference of deliberate concealment." *Cho*, 108 Wn. App at 327. As previously discussed, there is no evidence here that Bundy concealed any facts.

Nickels's reliance *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998), is also misplaced. There, a juror denied having any family member who was the victim of a crime. It was later discovered her brother was killed. When examined, she stated that she thought it was an accident and therefore not a crime. In fact, the brother, who was seventeen, was pistol-whipped four times and then shot in the back of the head (as were Dyer's victims). The same prosecutor who handled that case was the prosecutor in Dyer's. *Dyer*, 151 F.3d at 972-73, 975. The federal court ultimately

implied bias because the record “conclusively establishe[d] that [the juror] lied, and lied repeatedly.” *Dyer*, 151 F.3d at 981.

As *Dyer*, 151 F.3d at 981, observes, a finding of implied bias is reserved for “extraordinary cases.” *See also Cho*, 108 Wn. App at 325 (findings of implied bias are reserved for “exceptional cases”). Nothing in the record here provides a basis for attributing bias to Bundy. Nor does anything in the record suggest a basis for excusing her for cause. As such Nickels failed to meet his burden of showing either bias or prejudice. The trial court acted within its discretion in denying his new trial motion.

To the extent that this claim is based on any effect Bundy’s comments may have had on her fellow jurors, it is also without merit. Eleven juror denied hearing any comments of the kind alleged by Reese, who as the alternate, did not deliberate on the verdict. *See RP (1/16/12)* 894, 908, 916, 923 (“absolutely not”), 931, 941, 944, 951, 966, 974. The one juror who stated she had was clearly not influenced by the exchange, as noted above. There thus could be no prejudice from the communication between jurors, and no new trial was justified. *Bourgeois*, 133 Wn.2d at 410-11; *Depaz*, 165 Wn.2d at 856 n.3.

**C. NICKELS WAS NOT PREJUDICED BY THE BAILIFF’S EX PARTE CONTACT WITH JURORS.**

Nickels next claims that the trial court’s handling of Bundy and

Reese's communications with the bailiff violated his rights to be present and to counsel. Assuming the communications to be improper, where, as here a post-trial hearing was held on the matter, there can be no prejudice to Nickels.

Washington courts apply federal constitutional law to asserted violations of defendants' rights to be present at trial. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011); *In re Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998). Although the right to be present originated in the Confrontation Clause of the Sixth Amendment, the United States Supreme Court has applied the Due Process Clause of the Fourteenth Amendment in situations where defendants are not actually confronting witnesses or evidence against them. *See United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (per curiam); *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).

In *Spain*, the Supreme Court addressed a situation similar to what occurred below. The Court observed:

When an ex parte communication relates to some aspect of the trial, the trial judge generally should disclose the communication to counsel for all parties. The prejudicial effect of a failure to do so, however, can normally be determined by a post-trial hearing.

*Spain*, 464 U.S. at 119. *See also Spain*, 464 U.S. at 125-28 (Stevens, J., concurring) (no violation of right to presence because of post-trial

opportunity to address the issue). Our Supreme Court has followed a similar approach. *State v. Bourgeois*, 133 Wn.2d 389, 408, 945 P.2d 1120, 1129 (1997) (quoting *State v. Johnson*, 56 Wn.2d 700, 709, 355 P.2d 13 (1960) (Where “the trial court ‘communicated no information to the jury that was in any manner harmful to the appellant,’ we held that the communication was improper, but not prejudicial, and therefore not a basis for reversal.”)).

In *Spain*, a juror expressed concern in an ex parte contacts with the judge that she was familiar with the facts of a case tangentially related to the case on trial. The conversations were discovered post-verdict, and a hearing was held on the defense motion for new trial. Because the post-trial hearing allowed the defendant to explore the juror’s potential bias, the Supreme Court concluded that any error was harmless. *Spain*, 464 U.S. at 120-21. Moreover, the Court particularly noted that the contact *itself* did not prejudice the juror.

The present case is difficult to distinguish from *Spain*. Here the judge did not even personally have contact with a juror. He merely determined to address the issue by reminding the jury of its responsibilities. As in, *Spain*, however, the defendant had the opportunity post-trial to raise the issue of Bundy’s impartiality. As in *Spain*, the trial court determined that the juror was not biased. For the reasons previously

discussed, that determination was correct. It follows, then, that any error in resolving the matter *ex parte* was harmless beyond a reasonable doubt under *Spain*.

**D. BECAUSE POST-SELECTION CONTACTS WITH JURORS HAVE NOT HISTORICALLY BEEN OPEN TO THE PUBLIC, NICKELS CANNOT SHOW THAT HIS PERSONAL PUBLIC-TRIAL RIGHT HAS BEEN VIOLATED.**

Nickels next claims that the bailiff's contact with the jurors violated both his and the public's open trial rights. Because he cannot show the former, Nickels may not raise the latter issue.

When an appellant seeks a new trial to remedy an alleged violation of the public's article I, section 10 rights to open proceedings—without also demonstrating an article I, section 22 violation of the defendant's public trial rights—the alleged error does not warrant a retrial. *State v. Beskurt*, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013).

Whether a defendant's constitutional right to a public trial has been violated is a question of law, which is reviewed *de novo*. *State v. Sublett*, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). The federal and state constitutions protect the public trial right. U.S. Const. amend. VI; Const. art. I, §§ 10, 22. However, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or

constitute a closure if closed to the public.” *Sublett*, 176 Wn.2d at 71. Before determining whether there was a violation of a defendant’s right to a public trial, the Court must first consider “whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all.” *Id.*

In *State v. Halvorson*, 176 Wn. App. 972, 977, 309 P.3d 795 (2013), the defendant argued that questioning an impaneled juror during deliberations on suspicion of misconduct was analogous to questioning a juror for potential biases during pretrial voir dire. This Court disagreed, citing the Court’s conclusion in *State v. Wilson*, 141 Wn. App. 597, 605, 171 P.3d 501, 505 (2007), that an in-camera meeting regarding a seated juror without the defendant present was a “short interlude” at trial that did not violate the defendant’s rights to be present. Applying the experience and logic test, the Court also noted that federal courts had reached the same conclusion:

Federal courts show a similar historical acceptance and practice of in-camera questioning of impaneled jurors. *See, e.g. United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (“Experience and logic do indeed provide the reasons why midtrial proceedings involving the questioning of jurors have traditionally been closed to the public: holding such proceedings in open court would itself introduce an element of bias and would substantially raise the risk of destroying the effectiveness of the jury.”). Given this documented practice in Washington and elsewhere, in-camera questioning of impaneled jurors has not traditionally been

open to the press and general public. Thus, Halverson's argument fails the experience prong of the experience and logic test, and we need not address the logic prong.

In conclusion, experience tells us that the place and process of preliminary, individual questioning of impaneled jurors for misconduct has not historically been open to the public, and the trial court did not error by conducting this proceeding in chambers. Therefore, Halverson did not demonstrate reversible error relating to a violation of his article I, section 22 public trial rights.

*Halvorson*, 176 Wn. App. at 978. Because post-selection contacts with jurors have not historically been open to the public, Nickels cannot show that his personal public-trial right has been violated. Because he raised this issue in a post-trial motion, he thus cannot raise the public's rights. Even if he could, however, as discussed, he has failed to show that the "proceeding" was one traditionally open to the public.

**E. NICKELS FAILS TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION FOR DISMISSAL.**

***1. Introduction.***

This claim, like others Nickels raises, is replete with innuendo and assertions without citations to actual evidence. As a typical example, fully five assertions alleged as fact on page 36 of Nickels's brief are supported by reference to argument of counsel below, not evidence. *See* RP (6/6/12) 461, 464-66, 484-86, 478-80, 480.<sup>12</sup> Moreover, his brief is a hodgepodge

---

<sup>12</sup> The State will address the facts as appropriate in its argument. The failure to deny a specific factual assertion in Nickels's brief should not be taken as agreement.

of mixed claims and sensationalist out-of-context quotes from the record. The State had genuine difficulty discerning the precise contours of these claims and formulating a response. No actual assertion of an appellate issue appears until part (d)(i) of the claim. Rather than attempt to sort through the “factual” ramblings, the State will attempt to respond to the actual present claims on pages 41 through 44 of Nickels’s brief.

**2. *Cox’s statement was not exculpatory or material.***

Nickels asserts that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to turn over the purportedly exculpatory transcript of Matthew Cox’s recorded interview until after trial was over. In his new trial motion, filed September 17, 2012, Nickels asserted that he received the document in question on August 27, 2012. CP 3928. He further asserted that the interview provided the missing link that showed that Libby’s July 27, 2012, assault on Cox was related to Cox’s testimony in Nickels’s case. CP 3928.

However, nowhere in his new trial motion, in his extensive reply regarding that motion filed on December 14, 2012, CP 4063, nor in the body of his post-evidentiary hearing briefing filed on February 11, 2013, CP 4538, did Nickels ever explain how Cox’s statement provided evidence that was material to the case. His sole explanation buried in a footnote of the latter document:

Specifically, the recorded statement of defense witness Matt Cox wherein he states: “‘cause I mean, I know Ian’s pissed off about this whole thing.” (page 9 of recorded statement). Officer Koch responds: “Right” and then asks Mr. Cox: “And the primary root for him being there was that car deal that you guys had?” *Id.* Cox responded: “Mm-hmm.” *Id.* at 10. It is reasonable to infer that Matt Cox meant that Ian Libby was “pissed. off” about the Sage Munro murder trial. Otherwise, Officer Koch would not have quickly tried to distinguish the trial from the car deal.

CP 4582 n.21. Nickels repeats a variation this assertion in his current brief, at 40. In neither case are the inferences he posits warranted.

There is absolutely no evidence to support an inference that Cox meant Libby was “pissed off” about Nickels’s trial. At the very beginning of the statement, and without any prompting from Sgt. Koch, Cox described at length how Libby was upset about a car deal. CP 3945. At no point in his 13-page statement does Cox mention the Nickels trial. Nor do any of the five witnesses to the assaults in their own written statements.<sup>13</sup> CP 3960, 3962, 3964-65, 3967, 3969. This evidence was clearly not exculpatory. Furthermore, although Cox testified for the defense at trial, nothing in the statement impeaches any of that testimony. Nickels simply fails to meet his burden of establishing that the evidence was exculpatory. This claim should be rejected.

---

<sup>13</sup> Notably Cox’s friends Carter and Rains, who have no obvious relation to the trial, bore the brunt of the assaults. CP 3946, 3949, 3952, 3962, 3964. Cox was only the victim of an attempted slap. CP 3950.

**3. *There is no evidence of bad faith on the part of the police.***

Nickels next asserts that the State evinced bad faith. He makes numerous factual assertions (without, however, citing to any evidence in support of them).<sup>14</sup> He does not, however tie his allegations to any legal consequence.

The state and federal constitutions both require, as a matter of due process, that the State disclose and preserve material exculpatory evidence for use by the defendant. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). A showing that the evidence might have exonerated the defendant is not enough to subject the evidence to the duty to preserve. *Id.* To be materially exculpatory, evidence must both (1) possess an exculpatory value that was apparent before it was destroyed and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Where evidence does not rise to the level of being materially exculpatory but is only potentially useful, a failure to preserve evidence does not constitute a due process denial unless a defendant can demonstrate the State's bad

---

<sup>14</sup> This section of his brief ((d)(ii) beginning on p. 42) contains a single record reference. Nickels, at p. 43, asserts that “the prosecution took a hands-off approach to Brady material from Montana, averring that it was “not the State’s problem.” RP (Jackson Vol. 2) 219. Nothing on that page of the report from October 27, 2011, supports that quote. Moreover, Nickels clearly obtained the material from Montana by trial, and used it to impeach Mlekush. *See* Point F(2)(b), *infra*.

faith. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); *State v. Copeland*, 130 Wn.2d 244, 279-80, 922 P.2d 1304 (1996).

Although Nickels offers no actual evidence of bad faith, it is clear that regardless of any sloppy practices during the investigation, the police did not act in bad faith in excluding Libby as a suspect. To the contrary, the police investigated Tycksen's claim and found it wanting:

On 1/22/10 I received a phone call from Detective Rodriguez advising he had been notified by the Ephrata Police Department about a domestic violence case they handled the night before. Detective Rogriguez [sic] said Ian Jacob Libby's name was brought up by his girlfriend as being possibly responsible for the shooting of Sage Munro. Detective Rodriguez told me he would interview Libby's girlfriend and then meet me at the Grant County Sheriff's Office so Libby could be interviewed.

At Approximately 1410 hours [on January 22, 2010] Detective Rodriguez and I interviewed Libby at the Grant County Jail where he was incarcerated for the domestic issue with his girlfriend. Detective Rodriguez advised Libby of his legal rights which he waived and agreed to a taped interview. Libby was asked about the alleged statements he made to his girlfriend and others about being responsible for killing Sage Munro. Libby said the rumors were started by his friend Julian Latimore's mother soon after Munro was killed. He said he was being blamed because of his past with thefts and living within such close proximity to Munro. When Libby was confronted with killing Munro he became angry saying he had nothing to do with killing Munro. He said he watched Munro with his son and saw how close they were. Libby said he grew up without a father and he would not do that to Munro's son. Libby said he would be willing to take a polygraph test.

Libby said on the morning of the shooting he had spent the

night at Tasha Deviak's [sic] house.

CP 1723 (Rectenwald report). Additionally while Nickels portrays the police in this case as bumbling and careless, it should be kept in mind that their investigation took nearly six months before charges were laid, and they interviewed literally hundreds of witnesses and followed up on numerous leads. The excerpts from the police reports in the statement of probable cause alone ran some 25 single-spaced pages. CP 2-26. There simply is no evidence to support a claim that the investigation on a whole was massively mismanaged and there is certainly no evidence that police acted in bad faith during the investigation.

***4. Nickels fails to show prejudice.***

In his next section, Nickels asserts that the State prevented him from obtaining Libby's text messages, his call detail record, his cell phone tracking data, and Cox's recorded interview. As discussed above, there was nothing exculpatory or impeaching in the Cox recording.

As for Libby's phone, the trial court specifically found that it did not appear "to involve evidence whose exculpatory nature was immediately apparent." CP 2008. The Court further noted that Nickels's real complaint was about the investigation, not the hiding of evidence:

[T]here's a couple of principles here that I think are important to note. One of them is that with all due respect to the defense, most of Mr. Larrañaga's argument about this latest report is not about the latest report, it's about the failure to investigate at the time, which remains a subject

available to the parties on cross-examination in the defense case in chief and all of that. That hasn't changed.

2RP 38. It its final ruling, the court carefully explained why it was denying the motion to dismiss:

This official bungling did not force Nickels to elect between speedy trial and adequately prepared counsel. The jury heard the testimony of Ms. Hays regarding the anonymous tip, and the appearance and statements of Tycksen which caused Hays to make it. The jury heard testimony from Tycksen regarding the specifics of the text messages she received from Libby. None of this testimony was contradicted.

Had Hays been promptly identified and interviewed, she would presumably have identified Tycksen to law enforcement (in relation to the Munro homicide) about a week before Tycksen brought herself to the attention of law enforcement. Hays would have offered no substantive evidence regarding the Munro homicide. In the court's view, none of this would have been materially different had the mismanagement not occurred.

Mr. Nickels had the opportunity to present a complete defense, and did so. He had the opportunity to establish Tycksen's visit to Hays, Hays's persistent efforts to notify law enforcement, and the substance and relative timing of the December 29 cell phone calls. Under these circumstances, while there may have been an opportunity, absent the mismanagement, to present a "perfect" or a "more thoroughly documented" defense, there remained an opportunity to present a complete one even given the impacts of the mismanagement.

CP 5750-51.

The record supports this conclusion. Tycksen testified on cross that in the texts, Libby did not say that he had killed or shot someone. 21RP 1326. They did not reference a shooting at all. 21RP 1326. They merely

stated that something bad had happened, and that he needed a ride. 21RP 1327. Devyak corroborated her testimony. 24RP 611.<sup>15</sup>

***5. Nickels fails to show dismissal was warranted.***

Finally, Nickels claims that the trial court erred in denying his motion to dismiss under CrR 8.3(b). This Court reviews such claims for abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Supreme Court has “repeatedly stressed that dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Nickels fails to even attempt to support his claim that he was prejudiced, as is his burden, both on a motion to dismiss and on appeal. He thus fails to show that the trial court abused its discretion in denying his motion to dismiss.

---

<sup>15</sup> In addition to his claims about Libby’s cell phone, Nickels asserts, without a record cite or even what evidence he is referring to, that the “same is true for the other evidence that the State permitted to be destroyed, failed to preserve, or did not pursue.” The State cannot and will not respond to such a vague assertion. Failure to cite legal authority that establishes that the trial court erred or to provide any argument in support of his claim is grounds for summarily rejecting his contentions. *Almagamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 12 P.3d 603 (2000); *State v. Neely*, 113 Wn. App. 100, 108, 52 P.3d 539 (2002).

**F. THE TRIAL COURT PROPERLY DENIED NICKELS'S MOTION TO SUPPRESS HIS DNA SWAB.**

***1. The trap-and-trace was authorized by court order.***

This Court reviews a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). Unchallenged findings of fact are verities on appeal. *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663, *review denied*, 178 Wn.2d 1011, 311 P.3d 26 (2013). The Court reviews the trial court's legal conclusions de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014).

Nickels first argues that he was stopped pursuant to an unauthorized of a track and trace of his cell phone. He theorizes that the trap and trace was used by Montana detective Michael Mlekush without authorization. The record, however, shows that Grant County Detective Ryan Rectenwald was the one who used the track and trace pursuant to a valid court order.

Under RCW 9.73.260, a law enforcement officer may apply to the superior court for an order authorizing a track and trace device. On May 3, 2010, Detective Ryan Rectenwald presented such an application to Grant

County Superior Court Judge John Antosz, which the judge granted. CP 1940, 1972. Rectenwald then relayed information from the track and trace to Mlekush, who used it to locate Nickels. CP 1937. Nickels has never argued that Judge Antosz's order was invalid.

Instead, Nickels argues the stop was invalid because three detectives "averred that the order either was never served upon a federal agency, or the U.S. Marshals would not execute it." Brief at 48. This contention reads their statements too broadly.

Rodriguez clearly was unsure as to what occurred: "I'd have to look at it. I don't think it was signed or we didn't, we didn't serve it." CP 1894. Dale likewise did not appear to recall exactly what had occurred. *See* CP 1517-19. He does, however state that the Marshal's service would not do the trap and trace for the DNA collection because there was no arrest warrant. CP 1519. Rectenwald, in his original report, stated:

On 05/03/2010 I applied for and was granted a court order authorizing me, US Marshalls, or its agents to track and trace David Nickels cell phone. The purpose of the order was to assist with locating Nickels so a DNA sample could be obtained. The US Marshalls later advised they were unable to assist so the DEA was contacted and they assisted with the trap and trace. Subsequently after Nickels was located in Helena we stopped researching the location of the phone.

CP 476. In his interview he stated:

I believe I made the request through the marshals and the marshals advised me they couldn't do it. And then I asked

for the DEA's assistance and they said they would be able to help me, but then subsequently he was located in Helena anyway, so I just put the kibosh on it. We no longer -- we notified the DEA and said there's no need for this, so we didn't go through with it.

CP 1989.<sup>16</sup> There is nothing inconsistent in these statements. Nickels relies on a subsequent statement later in the same interview where Rectenwald asserted that no trap and trace was used. CP 1990. The reasonable explanation, particularly in light of Rectenwald's prior statement and the discussion of the two separate trap and trace applications, was that Rectenwald was talking about when Nickels was arrested for the murder. CP 5889-90. This is also consistent with Rectenwald's supplemental report. CP 1937. It is also consistent with Montana Detective Hayes reported that:

Detective Mlekush was receiving updates from David's cell phone provider as to the location of David's phone. and it showed recent activity in this area.

CP 1363. There is no evidence that Verizon ever provided any information directly to Mlekush. Nickels conceded at the hearing that it could have meant that he got the cell information through Rectenwald. CP 5858. Moreover nothing in Mlekush's report<sup>17</sup> is inconsistent, either.<sup>18</sup> It simply

---

<sup>16</sup> The original report and interview thus directly contradict Nickels's claim, Brief at 47, that the detectives denied the DEA was involved until the motion to suppress.

<sup>17</sup> The State is referring report of May 14, 2010. Mlekush's email that the State offered in response to the motion to suppress was stricken on defense motion because it was unsworn. CP 5847, 5849, 5889. His complaints about it in his brief (at 47) are thus without basis because the trial court did not consider it.

<sup>18</sup> In his brief, Nickels asserts "Hayes's report contradicts Rectenwald and Mlekush,

stated that they located Nickels. CP 1978. None of this evidence was contradicted. The trial court's findings are supported by substantial evidence. Nickels does not appear to challenge its legal conclusions. The court's denial of the motion to suppress Nickels's DNA should be affirmed.

**2. *The trial court properly denied the Franks motion.***

This Court reviews a trial court's denial of a *Franks*<sup>19</sup> hearing for abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985). The Court begins with the presumption that the affidavit supporting a search warrant is valid. *State v. Atchley*, 142 Wn. App. 147, 157, 173 P.3d 323 (2007). To be entitled to a *Franks* hearing, a defendant must make a substantial preliminary showing that the affidavit includes deliberate or reckless inaccuracies or omissions. "If the defendant makes this preliminary showing, and at an evidentiary hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether, as modified, the affidavit supports a finding of probable cause." *State v. Chenoweth*, 160 Wn.2d 454, 469, 158 P.3d 595 (2007).

---

because he asserted Mlekush was *personally* receiving updates from Nickels's cell phone provider." Brief at 48 (emphasis in original). The argument was raised below, and the trial court called Nickels on it, pointing out that nowhere did the report say Mlekush was *personally* (or "directly" as it was stated below) receiving the information from the cell provider. CP 5858. Nickels conceded that was correct. *Id.*

<sup>19</sup> *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

The *Franks* test for material misrepresentations also applies to allegations of material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). If the affidavit, reformed to correct material inaccuracies or omissions, fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it will be excluded. *Chenoweth*, 160 Wn.2d at 469.

**a. Even striking reference to the Washington warrant, the affidavit provided ample probable cause to obtain Nickels's DNA.**

One misstatement was determined to exist: that a Washington judge had issued a warrant for Nickels's DNA. The misstatement was undisputed, and because the even without the statement, there was probable cause,<sup>20</sup> no hearing was necessary. The trial court did not abuse its discretion.

**b. There is no evidence Mlekush was under investigation at the time he applied for the warrant.**

Nickels asserts, wholly without evidentiary basis, that Mlekush was under investigation at the time he applied for the warrant. His only record citation is to argument of counsel below, which was likewise without evidentiary support. Brief at 51 (citing 9RP 12). The warrant was obtained in May 2010. CP 1325. The actual evidence shows that he was not terminated until nearly a year later, in April 2011, as a result of

---

<sup>20</sup> The detectives provided the Montana judge with 30 pages of additional facts regarding the investigation. CP 1327-57.

conduct occurring in February of that year.<sup>21</sup> The incident which lead to Mlekush's termination thus occurred some nine months *after* the warrant was obtained. CP 2663. It is not clear how this information should have been included in the warrant application.

Moreover, even if Mlekush had been under investigation at the time, his declaration was explicitly based on information he had received from the Washington detectives. As his termination had nothing to do with them or with any allegation that Mlekush had lied or misrepresented anything, probable cause would still have existed if the magistrate had been informed of the alleged disciplinary investigation.

***3. Any error would be harmless where a prior DNA sample from Nickels's toothbrush also showed him to be a contributor to the DNA on the handcuffs.***

Nickels's toothbrush was recovered from Samantha Costigan's apartment in Missoula before his buccal swabs were obtained. 13RP 127, 136; 16RP 94, 107; 19RP 140. The DNA technician was able to develop a full profile from it. 15RP 91. Like the DNA recovered from Nickels's buccal swab, it showed he was a potential contributor to the DNA from the

---

<sup>21</sup> Nickels makes it sound like Mlekush was an embezzler or worse. What actually happened was that he failed to properly secure a bag containing money for CI drug buys after being warned once about it. No money was missing. Then, during a disciplinary meeting regarding that incident he surreptitiously recorded the participants. Montana, like Washington, requires two-party consent. It was this latter behavior for which he was terminated and prosecuted. 13RP 60-61, 70, 71-73; CP 1168-77, 2661-75.

handcuffs. 13RP 91.<sup>22</sup> Indeed the DNA on the toothbrush and the swab were the same profile. 15RP 91, 115.

**G. THE TRIAL COURT ADMITTED MOST OF NICKELS’S PROFFERED HEARSAY STATEMENTS ATTRIBUTED TO LIBBY AND DID NOT COMMIT REVERSIBLE ERROR IN EXCLUDING A SMALL PORTION OF THEM.**

***1. The trial court did not improperly hold Nickels’s proposed hearsay evidence to a higher standard.***

Relying on *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), and *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014), Nickels asserts that the trial court improperly applied “(a) considered the strength of the prosecution’s case and (b) subjected the evidence to a ‘high bar.’” Brief at 53. The trial court did no such thing. Moreover, although he makes this assertion he utterly fails to cite any part of the record where the trial court did so. Brief at 53-55.

Instead, as Nickels notes, the trial court actually admitted most of his proposed evidence through Crystal Tycksen. 21RP 1188. Its exclusion of certain evidence had no relation to its status as other-suspect evidence. Rather, the court properly applied ER 803(b)(3) regarding statements against interest, which specifically provides that “[i]n a criminal case, a statement tending to expose the declarant to criminal liability is not

---

<sup>22</sup> Costigan, the other occupant of the apartment, provided a DNA sample that was excluded as a contributor to the handcuff DNA. 15RP 92.

admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”

***2. The trial court properly found that certain of Tycksen’s statements were not adequately corroborated.***

Appellate courts review the trial court’s decision on the reliability of a statement against penal interest for an abuse of discretion. *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999). In order for a statement to be admitted under ER 804(b)(3), three basic prerequisites must be fulfilled. First, the declarant must be unavailable despite good faith efforts to locate him. *State v. Valladares*, 99 Wn.2d 663, 668, 664 P.2d 508 (1983).<sup>23</sup> Second, the statement must so far tend to subject the declarant to criminal liability that a reasonable person would not have made the statement unless he believed it to be true. *Id.* Finally, the statement must be corroborated by circumstances clearly indicating its trustworthiness. *Id.*

If a statement contains both self-serving and inculpatory portions, it is error to admit the entire statement. *State v. Roberts*, 142 Wn.2d 471, 493-94, 14 P.3d 713 (2000). In *Roberts* the Supreme Court endorsed the rule in *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), directing trial courts to separate the self-serving

---

<sup>23</sup> Libby met this requirement. *State v. Roberts*, 142 Wn.2d 471, 491, 14 P.3d 713 (2000) (declarant who asserts Fifth Amendment is unavailable).

portions of a statement against penal interest from the inculpatory portions and to admit only the inculpatory portions under ER 804(b)(3). *Roberts*, 142 Wn.2d at 494, 498-99.

Nickels alleges five statements were improperly excluded. Brief at 54. He then faults the trial court for not analyzing “whether the individual ‘statements’ were inculpatory or self-serving.” Brief at 57. This assertion is blatantly contrary to the record. The State will address each statement in turn.

**a. Libby knew there were guns behind seat.**

In her declaration Tycksen stated:

After Sage Munro was killed, Ian mentioned that Sage had guns behind the seat of his truck. I did not know Sage Munro. Ian told me that Sage’s guns were what they were after.

CP 3847. Contrary to Nickels’s claim, the court overruled the State’s objection to the central contention in this statement:

THE COURT: The State’s motion should be -- or objection should be sustained in part and overruled in part.

It should be sustained as to Ian Libby’s profession of an intention to steal guns because there is no corroboration for that statement, which would be required as a statement against interest. ...

It should be overruled as to Mr. Libby’s statement that Sage Munro kept guns in the truck behind the seat because there is corroboration for that statement.

21RP 1237-38. Accordingly, Tycksen testified that Libby told her that he knew there were guns behind the seat of Munro’s truck. 21RP 1269.

Nickels accordingly argued in closing:

What else do we know from the testimony of Crystal Tycksen? We know that Ian Libby admitted to her that he knew Sage Munro kept a gun behind the seat of his --the driver's seat of his truck. Ian told that to Crystal Tycksen. That's his motivation. He's high and he wants the gun.

28RP 141. No abuse of discretion occurred.<sup>24</sup>

**b. Libby, Latimer and Cox shot guns night before the murder.**

In her declaration Tycksen stated:

Ian Libby told me that on December 28, 2009, in the middle of the night, he shot guns with Matt Cox, Julian Latimer and a gang guy. I don't know the name of the gang guy.

CP 3846. The trial court excluded this because it was not corroborated:

As I understand the proffered evidence, all of what Ms. Walsh argues about the relevance of this depends on the statement itself. And there is no corroboration suggesting the trustworthiness of the statement. I am assuming based on what I have read that no one will -- Mr. Latimer or the unidentified other person -- will say, "Yeah, we were out shooting guns." No one will say, "I saw these three people shooting guns." There just isn't any corroboration for it. That's a requirement of admitting what otherwise would be hearsay from an unavailable witness.

21RP 1222.

Only two cases appear to have examined the "presumption of

---

<sup>24</sup> Nickels argued that Amber Harmon could provide corroboration for this statement. 23RP 1238-39. Notably, in her offer of proof, Amber Harmon, who had dated Munro and remained close to him until his death, 23RP 462-63, testified that that the only time Munro ever had guns in his truck were when he went shooting (long guns not handguns), 23RP 463, 470, and one time when he took a gun to his nephew for him to borrow. 23RP 465, 469. She was quite clear that he never left guns in the truck unattended. 23RP 470.

admissibility” upon which Nickels relies heavily. In one case, this Court rejected the presumption entirely. *State v. Anderson*, 112 Wn. App. 828, 839, 51 P.3d 179, 185-86 (2002), *review denied*, 149 Wn.2d 1022 (2003) (“We note that the *Roberts* court also stated that a presumption of admissibility exists where the defense offers the declarant’s incriminating statements. It cited *Chambers v. Mississippi* and *State v. Anderson*, to support that proposition. We have examined those cases and find no apparent support for the proposition, and none that such a presumption would exist here.”). In the other, it endorsed it. *State v. Jordan*, 106 Wn. App. 291, 23 P.3d 1100, *review denied*, 145 Wn.2d 1013 (2001). In fairness to the trial court, neither party appears to have brought *Roberts* or *Jordan* (or *Anderson*) to its attention.

However, regardless of whether a presumption is applied, reliability should be assessed under the “*Gee* factors”<sup>25</sup> cited in *Jordan*, 106 Wn. App. at 301. Those factors are as follows:

(1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness.

*Id.* n.1. It would appear that other than the third and possibly the second

---

<sup>25</sup> *State v. Gee*, 52 Wn. App. 357, 362, 760 P.2d 361, 365 (1988), *review denied*, 111 Wn.2d 1031 (1989).

factor, the balance favors admissibility. As will be discussed *infra*, however, any error would be harmless.

**c. Libby acted suspicious and Latimer told him to shut up.**

In her declaration Tycksen stated:

Days following the murder of Sage Munro, I was with Ian Libby and Julian Latimer. Ian and Julian were acting suspicious and being secretive. When Ian made comments about the shooting, Julian told Ian to shut up.

CP 3847. The court rejected these statements because they were not statements against penal interest:

The objection -- this objection should be sustained. First, Mr. Latimer allegedly telling Mr. Libby to “Shut up” is not an assertion, so it’s not hearsay. But it is nothing more than Mr. Latimer expressing a state of mind, his own opinion or state of mind.

Mr. Libby may have at that point made some incriminating statement regarding the murder or his role in it. But if he did, we don’t know it because the witness’s statement simply says “when he talked about the murder.” That could be “Hey, did you hear there was a murder last week?”, or whatever.

So unless there’s an offer of proof as to some additional statement attributed to Mr. Libby, that objection is sustained.

21RP 1230.<sup>26</sup> No further offer of proof was made regarding this statement, and as such the trial court did not abuse its discretion. *State v. Gee*, 52 Wn. App. at 362 (“While the reach of Rule 804(b)(3) is not limited to direct confessions of criminal responsibility, the declarant’s statements must, in

---

<sup>26</sup> The trial court also observed that “whether or not the two men were acting suspicious and being secretive is speculation on the part of the witness.” 21RP 1231. Nickels does not appear to challenge this conclusion.

a real and tangible way, subject him to criminal liability.”).

**d. Morrison bought a gun for Libby**

At trial, Nickels asked Tycksen: “in the summer of 2009 did you know whether Jimmy Morrison had purchased anything for Ian Libby?” 21RP 1270. The State objected, and the court ruled that “the objection is sustained on the present foundation unless the witness can demonstrate personal knowledge as opposed to hearsay.” *Id.* Tycksen stated that she knew “because somebody told me that it happened.” *Id.* Nickels continued to repeat variations of the question, to which objections were sustained. 21RP 1271-72. Nickels never argued any basis for admission of the answer, and never attempted to establish a foundation under ER 804(b), or any other hearsay exception. Nor did he provide an offer of proof on which an evaluation of admissibility can even be made. Nickels fails to show any abuse of discretion.

**e. Libby was high and drunk when he murdered Munro.**

In her declaration Tycksen stated:

I knew that when Ian Libby told me when he and Julian went to Sage’s house to steal his guns, they were high and drunk.

CP 3847. The court sought clarification of this statement, and Nickels proffered that Tycksen would say that Libby told her he was high and drunk at the time of the crime. 23RP 1236-37. This final statement was then excluded simply because it was hearsay and not subject to any

exception:

It should be sustained as to Mr. Libby stating that they were high and drunk on the night of -- early morning of the 29th because it's hearsay and not a statement against penal interest or any interest.

21RP 1238. Nickels fails to explain how that conclusion was an abuse of discretion.

***3. The State did not open the door to admission of the statements***

Nickels argues that when the State cross-examined Tycksen about whether she had seen Libby shoot a gun, possess a gun, or prowl Munro's car, it opened the door to admit the excluded evidence. Nickels's logic fails. These cross-examination questions were only relevant because Tycksen had testified that Libby had said he had done these things. 21RP 1266-69. Their only purpose of the cross-examination was to highlight the fact that even if Libby made the statements Tycksen could not vouch for the truth of their contents because she had not witnessed the actual events. None of the excluded evidence would have in any way altered the fact that Tycksen had not personally seen the events she described.

Moreover, nothing in the State's closing took improper advantage of the minor exclusion of some of Tycksen's proposed testimony. The State indeed argued that there was no evidence that Libby killed Munro. And in so doing, it acknowledged that Tycksen had testified that Libby said he did it. But it also argued that Tycksen was not credible. 28RP 45-

49, 52-56, 59. As part of that it argued that Libby's actions, as related by witnesses who actual seen the conduct they were describing, were inconsistent with the statements Tycksen attributed to him. 28RP 46-47, 49-50, 59. It then pointed out that there were no eyewitnesses who saw three people at the scene at the time of the murder. 28RP 58-59. The statement Nickels cites in the State's rebuttal was a discussion of Cox's testimony and had nothing to do with Tycksen's. *See* 29RP 16-17.

The trial court did not abuse its discretion in not finding an opening of the door.

***4. Any error would be harmless.***

Improper exclusion of other-suspect evidence is subject to constitutional harmless error review. *Franklin*, 180 Wn.2d at 382. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Id.*

There is simply no basis for Nickels's hyperbolic claim that "the trial court exclude[d] the heart of Libby's confession." Brief at 61. Tycksen testified at length regarding Libby's alleged statements. She testified that she had received text messages from Libby the evening of December 28 and the early morning of December 29, 2009. 21RP 1254. Among them were text messages indicating that something bad had

happened and that Libby wanted her to pick him up. 21RP 1256. That message came in right before she woke up around 7:00 or 8:00 a.m. 21RP 1256, 1302.

Tycksen picked him up on the evening of the 29<sup>th</sup>. 21RP 1262. He had pick marks on his face, which were common when he did meth. 21RP 1262. He seemed like he had been up for a few days and had not slept. 21RP 1263. He wanted her to take him out to the middle of nowhere where there was a well. 21RP 1263. It was really foggy, which made her scared to drive, so she turned around. 21RP 1264-65. She dropped him back at the church where she picked him up in Ephrata. 21RP 1265.

While they were driving she asked him what was going on, what he was trying to get rid of, what all the messages were. 21RP 1266. She also accused him of being involved in the homicide and he did not deny it. 21RP 1266. Libby told her that he knew there were guns behind the seat of Munro's truck. 21RP 1269. He said that things had gotten out of hand, that two other people were with him and that one of the people had ended up shooting the man that was killed. 21RP 1267. He said Latimer and another man were with him. 21RP 1267. He said the third man lived a few doors down from his mother's house. 21RP 1268. Libby did not discuss the murder with her again. 21RP 1269.

One of Libby's best friends was Jimmy Morrison. 21RP 1269. On

January 21, 2010, she went out to Lenore Caves with Libby and Morrison. 21RP 1274. She bought them alcohol on the way, which the men drank. 21RP 1277-78. Libby proposed to her and she “threw [it] back in his face,” and he became angry and started punching and kicking her. 21RP 1284. The abuse continued for a while and then they all got into the truck and went back to Ephrata. 21RP 1286.

Morrison dropped Libby at his brother’s house, and before he got out of the truck, he told her that that he was going to go get a gun from his brother’s house and kill me like he did that man. 21RP 1293. Morrison took her to his mother who gave her some ice and some shoes, since she had lost hers at the caves. 21RP 1295. Then he took her home where she lived with her friend Kami Williams, where she contacted the police. 21RP 1296-97. She met the police at Carmella Haley’s house, which was next door. 21RP 1297. In addition to the assault she also told the police the information about Libby being involved with the murder. 21RP 1298. She met with a Detective Rodriguez the next day and told him what Libby had said to her. 21RP 1299-1300. She told him she wanted to remain anonymous. 21RP 1300. She also told him that Libby had stolen her phone when he assaulted her. 21RP 1301. She gave them permission to search it if they recovered it. 21RP 1301.

Despite this evidence, the jury apparently did not find Tycksen

credible, and convicted Nickels. This may have been because the State brought out that she never mentioned anything about the texts or what Libby had allegedly said until after the assault, nearly a month after the murder. 22RP 1346. She admitted she wanted Libby to be charged for the assault. 22RP 1355. She wanted Libby to pay for the assault. 22RP 1356.

And contrary to the suggestion that she had kept quiet because she was scared of Libby, 22RP 1380, she voluntarily went up to the caves with Libby to have sex. 22RP 1346. When he proposed, she told him that he would never be her husband and “that he would only ever be a fuck to me.” 22RP 1349. Even after she spoke to the police she saw Libby around town. 22RP 1357. He never shot her, assaulted her, or pulled a gun on her. 22RP 1357.

Additionally on cross-examination Tycksen made inconsistent statements. For example, it might have been a few days after the murder when she picked up Libby. 21RP 1321. Contrary to her testimony, in her original statement to the police she said he threatened to kill her at the caves, not in the alley. 22RP 1351. She also stated that she had gone out to the caves in own her car not Morrison’s truck. 22RP 1350-51. After giving that statement she was interviewed by the police a second time and was adamant that she had driven her own car. 22RP 1353.

Further Libby did not appear to have anything like a gun with him

when she picked him up. 22RP 1342. He never mentioned a gun. 22RP 1342. Libby did not object to her turning around due to the visibility. 22RP 1344. He just said they could go another time. 22RP 1344. He did not seem panicky about it. 22RP 1344. They did not discuss a murder or shooting in the car during the ride. 22RP 1344.

In the alleged statements, Libby never actually mentioned Munro's name. 21RP 1322. She never saw Libby with a gun on the 29<sup>th</sup>. 21RP 1325. She did not see Latimer or Libby on the 29<sup>th</sup>. 21RP 1325. Further the texts did not reference a shooting. 21RP 1326. It was not the first time Libby had acted kind of paranoid around her. 22RP 1345 She did not have any firsthand information that Libby was involved in the murder, other than what he had told her. 22RP 1360.

Aside from Tycksen's understandable and obvious bias against Libby, other witnesses contradicted her testimony. Latimer rejected her account. 22RP 1440, 1461. Morrison, while confirming the assault at the caves, denied that Libby threatened to kill Tycksen. 27RP 55. Libby's and Latimer's actions the morning of the murder, attested to by multiple witnesses, were inconsistent with Tycksen's account. 22RP 1469, 1471-72; 23RP 436; 24RP 585; 25RP 165; 27RP 36, 38, 44, 89. Neither Libby's nor Latimer's fingerprints or nor Libby's DNA were found at the scene of the crime. 15RP 93; 27RP 29-30. In short, there is no possibility that

admission of these additional minor parts of Libby's alleged statements would have persuaded the jury to believe Tycksen. This claim should be rejected.

**H. THE TRIAL COURT PROPERLY EXCLUDED OTHER PROPOSED DEFENSE EVIDENCE THAT WAS IRRELEVANT.**

Nickels next claims that the trial court erred in excluding various items of evidence. He fails to show an abuse of discretion.

The United States Constitution and the Washington State Constitution guarantee the right to present a defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). However, this constitutional right is not absolute and does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (although defendant has “a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence”); *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has right to present a defense ““consisting of relevant evidence that is not otherwise inadmissible””) (*quoting State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)). Accordingly, where evidence is inadmissible, excluding that evidence does not violate a defendant's constitutional right to present a defense. This Court reviews a

trial court's rulings on evidentiary matters for an abuse of discretion. *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

***1. Other Libby evidence***

**a. Theft from Destiny Devyak.**

Nickels sought to introduce testimony through Tosha Devyak that on December 29, 2009, Libby stole money from her sister Destiny as evidence of flight. 21RP 1196. The trial court ruled that the evidence would be no more than speculation. *Id.*

When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence. *State v. Freeburg*, 105 Wn. App. 492, 498, 20 P.3d 984 (2001) (*quoting Wong Sun v. United States*, 371 U.S. 471, 483 n. 10, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (“we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime”)). Therefore, while the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful. *Freeburg*, 105 Wn. App. at 498 (*citing State v. Bruton*, 66 Wn.2d 111, 112–113, 401 P.2d 340 (1965)). The probative value of evidence of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to

consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *Freeburg*, 105 Wn. App. at 498.

Here, the very first inference fails: Libby never fled. By all accounts he was still at large in Grant County up until the time of trial two and a half years later. Moreover, in her pretrial declaration, Devyak asserted it was her own money that was stolen and that she thought Destiny and Libby stole the money to buy drugs. CP 2213-14. The trial court's decision on the admission of evidence is reviewed for abuse of discretion and will not be overturned unless it was manifestly unreasonable or based on untenable grounds. *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). Plainly the trial court did not abuse its discretion in finding this evidence was speculative at best.

**b. Tycksen's demeanor when reporting the assault.**

The trial court ruled that unless Tycksen was impeached on cross-examination this Carmella Haley was not admissible:

Her testimony would be hearsay in regard to any of the matters other than an observation of Ms. Tycksen appearing fearful, emotional, et cetera.

I think the difficulty for the Court is that based on -- or depending on the cross examination of Ms. Tycksen, that evidence may be -- may become relevant. But until there's a suggestion that Ms. Tycksen was operating from a motive other than reporting truthfully, this evidence would be

inadmissible, irrelevant, and amount to vouching.

So the objection is sustained subject to being revisited based on the cross examination of Ms. Tycksen.

21 RP 1215-16. The court reached the same conclusion as to Lisa Haley as well. 21RP 1217. It similarly held that photos of her injuries would similarly not be relevant unless “her credibility in that regard [were] called into question.” 21RP 1242-43.

After Tycksen testified, the court, noting that her injuries had been amply documented and that the responding officer had testified regarding her demeanor,<sup>27</sup> adhered to its original ruling:

The Court does not find that the cross examination of Ms. Tycksen has been such as to render relevant the degree of injury inflicted upon Ms. Tycksen by -- allegedly by Mr. Libby.

The Court has permitted the fact of the assault. The Court has permitted that the witness received medical care, was injured all over her body, had to have CT scans -- pardon me -- and appeared to be frightened when she spoke with Deputy Pow-- or Officer Powell.

To go beyond that to the detail of her injury is to simply attribute brutality to Mr. Libby for which there is no legitimate evidentiary purpose. So I do not intend to permit witnesses to testify as to their observations of the condition or demeanor of Ms. Tycksen.

23RP 1403.

Nickels argues that “evidence that Tycksen was frightened and visibly reluctant to report Libby’s assault to the police would have

---

<sup>27</sup> 21RP 1289; 22RP 1394.

rebutted the State's attacks and provided circumstantial evidence of her credibility." Brief at 65. Nickels's logic is again faulty. The State in no way challenged the occurrence or severity of Libby's assault on Tycksen. To the contrary, the State's argument was that it was the very severity of that assault that led her manufacture the his alleged "confession" to the murder. It is therefore difficult to see how additional evidence of the uncontested assault would have made her more credible.

The only citation to authority Nickels offers is to *State v. Aguirre*, 168 Wn.2d 350, 360-61, 229 P.3d 669 (2010), which he assert holds that "testimony about victim's demeanor when reporting crime was relevant to assist jury in assessing her credibility." Brief at 65. While that is roughly accurate, the issue in *Aguirre* was whether the rape victim had been raped. Here, there was no question that Libby brutally assaulted Tycksen. The issue was whether Libby had killed Munro. Neither Tycksen's demeanor nor anything the Haley sisters could present to the jury shed any light on that question. The trial court did not abuse its discretion.

**c. Tycksen's injuries.**

Without citation to any authority Nickels asserts the further evidence regarding Tycksen's injuries should have been permitted. As just discussed, neither the assault nor its severity were seriously questioned. He again fails to show an abuse of discretion.

**d. Harmon testimony regarding Munro's guns.**

Nickels next argues that he Amber Harmon should have been permitted to testify regarding Munro's guns. The trial court properly found the evidence was not relevant.

At trial Nickels argued that Harmon was familiar with Munro's guns

[S]he described seeing him with that it had been in the truck before, that she had also seen it in the house. She also -- she's very familiar -- at least more so than I. She's very familiar with handguns and rifles. My understanding is that the two would go to a I think it's some kind of club out by Soap Lake. And so she had -- she's familiar with guns, had seen him with guns, and describes a handgun that had a laser on it.

22RP 1506-07. Nickels was unable to identify when Harmon had last seen the gun. The court therefore excluded it barring a more specific offer of proof:

That Ms. Harmon believes or recalls that one of Mr. Munro's guns is missing is either entirely collateral or irrelevant or it's relevant, and that depends on establishing how recently that firearm had been seen in Mr. Munro's possession and whether it was ever seen in the truck.

So I'm going to sustain the objection of Ms. Harmon's testimony that one gun was missing unless the State -- or the defense can establish those points: Seen relatively recently and ever seen in the truck.

22RP 1507-08.

Harmon was later called to make an offer of proof. 23RP 461. Afterwards, the trial court tentatively found that Nickels still had not

shown the relevance of her testimony:

There were three subjects that the Defense indicated it wished to pursue with this witness and the Court gave rulings in regard to each of those. First, the Defense indicated that it intended to offer evidence that Mr. Munro kept guns in his truck, and the Court indicated that -- that the State's objection would be overruled if there was evidence of habit or routine, which it appears from this showing that there is not.

Next, the Defense indicated that it intended to elicit that one gun was missing. And the Court indicated that the objection would be sustained unless the Defense could establish relevance by how recently the gun was seen and whether it had ever been seen in the truck. And it appears that that relevance has not been established.

23RP 470-71. Nickels argued that her testimony was relevant because a certain gun with a laser sight that she had seen Munro with was not seized by the police at the murder scene. 23RP 472. The court disagreed:

There is no evidence in this case of any intrusion into Mr. Munro's house. The witness testified that she has never known the gun with the laser site to be in his truck. In fact, she testified that it was always in the pocket of a jacket hanging on his bed. And it's fairly clear that Mr. Munro, according to this witness's testimony, made no habit or routine of keeping guns in his truck. For a period that would represent the relationship of Ms. Harmon and Mr. Munro, something in the range of three to four years with very frequent daily contact, the witness knows of only one occasion when a firearm was transported in Mr. Munro's truck.

There is no relevance other than speculation in regard to the handgun with the laser site because the witness hadn't seen it for several months prior to Mr. Munro's death and never saw it in the truck.

23RP 473. The trial court's conclusions were supported by Harmon's testimony. 23RP 462-70. Because the proposed evidence was speculative

at best and had no tendency to make any fact in issue more or less likely, the trial court did not abuse its discretion in excluding it. *See State v. Rafay*, 168 Wn. App. 734, 797, 285 P.3d 83 (2012) (“the trial court properly excluded the proposed evidence because it was too speculative to establish a nexus between other possible suspects and the ... murders. The trial court admitted other suspect evidence sufficient to permit the defendants to challenge the adequacy of the police investigation. Consequently, the evidentiary rulings did not violate the defendants’ right to present a defense.”).

## ***2. Munro’s involvement with Gomez & Harmon***

Finally, Nickels argues that the trial court erred in excluding evidence that Munro was romantically involved with other women. The trial court cogently explained why the Gomez evidence was irrelevant:

The -- I think the broadest possible reading of the -- or interpretation of the State’s evidence does not support that the State’s theory is that Mr. Munro and the -- and Ms. Messick were in an exclusive relationship. I believe it’s been acknowledged that that’s not the case, nor does the State’s case depend on exclusivity.

It would interject matters into the case that would have no relevance that I can identify and could do unintended prejudice. The objection should be sustained.

21RP 1201.<sup>28</sup> It reached the same conclusion as to Harmon:

The difficulty that the Court has is that I disagree

---

<sup>28</sup> The only offer of proof of Gomez’s testimony is found in the State’s motion in limine: “Ms. Gomez will testify that she was secretly texting and sending photos to Sage Munro prior to his death and without her boyfriend Mario Cadena’s knowledge.” CP 3806.

that the State's theory somehow depends on the relationship between Mr. Munro and Ms. Messick being monogamous. I don't think the State's theory nor the evidence depends on that at all.

The State's theory depends on ... Ms. Messick having a relationship with Mr. Munro whether or not that was an exclusive relationship for either of them. I don't want to permit the defense to in some way – to present evidence which has the effect of just impugning the character of people with not serving any purpose.

And if the purpose is to show that Mr. Munro's relationship with Ms. Messick was not exclusive, then it's not appropriate.

22RP 1504-05.<sup>29</sup> After hearing Harmon's offer of proof, the court found the evidence was irrelevant because Harmon's other testimony was excluded. 23RP 471.

Nickels fails to show that the trial court abused its discretion. None of the passages he cites from Messick's testimony are impeached by this evidence. In one passage he cites, Brief at 68, Messick stated she told Nickels that she wanted a "real relationship with Sage" and that Nickels was getting in the way of that. 18RP 39. In the next, she testified that Nickels scoffed at her claim that she wanted to be with Munro and then she spent the night with Nickels. 18RP 45. In the final passage, she related that Nickels wanted her to stay in Montana for New Year's Eve, but she

---

<sup>29</sup> The trial court did not that at least as to Harmon it would be relevant to establish the basis of her knowledge if evidence was presented "to establish how often Ms. Harmon was present, when she last saw the guns, when she last was aware that Mr. Munro had guns in his truck, you know, how long they were in a relationship, that sort of thing." 22RP 1505. Of course Harmon did not testify, as discussed, *supra*.

told him she wanted to go back and spend time with Munro. 18RP 53. Finally, in the passage Nickels cites from the State's closing, the thrust of the argument was that Messick turned Nickels, down, which made him angry. 28RP 23.

Clearly, the relevance of the relationship between Messick and Munro was its effect on Nickels's state of mind: he killed Munro out of jealousy. Even assuming either Messick or Nickels were aware of Munro's relationships with Harmon and Gomez, of which there is no evidence, it is difficult to see how the relationships impeach Messick's testimony or impact the theory that Nickels was jealous of Munro. This claim should be denied.

***3. Any error would be harmless.***

As with the claims regarding Tycksen, these claims are subject to harmless error review. And as with those contentions, the evidence Nickels proposed was all of little probative value, and in light of the ample evidence he presented in support of his theory, and particularly in light of the extensive evidence of his own guilt, there is no probability that a different ruling on any or all of these points would have changed the outcome of trial.

**I. THE TRIAL COURT PROPERLY ADMITTED ER 404(B) EVIDENCE THAT SHOWED NICKELS'S OBSESSION WITH MESSICK AND HIS HOSTILITY TOWARD OTHER MEN SHE DATED.**

Nickels next claims that that the trial court erred in admitting certain evidence under ER 404(b). This claim is without merit. ER 404(b) prohibits a court from admitting evidence of other acts to prove the character of a person in order to show action in conformity therewith. ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity. ER 404(b) is not designed “to deprive the State of relevant evidence necessary to establish an essential element of its case,” but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). The trial court is generally the proper court to weigh the relevance of evidence, and this Court reviews such a determination for abuse of discretion. *Lough*, 125 Wn.2d at 861.

***1. Evidence that Nickels harassed and threatened to harm the only other man Messick dated besides Munro was relevant.***

Barber and Messick dated for about two years from 2006 through 2008. 13RP 99. During that period he received a call from Nickels, who told him he should leave Messick alone, because Nickels was “still with her.” 13RP 101. The call made Barber feel threatened. 13RP 101. Nickels

told him he and Messick had met at a hotel to have sex. 13RP 101.

The State argued the evidence was relevant to show Nickels's obsession and jealousy of other men who dated Messick, particularly since Barber was the only man Messick dated between Nickels and Munro. 13RP 91; *see* 18RP 18. The State subsequently tied it into evidence from Messick that after this call, Nickels told Messick he would burn down Barber's house *Id.*;

Messick testified that when Nickels found out she was dating Barber he became very angry. 18RP 19. Nickels told her if she kept dating Barber, he would burn down Barber's house with him and his family in it. 18RP 20. Nickels showed Messick a photo of Barber's house, which was in another town three hours away when he made the threat. *Id.* After she broke up with Barber, continued to repeatedly call and text her. *Id.* If she did not respond, he would call her mother and family. 18RP 21. He told her that if she broke off with him, he would hurt the people she loved and ruin her life. 18RP 21.

Messick dated Munro for six months before he was killed. 18RP 25. After Nickels found out about it, he called Munro. 18RP 28. Messick was visiting family in Helena when Nickels showed up unexpectedly while she was on the phone with Munro. 18RP 29. He grabbed the phone and hung up on Munro. 18RP 30. Then he left with the phone. 18RP 30.

When she caught up to Nickels, he had called Munro back and was talking to him. 18RP 31. Nickels hung up, threw the phone at her and left. 18RP 31.

In November, Messick was at Munro's house. 18RP 37. Later that evening, Nickels called her and asked what she had done that night. 18RP 36. When she stated that she had just hung out at home, Nickels responded that no she had been at Munro's house. 18RP 37. He then described exactly what they were doing. 18RP 37.

One proper purpose of ER 404(b) evidence is to establish identity via a particular "modus operandi." *State v. Foxhoven*, 161 Wn.2d 168, 175-76, 163 P.3d 786, 789-90 (2007). To be relevant, evidence must tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401; *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

The Supreme Court has previously held that evidence of other bad acts may be introduced to show identity by establishing a unique modus operandi. *Foxhoven*, 161 Wn.2d at 176. Evidence of unique modus operandi is relevant when the focus of the inquiry is the identity of the perpetrator, not whether the charged crime occurred. *State v. DeVincentis*, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). Whether the prior offenses are similar enough to the charged crime to warrant admission is left to the

discretion of the trial court. *Foxhoven*, 161 Wn.2d at 176.

Here, from opening statement on, Nickels argued that Messick was not to be believed and questioned her claim that Nickels had harassed her and stalked Munro. 8RP 933. It very much put the identity of the murderer in issue. Messick had dated two men since Nickels. In both cases he acted in a possessive angry manner about her relationships. In both cases he directly confronted both men on the phone. In both cases he traveled far from where he lived to stalk the men's homes. The trial court did not abuse its discretion in concluding that the acts were similar enough to show a modus operandi and were therefore relevant to the issue of identity. *See State v. Fualaau*, 155 Wn. App. 347, 358, 228 P.3d 771, *review denied*, 169 Wn.2d 1023 (2010), *cert. denied*, 563 U.S. 905 (2011) (assault against different victim relevant to show identity).

***2. Evidence that Nickels sought to buy a gun on craigslist five days before the murder was relevant and properly admitted.***

Nickels next objects that the State was permitted to introduce the fact that *five days* before the murder Nickels was seeking to purchase a handgun on craigslist, the *same day* he was angry because Messick left Montana after telling him she wanted to spend New Year's with Munro. 18RP 53-54. He quibbles that the evidence was irrelevant because Nickels sought a .22 rather than a .45, the murder weapon.

Nickels relies solely on *State v. Freeburg*, 105 Wn. App. 492, 20

P.3d 984 (2001). *Freeburg*, however is a “flight” case, as discussed, *supra*, at Point H(1)(a). There the defendant was apprehended in Canada two and a half years after the crime and had a gun in his possession when caught. *Freeburg*, 105 Wn. App. at 497. The Court found admission of the gun evidence was error because the defendant did not resist arrest and the gun had nothing to do with the crime and was thus not probative of either flight or consciousness of guilt. *Freeburg*, 105 Wn. App. at 500-01.

Here, as noted, Nickels was angry about Messick leaving to be with Munro the very day he placed the ad for the gun. Regardless of whether he ultimately used a .22 or a .45, the evidence is highly probative of motive, intent, preparation, and planning, all of which are proper purposes of ER 404(b) evidence. *Freeburg*, 105 Wn. App. at 497. Moreover, where gun evidence is relevant to an issue at stake in the trial, no special rule prevents that evidence from being admitted. *State v. Yates*, 161 Wn.2d 714, 775, 168 P.3d 359 (2007). The trial court did not abuse its discretion.

***3. Nickels’s obsession with and harassment of Messick was relevant to show why he killed his perceived rival.***

Messick’s mother testified that one night in August 2009 she received a call from Nickels that Messick, who lived with her two brothers at the time, was out partying, and the brothers were not watching Messick’s baby. 11RP 18-19. This call was remarkably similar to

Nickels's stalking behavior against Barber and Munro. It was thus properly admitted to show Nickels's obsession with Messick and thus his motivation in killing Munro. Even assuming that Nickels had properly objected on these grounds below, the trial court would not have abused its discretion in admitting this evidence.<sup>30</sup>

Nickels also asserts, again without any citation to authority that the fact that Nickels was continuously calling, texting, and otherwise harassing her in an angry or threatening manner was not probative where Nickels was charged with killing Messick's boyfriend. Particularly since the primary subject matter of the calls was Messick's relationship with Munro (and earlier Barber) along with Nickels desire to rekindle his relationship with Messick, it is difficult to understand the logic of this claim. Nickels offers no explanation, except for his contention that the trial court subjected him to a double standard. As has already been explained, the trial court largely admitted the evidence Nickels proffered, and had good cause to exclude that which it did not. This claim is without merit.

***4. The court properly admitted Rex Lain's testimony that***

---

<sup>30</sup> The State fails to see how the mother's statement that she did not approve of Messick's relationship with Nickels is other acts evidence. Indeed, the only objection to the single statement was relevance, not ER 404(b). 11RP 15. Moreover, the statement explains why Messick concealed her activities with Nickels and gave conflicting statements to the police. 11RP 15 (she told Merrick how she felt). *See also* 11RP 19 (she did not learn that Messick was meeting with Nickels until after the murder).

***Nickels asked him, a month before the murder, if he would kill someone for him.***

The trial court initially overruled Nickels's objection that Lain's testimony was improper other acts evidence:

The Evidence Rule 404(b) objection would be appropriate or valid if the state was offering this to show that Mr. Nickels acted in conformity with this on some other occasion. And rather clearly under this evidence, that's not the purpose, but a purpose to establish one of the alleged facts, which is premeditation.

17RP 33. After the issue of whether Nickels had offered Lain money arose,<sup>31</sup> the court determined to hear an offer of proof from Lain. 17RP 35.

---

<sup>31</sup> Nickels's account of the procedure leading up to Lain's testimony is less than crystal-clear. The State would therefore offer the trial court's unobjected-to summary of the sequence of events.

Mr. Lain was interviewed in February of 2010 by detectives and told about some of his conversations with Mr. Nickels, but said nothing about Mr. Nickels asking him if he would kill someone, and said nothing about \$2,000. He then -- he spoke to detectives again later, at least once, maybe twice, and essentially gave the same account.

He was interviewed at some point on behalf of the defense by a defense investigator and gave essentially the same account. No mention of Mr. Nickels offered asked me if I would kill someone, no mention of \$2,000.

Mr. Lain then arrived here for trial and apparently in conversation with the prosecutor's office and Detective Rectenwald, came forth with the allegations that the defendant had asked him if he'd kill someone, and would he do it for \$2,000. That led us through a long analysis and argument which is a matter of record, and ultimately resulted in the court requiring that Mr. Lain's testimony be delayed until today, so that the defense would have an opportunity to investigate, interview him.

The defense did that last Thursday. And Mr. Lain made no mention at that time of \$2,000. I get it that the questioning may have been a little cagey in that regard or not specific or something in that regard. But he said nothing about it.

He came into court this morning, and under penalty of perjury was asked more or less point blank, was there any mention of money associated with this offer or this request? And he said, no, there wasn't. And then he is outside the courtroom for a matter of maybe three hours

During the offer of proof, Lain testified that he met Nickels in April 2009, shortly after he was released from prison after serving a 16-year manslaughter sentence. 17RP 54-56. He told Nickels about the conviction. 17RP 57. He did not volunteer the specifics until Nickels asked him about them. 17RP 56. Nickels asked how it felt and how it happened. 17RP 57. Around Thanksgiving 2009, Nickels asked Lain if he would kills someone for him. 17RP 57. Lain now asserted that Nickels never mentioned a dollar amount. 17RP 57. Lain explained that it never got that far; he shut it down then. 17RP 57.

---

and comes back in and testifies under penalty of perjury, yes, there was, Mr. Nickels offered me \$2,000.

I want to make it abundantly clear that I'm not attributing bad motives or wrongdoing to anyone in the prosecutor's office. I have no reason to believe that anybody tried to encourage Mr. Lain to testify in one way or another. But what I'm absolutely sure of is that there is no way to reliably determine which account is true in regard to the \$2,000. And for that reason the court will not permit an inquiry of Mr. Lain in regard to money associated with his conversation with the defendant.

Mr. Lain was and is permitted, as the court earlier ruled today, to testify regarding his pool game conversation, and that -- be permitted to testify that Mr. Nickels asked him if he would kill somebody. But there -- and that is the status as the matter existed this morning and that's where we're going to leave it. I will not permit Mr. Lain now to commit perjury by testifying that there was such a conversation.

17 RP 138-42. The court later clarified that it was not making a legal finding that perjury had been committed:

Obviously, I was not making a legal conclusion about this person. He's not charged with perjury. What I said was under Washington law, if a person testifies in inconsistent and opposite ways, both times under oath, that is a form of perjury and Mr. Lain did that today. Now, I did not make a finding that Mr. Lain committed perjury. That's not an issue before the court. So if I said that, then I overstated it.

17RP 156.

Nickels visited Wyoming again just before Christmas, but did not broach the topic again. 17RP 58. Although Nickels was supposed to be selling him a Honda, Lain did not hear from him Nickels until January, when Nickels asked him to provide him an alibi. 17RP 59. Lain declined. 17RP 60. Nickels never offered him any money to kill someone. 17RP 64.

As noted, later in the afternoon a Lain gave a second offer of proof: Nickels offered him \$2000 to do the murder. 17RP 125, 127. He said was overwhelmed by the questioning, and once he said no, he thought he should keep saying no. 17RP 125-26. He confirmed that did not discuss his testimony with the State after he testified in the morning, that no one had discussed perjury with him, and that he had not been offered any promises by the State. 17RP 129-30, 132. As noted, the trial court determined that Lain's original statement would be admissible, but it excluded any testimony about an offer of money. 17RP 140. Lain thereafter testified consistently with his morning offer of proof. 17RP 144-49.<sup>32</sup>

---

<sup>32</sup> Nickels makes much of Lain's criminal record, but the forgery occurred before the manslaughter, which resulted from a bar-fight, 17RP 37, and for which he served over 16 years. 17RP 158. As such these crimes would have occurred in the late 1980s or early 1990s. The alleged "dishonest behavior" in prison, Brief at 72, was counsel's characterization of unidentified infractions during the morning offer of proof. 17RP 68. Counsel attempt to raise that issue before the jury was properly quashed. 17RP 160; ER 609. Counsel then improperly asked him if his parole was revoked for a dirty UA. *Id.* Lain also testified that the demand for \$100 from the defense investigator was a joke. 17RP 175. Lain was not going to sign the paper the investigator offered, regardless. 17RP 176.

On cross-examination, Nickels brought out that Lain had not mentioned the request to kill someone until shortly before trial, despite several contacts with detectives and defense investigators dating back to 2010. 17RP 163-65. Despite the exclusion of the money testimony, Nickels brought it out on cross-examination to impeach Lain. 17RP 165-69.

Nickels argues essentially that the evidence was insufficient to show by a preponderance that Nickels asked Lain to kill someone. He mistakes the trial court's rejection of his argument as a failure of proof. Lain testified under oath that Nickels had asked him to kill someone for him. This testimony was utterly uncontradicted. Even under the much more onerous reasonable doubt standard appellate courts defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997); *see also State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (trial court may determine that uncharged crimes probably occurred based solely on the State's offer of proof).

##### ***5. Prejudice***

Finally, any error would be harmless. An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b)

evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Halstine*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). As discussed with regard to Nickels's other claims, there simply is no likelihood that exclusion of this evidence would have changed the outcome of trial.

**J. NICKELS FAILED TO PRESERVE HIS CLAIMS REGARDING THE DNA TECHNICIAN'S TESTIMONY AND THE STATE'S CLOSING DISCUSSION OF THAT EVIDENCE AND IN ANY EVENT FAILS TO SHOW IMPROPRIETY.**

*1. Nickels failed to object to the testimony regarding the DNA evidence at trial, and further fails to show that it was in any way improper for the lab tech to characterize his DNA as "included" in the mixed sample recovered from the handcuffs found at the murder scene.*

For the first time on appeal, Nickels objects that the DNA technician Anna Wilson gave improper opinion evidence. However, questions of the admissibility of evidence are not of constitutional magnitude and do not fall within RAP 2.5's exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Here no objection of any kind was raised to Wilson's testimony. This Court should decline to review this issue for the

first time on appeal.

Even were this issue preserved for review, Nickels relies on a protocol (Brief at 77, n.36) that was explicitly superseded in 2010. The current protocol published by the Scientific Working Group on DNA Analysis Methods, *Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories*,<sup>33</sup> is consistent with Wilson's testimony. She explained on cross-examination:

Q. And so because there's at least a shared allele, as it applies to the DNA profile here, that's why Mr. Nickels cannot be excluded; is that right?

A. *We don't say cannot be excluded. We say that he's – his entire profile, so all his numbers are actually included in that mixture. So that's the type of terminology that we would say now, yes.*

15RP 104 (emphasis supplied). This statement is entirely consistent with current recommended protocol:

The following determinations can be made upon comparison of evidentiary and known DNA typing results (and between evidentiary samples):

- The known individual cannot be excluded (*i.e., is included*) as a possible contributor to the DNA obtained from an evidentiary item.
- The known individual is excluded as a possible contributor.
- The DNA typing results are inconclusive/uninterpretable.
- The DNA typing results from multiple evidentiary

---

<sup>33</sup>Hereafter "SWGDM." Available at <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/swgdam-interpretation-guidelines> (viewed March 14, 2016).

items are consistent or inconsistent with originating from a common source(s).

SWGDM, at ¶ 3.6 (emphasis supplied). Likewise, the Washington State Patrol's current STR manual,<sup>34</sup> at 76-80, provides for three classifications where there is more than one person's DNA present: exclusion, inclusion, and inconclusive.<sup>35</sup> Wilson's testimony followed these guidelines.<sup>36</sup> She further testified "We can't say it's a match because I can't pull out a single profile." 15RP 104.<sup>37</sup> Indeed Wilson *never* said Nickels was a "match." The concern expressed in *Bander*, cited by Nickels, was simply not present:

The concerns that animated the court's decision in *Cauthron* are not present here. Frank and Pineda did not testify that Bander's DNA profile *matched* the mixed samples at issue. They testified only that Bander *could not be excluded* as a possible contributor to those samples or that the results were inconclusive. ... The witnesses explained the differences in meaning between their conclusions that Bander was a possible contributor to some samples and their conclusions that he could not be excluded as contributor to other samples. Frank's explanation of the different interpretive terms that he employed made clear that "inconclusive" or "not excluded" did not mean that

---

<sup>34</sup> Washington State Patrol, *Casework STR Analysis Procedures* (2015). Available at [http://www.wsp.wa.gov/forensics/docs/crimelab/manuals/technical/dna/DNA\\_STR\\_CW\\_Procedures\\_Rev\\_24.pdf](http://www.wsp.wa.gov/forensics/docs/crimelab/manuals/technical/dna/DNA_STR_CW_Procedures_Rev_24.pdf) (viewed March 14, 2016).

<sup>35</sup> Nickels faults the State for authorizing consumption of the DNA on the handcuffs without notice to the defense. Brief at 78 n.38. The authorization occurred on February 16, 2010. 15RP 113. Nickels was not charged until four months later, on June 16. CP 1.

<sup>36</sup> See SWGDAM (2000), at ¶ 4.1.1.

<sup>37</sup> See also 15RP 68 ("maybe a one-person profile in which we can say it's a match, or it might be a little bit more complicated, so we can say, well, it's a mixture, so it can either be included, the person you're comparing it to is either included, or the third choice is that they're excluded").

Bander's DNA profile unequivocally matched a crime-scene sample. Further, the State's experts did offer statistical calculations for inconclusive test results ... Accordingly, we find no error in the trial court's admission of this expert testimony.

*State v. Bander*, 150 Wn. App. 690, 719-20, 208 P.3d 1242 (2009) (emphasis the Court's).<sup>38</sup> This claim is without substantive merit and should be denied.

***2. The prosecutor's closing argument properly discussed the DNA evidence presented at trial.***

Nickels also asserts the State misused the DNA evidence in closing. He asserts that the

The prosecutor told the jury Nickels was "included as a contributor to that mixture." and accused the defense of trying to "downplay the significance of the DNA[.] " RP (8/28/12) 41. He said, "Ladies and gentlemen, the defendant's DNA was on those handcuffs" and, "There is [DNA] for David Nickels." *Id.* at 64. In rebuttal he said Nickels's "DNA [was] at the scene." RP (8/29/12) 27-29.

Brief at 74 (editing Nickels's).

Although he acknowledges that there were no objections below, he utterly fails to explain how any of these comments were improper. A reviewing court must first determine if the comments were improper and must assess the challenged comments in context. *State v. Starbuck*, 189 Wn. App. 740, 760, 355 P.3d 1167 (2015). Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial

---

<sup>38</sup> As in *Bander*, where the Court affirmed, Wilson also did a statistical analysis, finding a 1 in 2300 probability. 15RP 87-88.

misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *Id.* Where, as here, counsel did not object to the alleged misconduct, this Court reviews the statements for incurable flagrancy. *Id.*

The first comment was part of a larger presentation:

Now, as you know, while law enforcement was investigating this case, they sent the handcuffs to the crime lab, and at the crime lab Anna Wilson found a mixed DNA profile of three or possibly more people. And what the mixed profile means is that there's DNA of these three people. But it's so mixed together that you can't pull them apart and distinguish three individual DNA strands. Law enforcement sent a number of different exclusionary DNA to compare against the handcuffs, including Ian Libby. And every single one of them was excluded from the DNA. Except for the defendant, David Nickels.

When she described it on the stand, she referred to the DNA comparisons as numbers. I don't know whether that's actually the technical term, but I'll admit it's a lot easier for me to understand. All of his numbers, his entire profile, all of those numbers are in the mixture from the handcuffs, so he's included as a contributor to that mixture.

Now, what does that mean? The defense, when they questioned Anna Wilson on the stand, tried to downplay the significance of the DNA by using the analogy of phone numbers put into a hat. Under that example, they would take three people, person A, B and C, they'd take the individual numbers from their phone numbers and toss all those individual little numbers into a hat. So under this example, you'd have the numbers zero, one, two, three, four, five, seven and nine. So --

THE COURT: Three is not there, Counsel.

MR. HILL: Thank you, Judge. There's no three. So under this example of someone who had a phone number

with a three in it, they could be excluded as being a contributor, because there's no three in the hat. But someone like David Nickels, if he has a seven in his phone number, well, he can't be excluded because he has a seven and there's a seven somewhere in the hat. It doesn't sound that -- like that good of evidence, does it? Not something really to consider. The only problem with the analogy is it's completely wrong.

As Anna Wilson testified, when they take DNA, they look at 13 distinctive points on the DNA strand in order. Each one of those points has a number much greater than zero to nine. For this analogy, we're simply going to use zero to 99, though it could be much higher. At this point there would be a mixture of three numbers, one from each contributor. We don't know, for example, on this first point, 17, 64, 87, we don't which one goes to A, which one goes to B, which one goes to C. We only know that they're there. When they took the defendant's DNA and compared it, in order, every single one of his numbers matched all the way down the line. And that's why she was able to say the defendant's DNA is included in the mixed DNA profile. Thirteen points, a mixture of three, possibly more individuals, and his number is there every time in the right order.

Ladies and gentlemen, the defendant's DNA was on those handcuffs. On handcuffs that he had no business having there with his DNA in Sage Munro's yard.

28RP 40-42. This argument was consistent with Wilson's testimony, which, as discussed, was entirely proper.<sup>39</sup> The next passage, in its entirety, reads:

DNA? Yep. There is for David Nickels, not for Ian Libby, he's excluded.

28RP 64. The final passage, during rebuttal, follows:

Now, how do we know it's David Nickels? Well,

---

<sup>39</sup> See also 15RP 101-04 (Wilson explaining to defense counsel why counsel's analogy was incorrect).

we go to his confession. Well, let's go back to the scene. We heard defense say, David Nickels didn't do it because they couldn't put him in Ephrata. Yeah, we could. His DNA is there. The state argues his DNA is there. It's included in there. We saw the description of how that DNA is included.

Now, certainly, we heard the numbers that, what's the possibility of it being Mr. Nickels and stuff?<sup>[40]</sup> Okay. Then let's do this. Let's say his DNA is there. What's the possibility that Mr. Nickels then a few weeks later tells people in Montana how it happened? Would that be circumstantial evidence that would raise the possibility that Mr. Nickels was there? Certainly, it would. Because who else would? Nobody else's DNA, the police checked everybody's DNA in there, checked all the suspects in there, officers in regards to there, they even shown that one officer on the bullet sneezed or had a cold or something there and his DNA was on there. It made the officer look bad. But still, we're not going to hide that. That's what happened. But they checked the officers on the handcuffs, as well. No.

So then we have again this DNA, the confession, and him trying to get a .22. Now, do we think it was a .22 that did it? No, we don't. But he's trying to get a gun, just right after they split up and just before it happens.

And then let's add Rex Lain. Rex Lain comes across there and starts saying, yeah, he talked to me all the time how to do it, because he knew I did it, I didn't really want to talk about it, but I'd tell him how I did it and stuff. And then he asked me how to do it, if I would do it for him. And then he offered me money. What's the chances of that, ladies and gentlemen? What's the chances then and circumstantial evidence that, oh, we're just picking on David Nickels? The evidence keeps going there.

So we get a hold of David Nickels. Mr. Nickels, please, tell us, where were you? What were you doing? This is before the phone records. Tell us, what were you doing? Oh, I was with Rex Lain. I was with Rex Lain on

---

<sup>40</sup> Defense counsel extensively argued the statistics. 28RP 103-05.

the 28th and 29th. What does Rex say? Nope, you weren't with me. Sorry.

Oh, okay.

Well, where were you?

Great Falls maybe. I'm not sure.

Does that add a little bit more circumstantial evidence? Now does that DNA at the scene and him confessing and Rex -- talking to Rex Lain and trying to get a gun, does that get it a little bit stronger case now?

27RP 28-29.

This Court recently rejected an almost identical claim, except that in the present case, the prosecutor never actually said the profile “matched.” In *Starbuck*, the Court explained:

It was not improper to say that the DNA profile matched Clay Starbuck's profile. That is, in fact, what the expert testified to on cross-examination by the defense; the expert also told the jury that the test was not powerful enough to identify just a single individual as the contributor. RP at 2474–75. The prosecutor did not err in using the same language as the expert witness.

In context, there also was no error in using the word “matched” or in referencing the possibility of additional perpetrators. The argument is a clear response to defense counsel's claim that additional testing would have shown that other males had left DNA in the house. The prosecutor properly noted that additional DNA contributors did not explain how Mr. Starbuck's DNA turned up in the most incriminating areas and did not exonerate him, even as evidence of additional perpetrators would not have excluded the Starbuck male DNA match. This was not a case of the prosecutor overstating the evidence or injecting a new theory of liability. He simply pointed out that the defense theory of inadequate investigation failed to explain away the evidence against Clay Starbuck.

*Starbuck*, 189 Wn. App. at 761. Nickels fails to show incurable flagrancy.

This claim should be rejected.

**K. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN CONCLUDING THAT NICKELS HAD FAILED TO PRESENT NEWLY DISCOVERED EVIDENCE WARRANTING A NEW TRIAL**

This court will reverse the trial court's decision on a motion for a new trial only for an abuse of discretion or when the decision is predicated on an erroneous interpretation of the law. *State v. Carlson*, 61 Wn. App. 865, 871, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022 (1993). An abuse of discretion exists when the trial court acted on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Nickels demonstrates neither.

To obtain a new trial based on newly discovered evidence, a defendant must demonstrate “that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new proceeding.” *In re Brown*, 143 Wn.2d 431, 453, 21 P.3d 687 (2001)(quoting *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)) (emphasis the Court's).

To be “material,” allegedly newly-discovered evidence must be

admissible. *State v. Pierce*, 155 Wn. App. 701, ¶ 27, 230 P.3d 237 (2010); *State v. Eder*, 78 Wn. App. 352, 357, 899 P.2d 810 (1995), *review denied*, 129 Wn.2d 1013 (1996). It also must be relevant.

Additionally, it is well-settled that a new trial may not be granted when the only purpose of the new evidence is to impeach testimony presented at trial. *State v. Hutcheson*, 62 Wn. App. 282, 300, 813 P.2d 1283 (1991). “Impeachment is evidence ... offered solely to show the witness is not truthful. *State v. Burke*, 163 Wn.2d 204, ¶ 27, 181 P.3d 1 (2008). For example, in *State v. Sublett*, 156 Wn. App. 160, ¶ 73, 231 P.3d 231 (2010), the appellant requested a new trial based on a new witness who could allegedly exonerate him. The court held the new witness’s testimony would merely be used to impeach another witness who placed the appellant at the scene of the crime and, therefore, did not support a new trial. The present case is no different.

When considering whether newly discovered evidence will probably change the trial’s outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence. *State v. Gassman*, 160 Wn. App. 600, ¶ 17, 248 P.3d 155, *review denied* 172 Wn.2d 1002 (2011), *reversed on other grounds*, 175 Wn.2d 208 (2012). “[I]n evaluating probative force of newly presented evidence ‘the court may consider how the timing of the submission and the likely credibility

of the affiants bear on the probable reliability of that evidence.”” *State v. Riofta*, 166 Wn.2d ¶ 38, 209 P.3d 467 (2009) (quoting *Schlup v. Delo*, 513 U.S. 298, 332, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).

***1. The trial court did not abuse its discretion in finding that Latimer’s alleged statement to Travis Powell was not an excited utterance where there the only evidence of his behavior between the time of the murder and his contact with the Powells showed that he was not under the influence of stress caused by the murder.***

ER 803(a)(2) allows the admission of excited utterances as an exception to the rule excluding hearsay statements. An excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” *See State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting ER 803(a)(2)) (proof of three closely related requirements needed to qualify as excited utterance: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement must relate to the startling event or condition). The trial court should consider the passage of time between the startling event and the utterance. But the passage of time alone is not dispositive. *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992). Other considerations include the declarant’s emotional state and whether the declarant had an opportunity to reflect on the event and fabricate a story. *State v.*

*Briscoeray*, 95 Wn. App. 167, 173-74, 974 P.2d 912 (1999).

Here, the Powells asserted that three or four hours after the murder, Latimer was distraught. They had no contact with Latimer during those three hours. As such, their statements cannot show Latimer's purported distress was due to the murder. To the contrary, three witnesses (all called by Nickels) testified that Latimer was home in bed at the time of the murder. 22RP 1440, 1461, 1471-72; 24RP 577-78. Even a fourth witness, also called by Nickels, who testified that Latimer could have been out at the time of the murder described his demeanor as normal within an hour of when the murder occurred. 25RP 152, 162, 164-65. As such, Nickels presented no evidence that Latimer was under the "the stress of excitement caused by the" murder at the time he allegedly spoke to the Powells. The *only* evidence regarding Latimer's demeanor between the time of the murder and when the Powells alleged to have seen him was that Latimer was calm. The trial court did not abuse its discretion in concluding the Powell statements were not admissible as excited utterances.<sup>41</sup>

Finally, even were the evidence admissible, a new trial would properly be denied based on the fact that the Powell testimony would have

---

<sup>41</sup> The State cannot locate any testimony at the cited pages to support Nickels's claim (Brief at 87) that Latimer testified he *only* went to the crime scene on December 29. See 22RP 1440, 1442, 1457-58. In any event the issue was not the reliability of Latimer's post-trial statement but whether the evidence showed Latimer was under the influence of a startling event. The only evidence of his demeanor between the time of the event and the visit to the Powells was that he was not.

failed to change the outcome. Like Tycksen, whose testimony the jury also obviously rejected, the Powell evidence was of questionable provenance. First, the fact that they allegedly heard first-hand evidence directly bearing on a murder a block from their home and never contacted the police with that information until the week after trial is implausible. That Sharon Powell heard someone supposedly confess a murder and did not mention it to her husband for two and half years is equally implausible. What is clear, however is that the elder Powells, again like Tycksen, bore an antipathy toward Latimer and Libby and did not like their teenage son associating with them.

Further, Sharon Powell asserted to police that her account could be verified because she had a conversation the same day (December 29, 2009) with Rosanne Inghram who worked at a local gas station. The conversation was purportedly at the gas station. The Powells provided a purported written statement from Inghram. However Inghram's boss provided records showing she was off work from December 28 through December 31. CP 4209, 4211-12. Sharon Powell was at best then mistaken.<sup>42</sup>

Additionally, the account is simply inconsistent with the physical and other evidence from the scene. The evidence showed Munro was

---

<sup>42</sup> Inghram herself subsequently declined to stand behind the statement. CP 4228.

essentially ambushed, which is inconsistent with a confrontation. The neighbor saw the fatally injured Munro go up the walk and into the house but did not see three men running from the scene. Witnesses refuted the notion that Munro kept guns in his truck or that one was missing after the murder. Neither Libby's nor Latimer's fingerprints were on the truck. Nor do the Powell's statements in any way impact the evidence that the jury found was established Nickels's guilt beyond a reasonable doubt. There simply is no likelihood that this evidence would have changed the outcome of the proceeding.

***2. Nickels failed to meet his burden of showing that Latimer would be unavailable to testify, and as such his alleged statement to Travis Powell was merely impeaching.***

Nickels faults the trial court and the State for not establishing that Latimer would have testified at a new trial. However, "ER 804(b)(1) requires the *proponent* of the evidence to establish unavailability of the declarant before" a statement against interest may be admitted at trial. *See State v. Scott*, 48 Wn. App. 561, 564, 739 P.2d 742 (1987), *aff'd*, 110 Wn.2d 682 (1988) (emphasis supplied). It was thus Nickels's burden to establish that Latimer *would not* testify at trial. Latimer testified at the first trial in the face of similar claims from Tycksen, and repeatedly denied any involvement in the murder. 22RP 1440, 1461. He additionally swore under oath that he would deny the Powells' stories if called to testify again. CP 4236-37. As the proponent, it was Nickels's burden to establish Latimer's

unavailability, which he did not do. The trial court did not abuse its discretion in determining that the Latimer's alleged statement to Powell was not admissible as substantive evidence and thus merely impeaching.

**3. *The Powells' statements were not admissible under the open-door doctrine.***

Nickels misapprehends the "open door" doctrine, which this Court has explained:

"A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party.... [T]he introduction of inadmissible evidence is often said to "open the door" both to cross-examination that would normally be improper and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence."

*State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324, 329 (1995) (quoting Karl B. Tegland, 5 *Wash. Prac.* 41 (3rd ed. 1989) (editing the Court's)).<sup>43</sup> The State did not offer any inadmissible evidence regarding Tycksen, and its vigorous cross-examination of her did not "open the door" to the Powell's otherwise inadmissible hearsay. Nor does it change its essential character as impeachment of Latimer's testimony.

Further, as previously discussed, the Powells' statements were as fraught with potential bias and unreliability as Tycksen's. Given their antipathy (at least on the parents' part) toward Libby and Latimer along

---

<sup>43</sup> The rule of completeness, which Nickels cites, also does not apply. *See* ER 106. The State introduced no statement or writing that in any way pertained to the Powells' statements.

with the fact that their “corroborating” statements were not produced until after the trial and after Tycksen testified, it is difficult to see how their testimony could have bolstered her testimony or changed the outcome of trial.

***4. The trial court properly found that Libby’s alleged confessions to jailhouse informants Rodriguez would not have changed the outcome of the trial.***

**a. The trial court acted within its discretion in concluding that Perry’s statement was of limited evidentiary value.**

Nickels argues that under *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713, 728 (2000), the trial court erred in finding that Perry’s statement was inadmissible. He misreads the court’s ruling. In fact, the court *questioned* whether the statement was one against penal interest, CP 5960, but actually ruled the statements would be of limited evidentiary value because in them Libby asserted both that he killed Munro and that he did not:

The so-called confession of Ian Libby to Jerry Perry is, when expanded to include his subsequent clarifications, deprived of evidentiary value. Mr. Perry can testify that Mr. Libby, in the course of a single conversation, said that he shot Sage Munro and that he did not shoot Sage Munro. It is debatable, at best, as to whether or not Mr. Perry can even offer a statement against penal interest by Mr. Libby.

CP 5960.<sup>44</sup> As noted by the Supreme Court in *Roberts*, “the State could

---

<sup>44</sup> Nevertheless, the State notes that in the context of a new trial motion, a declaration against penal interest which is subsequently repudiated by the declarant and which is inconsistent with other evidence is not sufficiently trustworthy to be required constitutionally to be admitted as an exception to the hearsay rule. *State v. Castro*, 32 Wn. App. 559, 566, 648 P.2d 485, *review denied*, 98 Wn.2d 1007 (1982).

also move to admit the entire statement under ER 106, the rule of completeness.” *Roberts*, 142 Wn.2d at 496. Thus if even if Nickels could introduce the inculpatory Perry testimony, there can be no doubt the State would have been entitled to admit the exculpatory portion, particularly since they occurred in essentially the same statement (“the very same sentence” according to Perry). *See* CP 4220-22, *cf.* CP 4166-69. The trial court did not err in concluding that the proposed Perry testimony would not have changed the outcome of the trial.

**b. The trial court acted within its discretion in finding that Rodriguez lacked credibility and that his statement was cumulative.**

Contrary to Nickels’s argument the trial court did not find Adrian

Rodriguez not credible solely because he had criminal history:

*Under the circumstances of timing, trial publicity, and the like, it is unlikely that the proffered confession to Mr. Rodriguez would change the outcome of the trial. At very best, it could result in the admission of a small part of Crystal Tycksen’s potential testimony excluded during the trial. In this regard, it is noted that Ms. Tycksen’s trial testimony was not strictly confined to the parameters of the court’s rulings on the state’s motion to limit her testimony.*

In response to the State’s motion in limine, the court excluded, inter alia, Ms. Tycksen’s testimony that Libby intended to steal guns from Munro’s truck and that Libby was high and drunk at the time. To some extent, her testimony included these subjects without objection from the State. Ms. Tycksen testified to Libby’s appearance and behavior being consistent with times she has known him to be using methamphetamine. She testified that Libby told her he was with Latimer and Libby’s “gang-banger” neighbor, that a situation had gotten out of hand, and that

one of them shot the guy. She testified it happened on E Street, and that Libby said he knew there were guns behind the seat of Munro's truck.

To a significant extent, then, the statement attributed to Libby by Mr. Rodriguez would be cumulative. It is unlikely to change the outcome of the trial. *It is doubly so because of the likelihood that Rodriguez would be so impeachable as a witness. He apparently requested to be placed in a cell with Mr. Libby, where he remained only a very short time.* His criminal history includes a substantial number of potentially impeachable prior convictions.

CP 5637-38 (emphasis supplied).<sup>45</sup> This conclusion is supported by the record. At the time he gave his statement to the defense, Rodriguez was facing first-degree murder charges. CP 4214. He specifically requested to be housed with Libby, and four days later asked to have Libby moved out of his cell. CP 4215. Moreover, there was "jail house chatter" about Nickels's theory of the case circulating at the time. CP 4217.

***5. The anonymous declaration regarding Libby's attempted sale of a gun with a laser sight two and a half years after the murder was not newly discovered material evidence where there was no evidence such a gun was ever in Munro's truck.***

Nickels argument that this anonymous witness's post-trial declaration warranted a new trial is without basis. The anonymous witness asserted that two and a half years after the murder, Libby offered to sell him a gun with a laser sight on it. CP 4092. Nothing in this declaration calls into question the court's exclusion of Amber Harmon's testimony.

---

<sup>45</sup> Nickels assertion that Perry received a favorable plea deal is without record support. The only evidence (a sworn declaration from the elected prosecutor) is that the plea negotiations had been pending for months before the defense contacted Perry, and the agreement had no relation to Nickels's case. CP 5612.

Harmon testified in an offer of proof that she had known Munro since 2004, dated him from 2005, and had maintained nearly daily contact with him until his death, even after they stopped dating. 23RP 462-63. She had seen a black handgun with laser in the Fall of 2009. 23RP 464. However, she never saw that gun in Munro's truck. 23RP 468. She had not seen it at all for months before the murder, and the last time she saw it was in Munro's bedroom. 23RP468, 470.<sup>46</sup>

Based on the offer of proof, the court found no relevance because Harmon directly contradicted the assertion that Munro kept guns in his truck, because there was no evidence the house was ever entered and no evidence the allegedly missing gun was ever in the truck, and as such Harmon had no relevant evidence to offer. 23RP 470-71, 473.

The only thing the anonymous declaration offered was the coincidence of the laser sight.<sup>47</sup> Nothing in the declaration calls into question the trial court's primary rationale: that there was no evidence whatsoever that Munro ever kept guns generally, or the laser-sighted pistol specifically, in his truck. It properly concluded that this "evidence" did not

---

<sup>46</sup> Harmon disputed Nickels's claim that she said Munro kept guns in truck: she saw one once in the truck when he was lending it to his nephew. 23RP 465. That was a year or two before he was killed, and it was a little .22 not the laser one. 23RP 469, 465. Indeed she was clear that Munro *never* left guns in the truck. 23RP 470.

<sup>47</sup> Nickels offered no evidence regarding how common such sights are. It appears that they are readily available online and in sporting goods shops for under \$150. *See, e.g.*, <http://www.cabelas.com/category/Handgun-Laser-Sights/166648680.uts>.

meet the requirements of materiality to qualify as newly-discovered evidence, and would not have changed the outcome of the trial.

**L. THE TRIAL JUDGE DID NOT VIOLATE THE APPEARANCE OF FAIRNESS BY FAILING TO DISCLOSE HIS STEPSON'S HIGH SCHOOL RELATIONSHIP WITH MUNRO WHERE THE JUDGE DID NOT MARRY THE STEPSON'S MOTHER UNTIL YEARS LATER.**

The burden of establishing an appearance of fairness violation is on the proponent, who must “provide sufficient evidence to overcome the presumption that the trial court performed its functions without bias or prejudice.” *State v. Witherspoon*, 171 Wn. App. 271, 289, 286 P.3d 996 (2012), *aff'd*, 180 Wn.2d 875 (2014). “The party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough.” *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 24, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014).

A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012). “The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that ‘a reasonable person knows and

understands all the relevant facts.”” *Tatham*, 170 Wn. App. at 96 (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d cir.1988)). This Court reviews a trial judge’s recusal decision for abuse of discretion—whether “the decision was manifestly unreasonable or based on untenable reasons or grounds.”<sup>48</sup> *Kok*, 179 Wn. App. at 23-24.

Here, Judge Sperline did not abuse his discretion in declining to sua sponte recuse himself after the notice of appeal was filed. There is no evidence that the judge had any personal or pecuniary interest in the outcome of the case. There is no evidence that the judge ever even met Sage Munro.

That his stepson Eric Newstrand, who apparently lives in Redmond, went to high school with Munro does not establish that Judge Sperline had any connection with him. Newstrand, like Munro, was born in late 1974. CP 1, 6014. Assuming a normal progression, they would have been in the high school class of 1992 or 1993. The evidence Nickels presented, however, shows that Judge Sperline did not even marry Newstrand’s mother until 1998, when Newstrand would have been 24.

---

<sup>48</sup> There is not actually a ruling below, because Nickels filed an “objection” after the notice of appeal was filed, and never sought any specific relief. CP 6007.

Regardless of Newstrand's relationship with Munro,<sup>49</sup> there is no evidence whatsoever that the judge knew or had any relationship with him. The trial court properly declined to act on the defense "objection."<sup>50</sup>

Nickels's reliance on *Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012), is misplaced. In that case, the attorney for the opposing party was a partner in the judge's former firm, may have represented the judge during a DUI arrest, served as the judge's campaign manager, designated the judge her attorney-in-fact, and was appointed county court commissioner by the judge. *Tatham*, 170 Wn. App. at 85. The present situation is more analogous to *Kok*, where no violation of the appearance of fairness doctrine was found:

First, the connection between the parties and the trial judge is more tenuous in this case. In *Tatham*, the trial judge had direct connections to an attorney appearing before the judge. Here, the Estate does not allege a direct connection between the judge and the parties or their counsel; rather, it alleges that the trial judge's spouse had previously represented the [respondent].

Second, the trial judge in this case did not violate the CJC. In *Tatham*, the trial judge acted as attorney-in-fact for one of the attorneys despite a CJC provision [prohibiting such]. Here, [the appellant] did not show that the judge's spouse's interest was more than de minimis.

---

<sup>49</sup> Notably Newstrand does not mention any actual activity with Munro since the 1990s. See CP 6055, 6057-58

<sup>50</sup> Nickels also appears to fault the judge for reacting negatively to his objection. Considering that Nickels attached to his motion records of a 15-year-old disciplinary proceeding against the judge that was utterly unrelated to a personal conflict of interest, it is not surprising that the judge took offense. In any event, the judge made no rulings after the objection was filed.

The trial judge's spouse—whose area of concentration is real estate law—and his firm had represented the [respondent] only on unrelated issues. Neither the judge's spouse nor his firm has any interest in the outcome of this proceeding—they are not involved in any way in litigating the present case and they will not receive any fees relating to the case.

Finally, the nature of the proceedings was different in each case. In *Tatham*, a property division case, the trial judge had greater discretion in making his decision, and, on review, the appellate court would apply a deferential standard of review. By contrast, this case involved a summary judgment order, which appellate courts review de novo. Therefore, the increased risk of prejudice present in the *Tatham* case is not an issue here.

Kok, 179 Wn. App. at 25-26 (editing added). Here, as *Kok*, the judge's relationship to the murder victim was tenuous at best. There is no evidence Judge Sperline was even acquainted with Munro. Indeed the judge denied he was. CP 6182. Second, as in *Kok*, there is evidence the judge violated the CJC. Finally, again as in *Kok*, the judge did not have discretion over the ultimate decision: that was in the hands of the jury, whose decision could only be modified by the judge in Nickels's favor. Nickels fails to present any evidence or law that would require a new trial based on his purported once-removed relationship with the victim.

#### **M. CUMULATIVE ERROR**

Nickels finally claims that he is entitled to a new trial under the doctrine of cumulative error. The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants

reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Nickels offers only boilerplate language and citation without explanation of how it pertains to any specific claims he has raised. Moreover, as has been discussed, Nickels fails to even show multiple trial errors. This contention is without merit.

#### IV. CONCLUSION

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

DATED March 22, 2016.

Respectfully submitted,

GARTH DANO  
Prosecuting Attorney

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

RANDALL A. SUTTON  
WSBA No. 27858  
Special Deputy Prosecuting Attorney

Office ID #91103  
kcpa@co.kitsap.wa.us

NO. 31642-4-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

DAVID EMERSON NICKELS,

Appellant.

**FILED**  
**Mar 22, 2016**  
Court of Appeals  
Division III  
State of Washington

---

ON APPEAL FROM THE SUPERIOR COURT OF  
GRANT COUNTY, STATE OF WASHINGTON  
Superior Court No. 10-1-00322-6

---

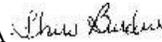
BRIEF OF RESPONDENT

---

GARTH DANO  
Prosecuting Attorney

RANDALL A. SUTTON  
Special Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

|                |  |   |
|----------------|--|---|
| <b>SERVICE</b> | <p>Susan F. Wilk<br/>Office of the Federal Public Defender<br/>101 SW Main St., Suite 1700<br/>Portland, OR 97204-3225<br/>Susan_wilk@fd.org<br/>wapofficemail@washapp.org</p> | <p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED March 22, 2016, Port Orchard, WA </p> <p><b>Original e-filed at the Court of Appeals; Copy to counsel listed at left.</b><br/><b>Office ID #91103 kcpa@co.kitsap.wa.us</b></p> |
|----------------|--|---|