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Division III
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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STAFONE FUENTES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court abuse its discretion by not allowing the defense to present alternative suspect evidence if the defense did not produce any evidence and only supported its argument with a generalized, unsupported theory that another could have committed the shooting?

2. Was evidence that Fuentes was his girlfriend's (White) pimp and that he was abusive and controlling toward her relevant to rebut defense counsel's inference during cross-examination that his girlfriend (White) was not trustworthy because she gave inconsistent statements to the police during the shooting investigation?

3. Was the defendant denied the right to present a defense and cross-examine two State's witnesses if the State had provided defense counsel with all requested potential impeachment materials concerning the federal plea documents of the two witnesses if defense counsel did not exercise due diligence to have the federal district court unseal and remove the protective orders from those plea documents?

4. If the defendant testified in both his first and second trials, was it error for the deputy prosecutor to allege that the defendant's testimony was inconsistent by asserting the defendant had tailored his testimony between the first and second trials?

5. Should this Court remand to the trial court to strike the $200 court costs if the defendant was indigent at the time of sentencing?

6. Does the defendant's persistent offender sentence violate equal protection?

7. Was the defendant entitled to have a jury determine the existence of a prior conviction for purposes of the Persistent Offender Accountability Act?

II. STATEMENT OF THE CASE

Stefone Fuentes was convicted by a jury of attempted first-degree murder of Titus Davis and first-degree assault of Lamont O'Neal.[1] CP 1-2, 1320. The jury also found each conviction involved a firearm. CP 1-2, 1324. This appeal timely followed.

On February 17, 2013, Lamont O'Neal was in Spokane visiting his friend, Titus Davis. RP 810-11, 827. Around 11:00 p.m., both went to the Knitting Factory, parked in a nearby parking lot, and entered the establishment. RP 812-13, 828. After several hours, O'Neal and Davis returned to their vehicle. RP 813, 832. Davis sat in the driver's seat and O'Neal in the passenger seat. RP 831-32. Davis began to roll a marijuana

[1] The first trial ended in a mistrial as the jury was deadlocked. RP 637-38. The verbatim report of proceedings for the first trial are paginated 1 through 652. The second and current trial proceedings commenced on June 18, 2018, and begin on page 653 of the verbatim report of proceedings.

cigarette when gunfire unexpectedly erupted through the driver's side window striking both Davis and O'Neal. RP 814. The shooter then ran in front of Davis' vehicle and down an alleyway. RP 832.

Both Davis and O'Neal had bullet wounds which caused O'Neal to drive the pair to Deaconess hospital for treatment of their injuries. RP 814-15, 817-18, 834. Davis suffered three gunshots to his stomach and three gunshots to his arm. RP 834, 836. After his initial stay at the hospital, Davis had four subsequent surgeries. RP 839. A fired bullet was recovered from each victim. RP 819, 907, 923-25.

Davis knew Fuentes from prior social gatherings. RP 841. In 2011, Fuentes called Davis, confronted Davis about having lunch with Fuentes' girlfriend and then hung up on Davis. RP 842-43. Fuentes was angry about Davis having had lunch with Fuentes' girlfriend, that she took Davis to school several times, and Fuentes believed Davis was trying to have sex with his girlfriend. RP 844-45. On the stand, Davis identified Fuentes as the person who shot him based upon representations made by Fuentes after the shooting. RP 838, 856.

Cierra White met Fuentes when she was sixteen-years-old. RP 862. White and Fuentes were boyfriend/girlfriend; Fuentes had also acted as White's pimp. RP 862. Fuentes essentially controlled White's life between the ages of 16 and 18. RP 863-64.

On the night of the shooting, White had plans to celebrate her eighteenth birthday with Fuentes at the Knitting Factory in downtown Spokane. RP 866-67. When the pair arrived at the Knitting Factory, Fuentes saw Davis. RP 869. After waiting a while in a parking lot near the Knitting Factory, Fuentes, White, and several others decided to leave and attend a party. RP 870-71. Before leaving the parking lot, an argument ensued and Fuentes struck White with a black handgun. RP 872, 880. Thereafter, as Fuentes drove out of the parking lot, rather than follow the other anticipated party-goers in their vehicles, Fuentes drove down an alleyway, exited, and walked toward a fight in the parking lot. RP 871, 873. Soon thereafter, White heard gunshots and saw Fuentes running toward his car. RP 873. Thereafter, Fuentes and White parted and then met up again a short time later at a Quality Inn. RP 874. The following morning, the shooting was broadcast on the news. RP 874. Fuentes remarked something akin to "Davis should have been dead." RP 875.

After the shooting, White was charged with unrelated federal and state drug crimes. RP 876, 882. During the pendency of those charges, Fuentes told White to speak with law enforcement to determine what evidence the police had regarding the shooting. RP 877. White eventually worked out a plea bargain for her agreement to testify. RP 878. While

incarcerated, White received instructions from Fuentes, via a third party, not to implicate him. RP 895-96.

Shortly after the shooting, officers responded to the area where both victims were shot. RP 911. No shell casings were recovered from the scene. RP 912. Either someone had picked up the casings or the bullets were fired from a revolver,[2] which does not eject shell casings. RP 912. Detectives processed Davis' car after the incident pursuant to a search warrant. RP 912, 925. There were six bullet strikes in the driver's side window of the vehicle. RP 913, 934. In addition, bullet defects were observed inside Davis' vehicle and a bullet fragment[3] was recovered from the front passenger seat. RP 913, 924-25, 937. A copper jacketing from a bullet was also recovered from the running board of the vehicle. RP 930-31. The trajectory of the bullets was a downward angle into the vehicle. RP 939.

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[2] A total of six rounds of ammunition is common for a revolver. RP 913, 935.

[3] Detective Martin Hill explained the difference between a bullet and a bullet fragment:

> Bullets are constructed either with lead or they have an inner core and outer jacketing. When a bullet strikes something, the outer jacketing peel[s] away leaving bits and pieces behind as the projectile passes through the object.
>
> [J]acketing would be the outer exterior of the bullet that maybe has been peeled away, and the bullet would be the main projectile.

RP 931.

Jason Jones had known Fuentes since approximately 2011. RP 943. He was introduced to Fuentes through another associate, Deandre Gaither. RP 944. Jones had contact with Fuentes once or twice every two weeks and Fuentes had previously been to Jones' residence three or four times. RP 945. In the spring of 2013, Fuentes and Gaither arrived at Jones' house. All three individuals discussed the shooting. Jones explained:

> From what my understanding was what the conversation was, there had been a shooting at a nightclub, and him and Mr. Gaither were talking about it, and from that point, I chimed in and said, you know, like basically they were saying, you know, how close he was when he shot the guy and why the guy didn't wind up being killed by Mr. Fuentes' actions, and I said something about it how did you miss from being that close? He said God put his arm up. He was in the car. I guess he had walked up on the car before he shot the guy, and the guy was sitting in the car smoking blunts or something like that, and they mentioned Mrs. White's name, also.
>
> I guess she was present or, you know, had talked to the guy first or put the guy in position. I'm not, you know, I just entered the conversation as far as like well, how you miss if you were like standing right over him, you know? From that point, I think Mr. Gaither is the one who would kind of somewhat initiated the trade like, you know, because you got a hot gun.
>
> So, you know, we just exchanged the firearms or whatever you may want to call them.

RP 947.

During that meeting, Jones and Gaither were teasing Fuentes about missing the mark in terms of not killing Davis at such a close range. RP 948. Fuentes told Jones and Gaither that the person he shot was named "Titus"

and he shot at Titus because Titus had been flirting with Fuentes' girlfriend. RP 949-50. At that meeting, Jones traded his .357 Smith & Wesson pistol with Fuentes for a similar pistol because Fuentes' pistol was a "hot gun." RP 947-48, 961-63. Jones subsequently hid that pistol[4] and one of his own pistols in the rafters of his home. RP 950-51. Jones ultimately informed law enforcement of the location of Fuentes' .357 magnum pistol and Jones' firearm inside his home pursuant to negotiations with law enforcement regarding Jones' then pending charges federal charges. RP 952-53. Consequently, Fuentes' .357 magnum pistol was recovered by law enforcement. RP 1059, 1117, 1126. Jones ultimately reached a plea deal with prosecutors in which he agreed to cooperate with the prosecution of Fuentes. RP 954-55, 959.

Deandre Gaither[5] was close friends with the defendant prior to the shooting. RP 979-80. The day after the shooting on February 18, 2013, Fuentes called Gaither and they discussed the shooting. RP 980, 999. Gaither stated that Fuentes remarked that he "shot a dude, and that he wanted to trade the gun like he knew that I or, you know, me and my homeboy had some guns that looked like his. He wanted to switch it."

---

[4] Jones identified the pistol collected by law enforcement from Jones' residence as the pistol Fuentes gave him during the meeting. RP 965.

[5] Gaither also entered into a plea agreement with prosecutors in which he agreed to cooperate with the prosecution against Fuentes. RP 987-89.

RP 980. Fuentes had a ".357 chrome" pistol. RP 982. Gaither told Fuentes to meet him at Jones' residence to exchange pistols. RP 983. At Jones' residence, Gaither recalled how Fuentes' explained the shooting:

> [Fuentes] told us about how he had Cierra [White] watching him all that night at the club and then Cierra came back and told him the dude's outside or whatever, and then that's all he basically explained to us. That was it, and then they switched the gun. They switch[ed] the gun, and he left, him and Cierra.

RP 984.

Ultimately, Gaither explained that Fuentes was angry with Davis because Davis "tried to get at [Fuentes'] wife while he was gone out of town. So he tried to come onto his wife." RP 981.

Gaither had introduced Edmundo Maltez[6] to Fuentes. RP 1022. Fuentes told Maltez that he shot Davis and demonstrated the shooting. RP 1016. Maltez explained:

> When [Fuentes] shot them, they left the car by the railroad tracks, and he went to the car. The car was in the parking lot over at the club, and he [said] he put his hoodie on, shot him through the window, but he came again and shot him again through the front glass, okay? That's when he took his hoodie off so he could see his face because he thought he was going to die, but Titus didn't die. He demonstrated he came with a hoodie and the[n] got ballsy, took the

[6] At the time of the shooting, Maltez was a paid federal confidential informant. RP 1013-15.

> hoodie off so he could see his face. Pretty much I'm Sticcs.[7] I killed you kind of.

RP 1017. Fuentes told Maltez that he shot Davis with a "blue" .357. RP 1021.

Detective Hill requested the crime lab compare the recovered bullet and bullet jacketing with Fuentes' .357 caliber Smith and Wesson revolver located in Jones' residence. RP 936. After testing, Washington State Patrol Firearms Examiner Glen Davis determined the fired bullet jacket[8] recovered from O'Neal's clothing and a fired bullet[9] lodged in O'Neal were both fired from Fuentes' .357 caliber Smith and Wesson revolver recovered from Jones's residence. RP 1032-33, RP 1100.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISALLOWED DEFENSE COUNSEL FROM PRESENTING ANY ALTERNATIVE SUSPECT EVIDENCE BECAUSE DEFENSE COUNSEL'S "PROOF" WAS NOTHING OTHER THAN THEORY, SPECULATION AND GUESSWORK.

Fuentes argues the trial court abused its discretion by refusing to allow him to introduce "other suspect evidence" which deprived him of his right to present a defense.

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[7] "Sticcs" was Fuentes' moniker.

[8] Admitted as State's exhibit P-33. RP 923.

[9] Admitted as State's exhibit P-32. RP 922.

Prior to trial, the State moved the court to exclude evidence of alternative suspects unless the defendant could establish the proper foundation for such testimony. CP 177-79. Defense counsel summarized his offer of proof in his pretrial briefing. Defense counsel claimed that several years before the shooting of Davis, Davis had been accused of shooting two individuals who belonged to the street gang "8-Trey Crips," and Davis ultimately pleaded guilty to "manslaughter" for that shooting. CP 186-87. Fuentes further asserted that Davis had contact and smoked some marijuana with several "8 Trey Crips" who were parked in a vehicle in the parking lot shortly before the shooting. CP 187. Fuentes alleged that one of the prior "8-Trey Crips" shooting victim's girlfriend, "Sadie," had texted Davis before the shooting asking if Davis was at the Knitting Factory; Davis had contact with "Sadie" after the shooting because he felt sorry for her. CP 187-88. Fuentes also asserted that one of the "8-Trey Crips" involved in the prior, unrelated shooting was at the Knitting Factory the night of the shooting of Davis. CP 188.

Notwithstanding that Fuentes proffered no percipient witnesses or physical evidence to support his claim that the shooting of Davis was committed by an "8-Trey Crip," he alleged in his briefing that a generalized "retaliation" by a gang member met the necessary evidentiary foundation

based upon a presage that "a shooting will be repaid with a shooting" in gang culture. CP 193; *see also* RP 670-71.

Before trial commenced, the trial court heard argument, in part, on the proposed alternative suspect evidence. 5/25/18 RP 7.[10] The defense wanted to ask Davis who he thought shot him and argued:

> [DEFENSE ATTORNEY]: You heard Mr. Titus Davis himself when asked by Detective Hill can you think of anyone who might have wanted to harm you, he talks initially and at some length about an incident that he was involved in and his connection with people he saw out in the parking lot that night right before he got shot. He talks about their gang affiliation and why that connects them to that incident that he was involved in. That is the shooting of Kenny Budik and Adoma Walton.
>
> [THE COURT]: The detective asked him anybody that you thought, start naming. Because we already did this trial once, at least I have the facts correct.
>
> My understanding is, though, that if you want to bring in that other suspect and all of that issue, you have to have some evidence to link it, not just the victim speculating to the detective who else may have done this crime.
>
> [DEFENSE ATTORNEY]: He's not speculating, Your Honor. He is giving Detective Hill facts. I was involved in a shooting of two people. People think I did it. Some people think I did it. One of the persons that I shot every time I've seen him in the last four years, I think it was two or four years, he was with these people that I saw in this car right before I was shot.

---

[10] The transcript is from a pretrial motion dated May 25, 2018, which is paginated separately from the trial transcript, both reported by court reporter Heather Gipson. Reference to this volume will be referred to as "05/25/18 RP." The trial transcript, consisting of three volumes, is simply referred to as "RP."

He's not speculating. These are all facts, and Detective Hill says and who were they? Who are these people in the car, and you can tell he's reluctant to name names, but Detective Hill says these are 8-trey, aren't they, and he says yes. Those are 8-trey gang members. It's Mr. Davis who connects Kenneth Budik every time he's seem them in the last few years they've been with these people in the car.

It's more than that, Your Honor. Officer Roberge has testified in court under oath that Kenny Budik is a Rolling 20's gang member, and we have other to support that that comes from Mr. Gaither and Mr. Jones.

So Kenneth Budik is a Rolling 20's gang member, and guess who ends up with the gun that is used to shoot Titus Davis and Lamont O'Neal? Jason Jones, a Rolling 20's gang member.

So these are facts. This is not speculation. Now, it's up to the jury to draw or not draw inferences from those facts. This is not a case of someone just saying well, I don't know. Gee, maybe that person had a reason to do this or had some reason to want to harm me. These are facts.

These are very specific information he's giving to Detective Hill that connect these people, and if you listen to that tape, Your Honor, of the interview, you may have or you may not have heard it, but when Titus Davis is describing the moment that he realized he had been shot, he says I knew it.

Now, Detective Hill doesn't ask him, doesn't follow-up questions about that, but I'm pretty confident when I asked him the follow-up questions, what he meant by that was I knew it. These people in this car were setting me up, and I was worried about them because I knew they were connected to this incident that happened some years ago where I shot somebody, and this is not at all speculation, Your Honor.

In fact, I would say the evidence is stronger, much stronger that this shooting has something to do with the Kenny Budik incident than it

> has to do with Mr. Fuentes at all, particularly this idea that he would attempt to kill someone because he went to lunch with his wife …

05/25/18 RP 7-9.

> [THE COURT]: But you agree that each of the witnesses, the reason why the Court let the drug dealing in [the first trial] was because each of these witnesses that testified, including Jason Jones and all this, got [plea] deals. So they had motive behind it.
>
> So the Court allowed you to ask and talk about the drug dealing because they got great deals based on that, but there's no tie to gangs. That's where I'm having the issue.
>
> This case isn't about gangs. You're trying to make it about gangs. I'm saying that that's not what the [first] trial was, and the State didn't bring it out. You brought it out in opening and went back. I took pretty good notes.
>
> You brought it out in opening, and then you brought it out with Mr. Fuentes on the stand about the gangs, and then they rebutted it so when the detective got back on the stand.
>
> So at this point, this case isn't about, and I still am having trouble on the other suspect evidence when you're taking someone who'd been shot and speculating on who might have done it, you're saying that every victim that gets on the stand is going to name all these people that they're kind of saying that had a bad day with this person. I did this. You're saying that we should put that out there, so that throws it out.
>
> [DEFENSE ATTORNEY]: Well, Your Honor, if we're not allowed to show that someone else had a very strong motive to do this, that they are -- that their presence at the scene is likely, we don't know for sure, but remember Titus Davis said Kenneth Budik was always with those people in the car every time he saw him. That's pretty good evidence that he was probably there that night.
>
> [THE COURT]: If you listen to that statement, probably there that night.

> [DEFENSE ATTORNEY]: Yes.
>
> THE COURT: That would be speculation.
>
> [DEFENSE ATTORNEY]: No, that's not speculation.
>
> THE COURT: Not that I saw him. Probably.
>
> [DEFENSE ATTORNEY]: Probably is a reasonable inference that the jury can draw. To say something is probably true is exactly what evidence is presented for, Your Honor, more likely than not.
>
> The standard overall for the State is beyond a reasonable doubt, but all we have to do is raise reasonable doubt. So anything -- if we can show that something is probably true, that would be inconsistent with the State's theory of the case that raises a reasonable doubt.
>
> So we don't have to prove anything beyond a reasonable doubt. We simply have to present evidence to the jury from which they can draw a reasonable inference that would establish a fact that would raise a reasonable doubt, and that's all we're trying to do, and we have an absolute -- Mr. Fuentes has a constitutional right to do that.

05/25/18 RP 11-13.

> [THE COURT]: Walk me through it because apparently what you just said is apparently Mr. Davis saw someone who's a Rolling 20's, and in the past, Mr. Budik has been seen with those people, but he wasn't seen that night. Nobody can lock him in that night.
>
> So because they were there and he's seen them together in the past, that links it together. Is that what you're trying to tell me?
>
> [DEFENSE ATTORNEY] Here's what I'm trying to explain to you, Your Honor.
>
> THE COURT: Okay.

[DEFENSE ATTORNEY]: Mr. Davis says he was involved or he was accused of shooting two people, Kenneth –

THE COURT: I got the story with Mr. Davis. What's the link?

[DEFENSE ATTORNEY]: He initially said when asked to Detective Hill that that's what he thinks maybe was behind the shooting.

THE COURT: It's all speculation. I'm asking –

[DEFENSE ATTORNEY]: Wait a minute.

THE COURT: -- what solid facts.

[DEFENSE ATTORNEY]: And these are the facts. Kenneth Budik was one of the persons he shot. Kenneth Budik is a person that whenever he has seen him since that time, he was with the people in the white car that –

…

THE COURT: Is somebody going to say they saw Kenneth Budik there that night right outside where Mr. Davis was because I didn't hear that.

[DEFENSE ATTORNEY]: No, and you're probably not going to hear that. That doesn't mean that the testimony of Mr. Davis is not relevant and not sufficient to raise a reasonable doubt. Because he may have not have seen Kenneth Budik in the car, that doesn't mean he wasn't there, and the fact that Mr. Davis says every time I'd seen him, he was with these people, that raises at least a likelihood or probability that he was with them, but it, also, raises another probability that someone did this on his behalf even if he, himself, wasn't present because these are the people he hangs out with, and then you have on top of that, you have Kenneth Budik connected to Ron Gardner -- I'm sorry -- Jason Jones and Deandre Gaither, and they have the gun that was used. So there's another connection.

So there's plenty of evidence here that this shooting had to do with the shooting of Kenneth Budik and Adoma Walton. It had nothing

> to do with Mr. Fuentes. In fact, I want to make this point really clear, Your Honor.

05/25/18 RP 19-20.

After further argument,[11] the trial court ruled:

> In this case, and I read all the cases, it says motive alone is not enough to establish a nexus for the defendant to be allowed to present third-party evidence without other evidence, hearsay evidence, speculation, inadmissible evidence. There has to be something more -- listen to what I'm saying. So you talked. Now I talk.
>
> The witness [Davis] says I'm speculating that these are things that I may have seen, may have done, but he didn't see Kenneth Budik there. [Davis] didn't know Kenneth Budik was there, and you're trying to make that leap without some solid evidence.
>
> You can ask Mr. Davis on the stand you had other people. You gave out lots of names, but as far as what they were or all of that, unless you can tie something because it says admissible evidence, not speculation, not speculative. As much as you like to make it a gang issue, I don't see it as a gang issue.
>
> So as far as gang evidence or anything about that, it's drug dealing evidence, yeah. Those people are selling drugs, and that's the motive they're going to testify against. They all got great deals. Those all go to motive, and you can get that out.
>
> As far as gang evidence, there is no relevance in this case for gang evidence at this time. The State didn't bring it out. They brought it out in rebuttal.
>
> At this point unless you can point to some actual admissible, relevant evidence, not hearsay, not speculation, something that actually can link it to the Court, then if you have some witness that

[11] The State proffered, amongst other things, that there was no evidence this was a gang shooting or that Davis was a gang member. 05/25/18 RP 15-17.

> said Kenneth Budik was there that night and he was after Titus and he was pissed off, but I don't have that.
>
> I have you saying well, you saw some people who used to hang with them. Just because I hang with them in the past doesn't mean I was there that night.
>
> That's what you want to throw out there, and that's exactly the case law that says in order to show it, the defendant must present evidence that the third-party took a step indicating an intent to act upon that motive with admissible evidence and not irrelevant evidence.
>
> At this point, you can bring out these guys all have motive to testify against Mr. Fuentes, big motive, but as far as they did it because of some other speculative third-party person is out as far as that unless you can bring into court some admissible evidence.

05/25/18 RP 23-24.

Standard of review.

An appellate court reviews a trial court's decision to admit or exclude evidence for abuse of discretion.[12] *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014); *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985). An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or is based on untenable grounds. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546

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[12] Asserting that a ruling violated the defendant's right to a fair trial does not change the standard of review from abuse of discretion, but an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 377 n.2; *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

(1997), *as amended* (Aug. 13, 1997). Stated differently, a trial court's decision on an evidentiary issue will be reversed only if no reasonable person would have decided the matter as the trial court did. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The Sixth Amendment of the United States Constitution and article I, section 22, of the Washington Constitution guarantee a criminal defendant's right to present a defense. *State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). However, a defendant does not have a constitutional right to present irrelevant or inadmissible evidence. *Id.* at 750.

The standard for the relevance of "other suspect" evidence is whether it tends to connect someone other than the defendant with the crime. *Franklin*, 180 Wn.2d at 381; *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932). Before the trial court admits "other suspect" evidence, the defendant must present a combination of facts or circumstances pointing to a nonspeculative link between the other suspect and the crime. *Franklin*, 180 Wn.2d at 381. In other words, a court must determine whether the probative value is outweighed by other factors, such as "unfair prejudice, confusion of the issues, or potential to mislead the jury," and focus the trial "on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Id.* at 378. The defendant bears the

burden of establishing the relevance and materiality of "other suspect" evidence. *Starbuck*, 189 Wn. App. at 752.

Mere evidence of motive, or motive coupled with threats of the other person, "is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged." *Franklin*, 180 Wn.2d at 379-80. Further, "[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose." *Id.* at 380. Likewise, a showing that it was possible for the third party to commit the crime is insufficient. *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). Importantly, the inquiry focuses on whether the evidence tends to create a reasonable doubt as to the defendant's guilt, and not on whether it establishes the third party's guilt beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 381*; see also Matter of Lui*, 188 Wn.2d 525, 552, 397 P.3d 90 (2017) ("The standard for relevance of other suspect evidence is whether there is evidence tending to connect someone other than the defendant with the crime beyond mere speculation"). Speculation is defined as "[t]he act of or practice of theorizing about matters over which there is no certain knowledge." BLACK'S LAW DICTIONARY 1617 (10th ed. 2014).

In *Franklin*, the trial court excluded evidence that Franklin's live-in girlfriend, Hibbler, had sent threatening e-mails to his other girlfriend. 180 Wn.2d at 372. The Supreme Court reversed, finding that Hibbler had the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (of sending threatening e-mails to another regarding her relationship with Franklin) to support Franklin's theory of the case. *Id.* at 372-73. The Court stated, "[T]he excluded evidence, taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Franklin's guilt." *Id.* at 382.

In the present case, the trial court did not abuse its discretion as the defendant's offer of proof was insufficient to satisfy his burden to establish a combination of facts or circumstances pointing to a *nonspeculative* link between the asserted alternative suspect (e.g., Budik) and the charged crimes. As the trial court correctly concluded, Fuentes' offer of proof was a bunching of unrelated, theoretical events which did not either directly or even indirectly establish that Budik shot Davis or that he had a motive to shoot Davis. The defense attorney's assertion that Budik harbored a grudge against Davis was speculative at best. Other than his pontification that a grudge existed, defense counsel failed to offer any proof, including any quarrels, threats, retaliation, or physical acts perpetrated by Budik or his

associates against Davis after that two-year-old alleged shooting.[13] Moreover, defense counsel proffered no police reports, testimony, or other evidence to support his claim that antagonism remained between Budik and Davis. Remarkably, defense counsel admitted during the motion that there was no evidence placing Budik at the crime scene.

On appeal, Fuentes once again argues that a clear motive was established by his trial counsel's offer of proof, yet he fails to cite to the record as to where or how that motive was established other than again repeating the prognostication of his trial counsel. *See* Appellant's Br. at 16. Furthermore, Fuentes criticizes the trial court claiming it raised the bar for admission of alternative suspect evidence. The court asked Fuentes' trial counsel several times if he could provide a link between Budik and the

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[13] *See State v. Burnam*, 421 P.3d 977, 980 (Wa. Ct. App.), *review denied*, 192 Wn.2d 1003 (2018). In that case, the defense made an offer of proof regarding a self-defense claim but failed to inform the trial court of the specific nature of the offered evidence. *Id.* at 981. The trial court excluded evidence finding the offer of proof inadequate. *Id.* at 375. In affirming the trial court, this Court explained the quality of the defendant's offer of proof, which is similar to what occurred in the present case:

> Mr. Burnam kept claiming that Ms. Sweet was involved in a homicide and was even more involved than law enforcement knew. However, he never said what acts she allegedly committed beyond disposing of the firearm, just simply that he thought she was capable of being involved in a homicide. He did not claim how he knew this information. The thrust of his lengthy argument focused on the fact that Ms. Sweet simply had been associated with a homicide four years earlier.

Id. at 981-82.

shooting other than trial counsel's circular reasoning and speculation. Trial counsel could not do so; in effect, he was trying to place a square peg in a round hole. The trial court's analysis was tenable and it was correct that Fuentes' theory of Budik's involvement in the shooting did not rise above the level of a hunch. The trial court did not abuse its discretion.

B. EVIDENCE THAT FUENTES WAS WHITE'S PIMP WAS RELEVANT TO EXPLAIN WHY WHITE GAVE INCONSISTENT ACCOUNTS TO THE POLICE OF HER KNOWLEDGE OF FUENTES' INVOLVEMENT IN THE SHOOTING AND WHY SHE DID NOT INITIALLY IMPLICATE FUENTES WHEN FIRST MEETING WITH POLICE DURING THE INVESTIGATION.

Fuentes argues that evidence that he was White's pimp was not relevant, that it was propensity evidence in violation of ER 404(b), and it was prejudicial.

Fuentes moved the court to bar testimony that he was White's pimp summarily arguing the testimony was more prejudicial than probative. RP 783. The State argued that the evidence was more relevant than prejudicial because it would establish the control Fuentes had over White during the investigation, including providing an explanation as to why White did not initially report the shooting, and Fuentes' attempts to manipulate White regarding her proposed testimony at trial. RP 784. The trial court permitted limited questioning on the subject.

> THE COURT: My understanding at least from her testimony, and I have to go back through it. That was one of the issues when she talked about control. Every time she worked for him, she had to give him the money. If she didn't, she was worried. Those were all things she testified to as his control over her besides their relationship.
>
> So it would go to motive, and it would go to why she didn't report it, why she didn't say anything, all of those. So at this point, I'm going to allow him to ask her about it because it has to go with the relationship. I'm going to allow it, not to go into detail about it, but it does. I don't know how you can explain working for him, that she indicated she had been working for him.
>
> So I'm going to allow him to ask him about it, but I'd ask to keep just briefly. I don't want to go into great detail about it.

RP 784-85.

Standard of review.

A trial court's ruling on the admission of evidence under ER 401, 402 and 403 is reviewed for a manifest abuse of discretion. *State v. Scherf*, 192 Wn.2d 350, 387, 429 P.3d 776 (2018); *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984); *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). In that regard, the trial court is in the best position to evaluate the dynamics of a jury trial and the prejudicial effect of a piece of evidence. *State v. Taylor,* 60 Wn.2d 32, 40, 371 P.2d 617 (1962). Accordingly, any error in admitting evidence is grounds for reversal only if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

ER 401 defines "relevant evidence" as evidence having a tendency to make the existence of any fact consequential to the resolution of an action more or less probable than it would be without that evidence. Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. *Rice*, 48 Wn. App. at 13. Facts tending to establish a party's theory of the case will generally be found to be relevant. *State v. Mak,* 105 Wn.2d 692, 703, 718 P.2d 407 (1986), *overruled on other grounds, State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

A trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. However, "nearly all evidence will prejudice one side or the other," and "[e]vidence is not rendered inadmissible under ER 403 just because it may be prejudicial." *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). "The ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is 'quite slim' where the evidence is undeniably probative of a central issue in the case." *Id.* at 224; *see Scherf*, 192 Wn.2d at 388 (internal citations omitted) ("[e]vidence is unfairly prejudicial when it is likely to stimulate an emotional response instead of a rational decision. … It is not inadmissible merely because it is harmful to the party opposing its admission").

As summed up by the *Rice* court:

> In determining whether or not there is prejudice, the linchpin word is "unfair". Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another. However, "unfair prejudice" is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors.

48 Wn. App. at 13 (citations omitted).

At the time of trial, White testified she had been in a romantic relationship with Fuentes, Fuentes was her pimp, and both shared the proceeds of her prostitution. RP 862-63. Fuentes was abusive, made threats,[14] and was controlling[15] during that relationship and throughout the criminal investigation. RP 863-64, 879. White spoke with law enforcement several times during the shooting investigation. While White was incarcerated on federal drug charges and during the shooting investigation, she was directed by Fuentes[16] to get information from the police. RP 879. White spoke with law enforcement several times and provided inconsistent

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[14] Shortly after the shooting, Fuentes threatened to kill White if she ever left him. RP 874-75.

[15] Fuentes' trial counsel agreed that White could testify that Fuentes was controlling during the relationship. RP 784.

[16] Both White and Fuentes were incarcerated at the time. RP 877. White and Fuentes communicated information through family members. RP 877. Fuentes also penned letters to White seeking the same information. RP 879. One letter was admitted at trial as Ex. 37. RP 881.

statements regarding her knowledge of the shooting and Fuentes' involvement as discussed below.

As expected and during cross-examination, Fuentes' trial counsel attempted to impeach White with her several different versions of the shooting given to law enforcement during the investigation. During her first meeting with law enforcement, White told detectives she had no knowledge of the shooting until the following day. RP 885. On the stand, White acknowledged that her first story would not likely get her any consideration from law enforcement. RP 885. Fuentes' trial counsel then had White admit that she changed her story several months later during her second meeting with law enforcement. RP 885. During that same meeting and after being advised that witnesses could place her at the crime scene, White then admitted she saw Fuentes with a pistol the night of the shooting. RP 886-87. Fuentes' trial counsel again had White agree that the detective did not believe her during that meeting. RP 888. It was not until the third meeting with detectives, several months later, that White revealed her true knowledge of the events surrounding the shooting. RP 888-89.

In *State v. Magers*, our Supreme Court held that "prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim." 164 Wn.2d 174, 186, 189 P.3d 126 (2008). The court found the

jury "was entitled to evaluate [the victim's] credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." *Id*.

Likewise, various divisions of this Court have held the same. In *State v. Grant*, 83 Wn. App. 98, 108, 920 P.2d 609 (1996), the court held that a pattern of domestic violence was admissible to rebut a charge that a victim's credibility should be called into question because of inconsistent statements. The *Grant* court recognized that "victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others." *Id.* at 107. Similarly, this Court held in *State v. Nelson*, 131 Wn. App. 108, 125 P.3d 1008, *review denied*, 157 Wn.2d 1025 (2006), that Nelson's previous violent and abusive actions toward the victim were relevant under ER 404(b) to explain the victim's inconsistent accounts to the police of Nelson's domestic violence toward her in that the victim had minimized the domestic violence, Nelson had argued during trial that the victim was lying, and he relied on her inconsistent statements as proof of that charge. *See also State v. Baker*, 162 Wn. App. 468, 475, 259 P.3d 270 (2011) (evidence of prior strangulations of a domestic violence victim by the defendant were admissible because the jury was entitled to evaluate the credibility of the

victim with "full knowledge of the dynamics of her relationship" with the defendant).

This Court has found that the State is entitled to anticipate matters of a defense in its case in chief. *State v. Anderson*, 15 Wn. App. 82, 84, 546 P.2d 1243 (1976). It was certainly reasonable for the State to anticipate that the defense would attack White's credibility with her inconsistent statements to the police during the investigation. The introduction of the "pimp" evidence was necessary to explain why White gave inconsistent information. The inconsistency of her statements was based upon Fuentes' control over her (which involved an abusive pimp/prostitute relationship alongside a romantic relationship[17]) and White's fear of him. It also provided an explanation as to why White followed Fuentes' demands, without question, when attempting to glean information from law enforcement about the shooting. As discussed above, prior abuse evidence that assists the jury in evaluating a victim's credibility is highly relevant and therefore admissible. *Magers*, 164 Wn.2d at 186; *Baker*, 162 Wn. App. at 474-75; *Nelson*, 131 Wn. App. at 114-16; *Grant,* 83 Wn. App. at 109. The record demonstrates that the trial court balanced the evidence's probative value against the potential for prejudice.

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[17] RP 862.

Here, the only difference between *Magers*, *Baker, Grant,* and *Nelson* and Fuentes' case, is that, in those cases, ER 404(b) evidence was admitted to explain why a victim of domestic violence would recant or give inconsistent statements in a case in which he or she was the charged victim of the abuse. Here, the evidence was found probative under ER 401 to explain that the control and abuse of working as a prostitute for Fuentes and to explain why White, also a victim of domestic violence, feared the defendant, agreed to follow his "rules" and demands, and why she failed to report what she knew about the shooting during her first and second meetings with the police. The trial court did not abuse its discretion.

ER 404(b).

Fuentes also faults the trial court for not conducting an ER 404(b) analysis regarding evidence that he was a "pimp" for White. *See* Appellant's Br. at 26-27. However, the trial court was not asked to conduct an ER 404(b) analysis regarding that evidence. Moreover, defense counsel never objected to the above testimony on account that it was allegedly inadmissible under ER 404(b). Counsel *only* objected to the evidence under ER 403 in that it was "prejudicial." The trial court overruled his objection and admitted the evidence. He further asserts that the trial court should have sua sponte provided a limiting instruction regarding that evidence. *See* Appellant's Br. at 28.

"[I]t is well established that '[i]f a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.'" *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); *see also State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006) (foundational objection did not preserve ER 403 objection).

However, this Court may review a claim raised for the first time on appeal if it involves manifest error affecting a constitutional right. RAP 2.5(a). But evidentiary errors under ER 404(b) are not of constitutional magnitude. *State v. Gresham*, 173 Wn.2d 405, 432-33, 269 P.3d 207 (2012). Because Fuentes' objection in the trial court under ER 403 is not now the basis for his claim on appeal under ER 404(b), this Court should not further consider his argument.

Furthermore, trial courts are not required to sua sponte give a limiting instruction regarding ER 404(b) evidence admitted against a defendant. *State v. Russell*, 171 Wn.2d 118, 122-23, 249 P.3d 604 (2011). Our Supreme Court has held that "a request for a limiting instruction is a prerequisite to a successful claim of error on appeal." *Id.* at 123. Fuentes' trial counsel did not request a limiting instruction at trial which precludes raising the issue on appeal.

Even if this Court considers this argument for the first time on appeal, the evidence would have been admissible under ER 404(b). Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In the present case, evidence that Fuentes was White's "pimp" explained, as discussed above, White's inconsistent statements to the police and rebutted Fuentes' assertion that she was untrustworthy. Such evidence would have been admissible under ER 404(b).

If this Court determines that the trial court erred when it did not analyze admission of the evidence under ER 404(b), erroneous admission of evidence under ER 404(b) requires a harmless error analysis. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). For non-constitutional errors, an appellate court need determine only "whether 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Id.* at 926.

As discussed above, the unchallenged evidence on appeal demonstrates Fuentes' guilt beyond a reasonable doubt. The brief mention of Fuentes' status as a "pimp" was minimal when viewed against all other

evidence and it was not emphasized by the deputy prosecutor during closing argument other than to rehabilitate White and to provide an explanation for her inconsistent statements to the police during the investigation. *See, e.g.*, RP 1290-91, 1310-11 (deputy prosecutor's closing argument). Admission of the "pimp" testimony did not materially affect the outcome of the trial and error, if any, was harmless.

C. ALTHOUGH UNDER SEAL AND A PROTECTIVE ORDER, THE STATE PROVIDED ALL REQUESTED POTENTIAL IMPEACHMENT MATERIALS (FEDERAL PLEA AGREEMENTS) TO THE DEFENSE. THE DEFENSE ATTORNEY DID NOT EXERCISE DUE DILIGENCE TO MOVE THE FEDERAL DISTRICT COURT TO UNSEAL THE PLEA DOCUMENTS AND LIFT THE PROTECTIVE ORDER BEFORE THE START OF TRIAL. THE DEFENDANT HAS NOT ALLEGED OR ESTABLISHED HOW HE WAS HARMED.

Fuentes next contends that he was denied his right to present a defense and cross-examine the State's witnesses by the State's failure to disclose in discovery potential impeachment evidence contained in a sealed federal plea agreement subject to a protective order in federal court.

During the first trial, the defense attorney stated he needed a copy of the federal plea documents regarding Jones and Gaither, which were under seal by a federal district court. RP 66. The defense attorney had been provided redacted copies of those plea agreements pursuant to a federal district court protective order. RP 66-67, 69. After rummaging through his own file, the defense attorney acknowledged that he had received the sealed

federal plea agreement for Gaither. RP 247. However, defense counsel did not move the federal district court to unseal either Jones' or Gather's plea agreements. RP 248. The trial court advised defense counsel that it was his duty to get the documents unsealed as the deputy prosecutors were not federal prosecutors. RP 248-49. After more searching of his file, defense counsel then acknowledged he also had a copy of Jones' federal plea paperwork prior to Jones' cooperation with law enforcement, but that he did not have the plea agreement that was under seal of the federal court. RP 252. The deputy prosecutor acknowledged that he did not have access to federal documents under seal and had no information of any other plea associated with Jones other than what paperwork had been supplied to defense counsel:

> [DEPUTY PROSECUTOR]: The only one that I've ever gotten from the federal government, including when I went to the federal courthouse and Judge Rosanna Peterson's courtroom. That's where we held the deposition of Mr. Jones. Mr. Aine Ahmed was the federal prosecutor there.
>
> At no time during that prosecution do I recall any other plea agreements being used by Mr. Trageser, who was representing Mr. Fuentes at the time, being used. Mr. Trageser, however, did talk to Mr. Jones at length about the cooperation and what he got from the government in order to testify against Mr. Fuentes.

RP 254.

The defense attorney acknowledged that Jones' federal plea paperwork was under seal and the federal district court had signed a protective order regarding those documents. RP 255. During the first trial,

defense counsel was provided an addendum to Jones' federal plea agreement. RP 361-62. However, that document was still sealed per the federal district court and it could not be published to the jury. RP 362.

Thereafter, during the second trial, defense counsel agreed he had Gaither's federal plea agreement and intended its use for cross-examination of Gaither; however, defense counsel recognized the document could not be published to the jury as it remained sealed. RP 974, 976-77. Defense counsel remarked that if during trial, he needed to publish the document, he would bring it to the court's attention. RP 976-77. The defense did not readdress the issue during the remainder of the trial.

The fair-trial guarantee of the Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes upon the State a duty to disclose to a criminal accused evidence that is favorable and material to his guilt or punishment. *See Brady v. Maryland*, 373 U.S. 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This principle extends to evidence affecting a witness's credibility. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011).

The requirements of *Brady* extend only to material evidence and there is no *Brady* violation if the defendant, using reasonable diligence,

could have obtained the evidence.[18] *State v. Lord*, 161 Wn.2d 276, 292, 165 P.3d 1251 (2007); *State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004); *Matter of Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998). In addition, "where 'a defendant has enough information to be able to ascertain the supposed *Brady* material on his own,

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[18] The Sixth Circuit has explained "the other source rule" as follows:

> Like several of our sister circuits, this circuit has held that because *Brady* did not alter the rule that defendants have no general constitutional right to discovery in criminal cases, a prosecutor violates his constitutional duty of disclosure only if "his omission is of sufficient significance to result in the denial of defendant's right to a fair trial," *United States v. Todd*, 920 F.2d 399, 405 (6th Cir. 1990) (quoting *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)), and where the defendant was "aware of the essential facts that would enable him to take advantage of the exculpatory evidence," the government's failure to disclose it did not violate *Brady*. *Id.* In *Todd*, we found no *Brady* violation where the prosecutor had disclosed to the defense the fact that two witnesses possibly possessed exculpatory evidence but did not disclose what that evidence was. *See also United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) (quotations and citation omitted) (holding that there is no *Brady* violation if the defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available to defendant from another source"). The Fourth Circuit has held that "the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources," *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986)); and "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." *Id.* at 381. The Second Circuit (*United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988)) and the First Circuit (*Lugo v. Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982)) have similarly ruled.

Spirko v. Mitchell, 368 F.3d 603, 610 (6th Cir. 2004).

there is no suppression by the government.'" *Mullen*, 171 Wn.2d at 896 (noting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)).

Here, it is clear from the record that the defense attorney was fully aware of, and had in his physical possession, the federal plea agreement documents.[19] Indeed, the deputy prosecutors provided all the information they physically possessed on Gaither and Jones to the defense. Fuentes' real complaint is that the deputy prosecutors did not go the extra step by requesting the federal district court unseal the plea agreements for defense counsel and that the federal court modify or remove the protective order it had in place so that defense counsel could publish the documents for the jury. Fuentes cannot deny that his trial counsel had the essential facts, including the sealed plea agreement in hand, which allowed him the ability to obtain production of any additional documents from the federal court and to request the unsealing of those documents and removal of the protective order. Moreover, Fuentes fails to discuss or offer any case authority that *Brady* requires the State to move a federal court to unseal and lift a protective order regarding a federal plea agreement of which defense counsel was fully aware, had copies of the same, and could obtain

[19] *See United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (*Brady* applies to "information which had been known to the prosecution but unknown to the defense").

"unsealed" documents of the same information on his own initiative through the exercise of due diligence. The *Brady* rule does not apply here.

Furthermore, Fuentes fails to cite to the record as to what additional exculpatory or impeaching information was contained within the federal plea agreements (which he had in hand) which was not disclosed, how that "undisclosed" evidence was not allowed into the record through his full cross-examination of Jones and Gaither,[20] or how his defense or cross-examination of those witnesses was impaired. Fuentes' trial counsel acknowledged during the second trial that if Jones and Gaither testified untruthfully, there would be need to impeach those witnesses with any additional documentation. RP 670. On appeal, Fuentes fails to cite to the record or make any argument as to what testimony was not truthful or how his defense was undermined with the documentation already provided to him for that potential purpose.

Fuentes also fails to discuss how the sealed plea agreements were material to his defense. He certainly cross-examined both Jones and Gaither regarding their federal plea agreements and the benefits each received from

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[20] Both the State and defense fully questioned Jones and Gaither regarding their respective plea agreements reached with the federal government *in exchange for their cooperation* in the prosecution of Fuentes. *See* RP 950-56, 970-72 (direct examination, redirect–Jones); RP 957-60, 968-69 (cross-examination–Jones); RP 986-89 (direct examination–Gaither); RP 989-97 (cross-examination–Gaither).

negotiating those plea agreements allowing the jury to adjudge both witnesses' credibility.

Finally, Fuentes fails to discuss what, if any, *undisclosed*[21] exculpatory or impeaching evidence was material, that there was a reasonable probability, were the evidence *disclosed* to the defense, the result of the proceedings would be different. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Fuentes cannot meet his burden because all information known to the State was disclosed and given to defense counsel before the start of trial. Boiled down, the State did not fail to disclose any exculpatory or impeachment evidence. The State met the requirements of *Brady*. Significantly, the crux of the matter is defense trial counsel failed to exercise due diligence and undertake the steps necessary to obtain a different form of the same information already known and provided to him by the State for potential impeachment of the State's witnesses. This claim fails.

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[21] Undisclosed evidence is "material" if, "considered collectively," the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *See Kyles v. Whitley*, 514 U.S. 419, 434-36, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

D. THE DEPUTY PROSECUTOR DID NOT COMMIT ERROR WHEN HE CROSS-EXAMINED THE DEFENDANT REGARDING THE DEFENDANT'S INCONSISTENT TESTIMONY BETWEEN THE FIRST AND SECOND TRIALS.

Fuentes argues the deputy prosecutor's assertion during cross-examination of Fuentes that his testimony in the second trial differed from his testimony in the first trial violated his right to be present and confront witnesses.

Fuentes testified during his first trial which ended in a mistrial. *See* RP 488-543 (testimony), 637-38 (mistrial declared). During the second trial, the following exchange took place during cross-examination of Fuentes:

> [DEPUTY PROSECUTOR]: Okay. Now, you, also, had opportunities numerous times to watch Mr. Gaither and Mr. Jones and Ms. White testify, correct?
>
> [DEFENDANT]: Yes.
>
> [DEPUTY PROSECUTOR]: And you've had numerous opportunities to tailor your testimony today; have you not?
>
> [DEFENSE ATTORNEY]: Objection, Your Honor.
>
> THE COURT: I'm going to sustain it to the form of the question.
>
> [DEPUTY PROSECUTOR]: You've watched them testify numerous times, correct?
>
> [DEFENDANT]: Yeah.
>
> [DEPUTY PROSECUTOR]: And you actually had opportunities to testify before, haven't you?

> [DEFENDANT]: In this case?
>
> [DEPUTY PROSECUTOR]: Yeah.
>
> [DEFENDANT]: Yes, retrial.
>
> [DEPUTY PROSECUTOR]: Okay. And your testimony today is different than your first testimony; is it not?
>
> [DEFENDANT]: In what respect?
>
> [DEPUTY PROSECUTOR]: I'm asking you a question.
>
> [DEFENDANT]: I'm -- in what respect? That's what I'm wondering.
>
> [DEPUTY PROSECUTOR]: You testified to a lot more things last time you testified; did you not?
>
> [DEFENDANT]: You guys asked me different things.
>
> [DEPUTY PROSECUTOR]: Okay. You testified -- did you tell the jury where you were on the night of the –
>
> [DEFENSE ATTORNEY]: Objection, Your Honor. Beyond the scope of direct.
>
> THE COURT: I'm going to overrule it if you can rephrase it.
>
> [DEPUTY PROSECUTOR]: No, I'll move on, Your Honor. Thank you. I think he's already answered the question.

RP 1255-56.

Although Fuentes' trial counsel objected to the "tailoring" question and the court sustained the objection as to its form, defense counsel did not move to strike the question and answer. "When an objection is sustained

with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration." *State v. Stackhouse*, 90 Wn. App. 344, 361, 957 P.2d 218 (1998).

Furthermore, a defendant who takes the stand is subject to all the rules of cross-examination that apply to all other witnesses. *State v. Gakin*, 24 Wn. App. 681, 686, 603 P.2d 380 (1979), *review denied*, 93 Wn.2d 1011 (1980). In that regard, "[t]he latitude of inquiry on cross-examination is not limited to the specific questions answered by defendant on direct examination. It extends to the development and exploration of any relevant subject unfolded on direct examination, subject to the trial court's discretion." *Id.* at 687.

However, a prosecutor is prohibited "from indicating, via questioning, that a defendant has tailored his or her testimony to align with witness statements, police reports, and testimony from other witnesses at trial." *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011). Importantly, this rule is tied only to generic "tailoring" questions tied to the "defendant's [physical] presence in the courtroom and not to his [or her] actual testimony." *Id.* at 535. The *Martin* court reasoned:

> Here Martin testified on direct examination about what time he was in the parking lot where the van was found as follows: "I would guess 11:30, 12:00, 12:30 at night. From prior testimony, I know it

> had to be before one." ... In our judgment, this testimony opened the door to questions on cross-examination about whether he tailored his testimony to evidence presented by other witnesses. Prohibiting the kind of questioning that occurred here, where the defendant states that he based his testimony, in part, on testimony of other witnesses, would inhibit the jury's ability to judge credibility and thereby seek the truth. In sum, we believe that in a case such as the instant, where the credibility of the defendant is key, it is fair to permit the prosecutor to ask questions that will assist the finder of fact in determining whether the defendant is honestly describing what happened.

Id. at 536 (VRP citation omitted).

After *Martin*, this Court found in *State v. Hilton*, 164 Wn. App. 81, 261 P.3d 683 (2011), *review denied*, 173 Wn.2d 1037 (2012), *cert. denied*, 568 U.S. 914 (2012), that the State's inference during cross-examination that Hilton tailored his testimony between the first and second trials was not error. After reviewing the facts of that case, this Court reasoned:

> As noted previously, the *Martin* majority did not address the issue, which had divided the court in *Portuondo*,[22] of whether a generic tailoring argument would be proper. This case does not truly present that issue, either, since the defendant was cross-examined about tailoring and the prosecutor's argument directly tied the credibility of defendant's testimony to his opportunity to prepare it. This was not a generic tailoring argument because it had a basis in the cross-examination. There was nothing improper about the argument because it was reasonably drawn from the testimony admitted at trial.

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[22] *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (the Sixth Amendment does not prohibit a prosecutor from arguing that the defendant's presence in the courtroom allowed him to tailor his testimony to meet the evidence and that the defendant's testimony should not be believed).

> It was proper to cross-examine the defendant about the changes in his story and his opportunities to prepare those changes. It was thus also proper to argue the issue to the jury. The defendant's constitutional rights under article I, section 22 were not violated.

Id. at 98 (internal citations omitted).

Fuentes' reliance on this Court's later decision in *State v. Wallin*, 166 Wn. App. 364, 366, 269 P.3d 1072 (2012), is unavailing as it is factually distinguished. In that case, the deputy prosecutor asked, during cross-examination, whether Wallin had the advantage of hearing the testimony in the courtroom before taking the stand. This Court found that asking generic tailoring questions were improper because they undermined the defendant's right to be in the courtroom during his trial, by implying that Wallin listened to witness testimony, and conformed his own testimony to that of other witnesses. *Id.* at 376. This Court distinguished the situation where a prosecutor may properly ask similar questions of a defendant during cross-examination, without violating the defendant's constitutional rights, where the question is "based upon something the defendant voluntarily puts into evidence." *Id.* at 376. Ultimately, the Court held that the deputy prosecutor's questions of the defendant were improper because they were based on nothing more than the defendant's physical presence at his trial. *Id.* at 376-77.

Here, Fuentes' credibility was at issue because he testified and denied shooting the victims or being at the crime scene the night of the shooting. The deputy prosecutor asked Fuentes specific questions about the difference in his testimony between the first and second trials. This line of questioning was permissible under *Hilton*. In general, a witness' prior statement is admissible for impeachment purposes if it is inconsistent with the witness' trial testimony. *See State v. Lavaris*, 106 Wn.2d 340, 344, 721 P.2d 515 (1986). This line of questioning was permissible under *Hilton*.

Accordingly, it was proper for the prosecutor to cross-examine Fuentes regarding changes in his story from the first trial to the second trial and his opportunities to prepare those changes. Fuentes has not established that such questioning violated his rights under article I, section 22. There was no error.

Even if this Court finds error, it was harmless. Under that test:

> The State bears the burden of showing a constitutional error was harmless. [An appellate court will] find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error ... and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.

State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

Under this standard, if there was error, it was harmless. The untainted evidence overwhelmingly implicated Fuentes in these crimes.

Fuentes had a motive to shoot Davis based upon Fuentes' perception that Davis was trying to date Fuentes' girlfriend. White was with Fuentes in the parking lot shortly before the shooting and she observed Fuentes with a firearm. White exited his car before the shooting and White observed Fuentes running toward the car shortly after White heard gunshots. Fuentes commented that Davis should have been dead the day after the shooting.

Fuentes remarked to three different individuals that he shot Davis. Fuentes had knowledge of facts only the shooter would have had about the crime. For instance, he described where he stood when he shot into the vehicle through the driver's side window and again through the front windshield. *See* RP 1017. Fuentes also remarked to Jones and Gaither that Davis should have been dead. *Id.* Fuentes knew his pistol could implicate him in the shooting, so he exchanged his pistol for another with Jones. Forensic testing identified Fuentes' pistol as being involved in the shooting.

The above evidence was untainted by the deputy prosecutor's brief questioning of Fuentes about Fuentes tailoring his testimony as being inconsistent between the first and second trials. If error, it was harmless beyond a reasonable doubt.

E. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE $200 COURT COSTS

The court imposed the $200 criminal filing fee against Fuentes. CP 289. Fuentes argues this Court should order the trial court to strike the imposition of the $200 filing fee imposed at sentencing. The State agrees.

As of June 7, 2018, trial courts are prohibited from imposing the $200 criminal filing fee on defendants who are indigent at the time of sentencing. RCW 10.01.160 (a)-(c). The defendant was found indigent at the time of sentencing. CP 137-38.

In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), our high court addressed the 2018 amendments to RCW 43.43.754 and held that the amendment is applicable to cases pending on direct review and not final when the amendment was enacted. *Id.* at 747. In the present case, the defendant was sentenced on May 11, 2018, and was pending direct review at the time of the legislative amendments. Thus, this Court should order that the $200 court cost be stricken from judgment and sentence. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (a ministerial correction does not require a defendant's presence).

F. IT IS WELL ESTABLISHED THAT A SENTENCE UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT IS NOT SUBJECT TO *BLAKELY v. WASHINGTON*,[23] REQUIRING A JURY TO DETERMINE ANY FACT OTHER THAN A PRIOR CONVICTION THAT INCREASES THE PENALTY FOR THE CRIME BEYOND THE STATUTORY MAXIMUM, NOR DOES SUCH A SENTENCE VIOLATE EQUAL PROTECTION.

1. The defendant's persistent offender sentence did not violate equal protection.

The defendant alleges that his persistent offender sentence violated the Equal Protection Clause because the legislature arbitrarily discriminates between persistent offenders and other recidivists by treating "elements" of the crime and "sentencing factors" differently.

Whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not eligible for parole or any form of early release. RCW 9.94A.570. "Persistent offender" is an offender currently being sentenced for a "most serious offense" who also has two or more prior convictions for "most serious offenses." RCW 9.94A.030(37). RCW 9.94A.030 (32) lists Washington's "most serious offenses," which include any class A felony, with second-degree assault and first-degree robbery among those offenses which classify as a most serious offense.

[23] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Standard of review.

An appellate court reviews equal protection claims de novo. *See State v. Hirschfelder*, 170 Wn.2d 536, 550-52, 242 P.3d 876 (2010). Our Supreme Court applies rational basis scrutiny when defendants sentenced under the POAA assert equal protection claims under article I, section 12, and the Fourteenth Amendment based on alleged disparate treatment under the POAA's provisions. *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996).

Here, there was no equal protection violation. This Court has previously rejected this same argument in *State v. Williams*, 156 Wn. App. 482, 498, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010):

> The Washington Supreme Court has rejected equal protection arguments under the Persistent Offender Accountability Act (RCW 9.94A.555) that would require the State to submit a defendant's prior convictions to a jury and to prove them beyond a reasonable doubt. *State v. Thiefault*, 160 W[n].2d 409, 418, 158 P.3d 580 (2007). The purposes of the Persistent Offender Accountability Act are the same for two-strike and three-strike offenders: to protect public safety by putting the most dangerous criminals in prison, to reduce the number of serious repeat offenders, to provide simplified sentencing, and to restore the public trust in the criminal justice system. …
>
> We conclude then that proof of his prior convictions by a preponderance of the evidence is not entirely irrelevant to the purposes of the persistent offender statutes.

See also State v. Reyes-Brooks, 165 Wn. App. 193, 207, 267 P.3d 465 (2011), *review granted, cause remanded on other grounds*, 175 Wn.2d 1020 (2012) (same); *State v. McKague*, 159 Wn. App. 489, 517-19, 246 P.3d 558, *affirmed*, 172 Wn.2d 802 (2011); *State v. Langstead,* 155 Wn. App. 448, 453-57, 228 P.3d 799 (2010). The defendant does not discuss or attempt to distinguish *Williams* from his case. Accordingly, Fuentes has not presented any compelling reason to disregard the above precedent and his claim has no merit.

2. The defendant was not entitled to have a jury determine the propriety of his "most serious offenses."

As stated above, the Supreme Court has consistently rejected the defendant's argument that he is entitled to have a jury determine the propriety of his prior most serious offenses. For instance, in *State v. Olsen*, 180 Wn.2d 468, 472-73, 325 P.3d 187 (2014), the Court stated, "[w]e have consistently held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."

Likewise, in *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014), the court held: "Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence." The Supreme Court

expressly stated that the "argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported." *Id.* at 892; *see also Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Almendarez–Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *State v. O'Connell*, 137 Wn. App. 81, 88, 152 P.3d 349 (2007) (holding "the federal constitution does not require that prior convictions be proved to a jury beyond a reasonable doubt." *Id.* at 89).

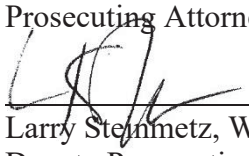
The defendant's equal protection argument and his claim that he was entitled to have a jury determine the propriety of his "most serious offenses" is contrary to settled law and it has no merit.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 22 day of August, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. STAFONE FUENTES, Appellant.	NO. 36223-0-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 22, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Thomas Kummerow
wapofficemail@washapp.org

8/22/2019	Spokane, WA	
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SPOKANE COUNTY PROSECUTOR

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