

No. 95920-0

NO. 75277-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TOMAS BERHE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. When a juror details allegations of racial bias during deliberations, the trial court may not deem the juror’s allegations unimportant without an evidentiary hearing.

a. Racial bias in jury deliberations is uncontestedly harmful and unconstitutional.

The United States Supreme Court recently declared that evidence of racial bias by a deliberating juror risks systemic injury to the administration of justice. *Pena-Rodriguez v. Colorado*, U.S. , 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017). A juror’s expression of racial animus “must be addressed,” even after a verdict has been entered, to safeguard the “central premise” of the Sixth Amendment right to a fair trial by jury. *Id.* at 869. The Supreme Court overturned Colorado’s blanket rule barring a party from impeaching jury verdicts by a juror’s post-verdict declaration, even for allegations of a juror’s racial discrimination.

Unlike Colorado, Washington has historically recognized the potential harmful effect of race-based decision-making of deliberating jurors. Long before *Pena-Rodriguez*, our state held that general rules preventing jurors from impeaching their verdicts do not apply when confronted with claims of racial discrimination in the jury room and

trial courts must fully inquire into the allegations. *See State v. Jackson*, 75 Wn.App. 537, 542-43, 879 P.2d 307 (1994); *see also Turner v. Stime*, 153 Wn.App. 581, 587, 222 P.3d 1243 (2009).

b. Jackson sets forth the protocol the trial court should have followed when confronted with prime facie evidence of racial bias.

Pena-Rodriguez leaves for the states to dictate what procedures for trial courts may follow or what level of bias is required for a new trial. 137 S. Ct. at 870.

Jackson already addressed the precise scenario raised in the case at bar, when one juror raises concerns of racial discrimination affecting jurors' deliberations. Yet puzzlingly, the prosecution's response brief does not mention *Jackson*, despite its central focus in the opening brief, except for a brief aside in a footnote asking this Court not to order a new trial as occurred in *Jackson*. Resp. Brief at 21 n.9.

Jackson holds that when confronted with a "prima facie showing" of racial bias during jury deliberations, an evidentiary hearing is "always the preferred course of action." *Jackson*, 75 Wn.App. at 543-44. If the court does not do so, a new trial is likely required because it is simply unacceptable to allow a verdict to stand when there is reason to believe racial bias infected deliberations. *Id.* at 544-45.

Rather than mention or discuss *Jackson*, the prosecution’s brief takes out of context Mr. Berhe’s citation to civil cases that discuss what a “prima facie showing” means. Resp. Brief at 15 n.4. These civil cases were not issued in some alternative universe, as the prosecution implies, but reflect the established doctrinal principle that the “prima facie showing” required by *Jackson* means threshold factual support, with the evidence or allegations viewed in the light most favorable to the moving party.

For example, in the *Batson* context, a “prima facie showing” of racial motivation occurs when the prosecutor strikes the sole African-American juror, even when members of other racial groups remain and without regard for the context in which the peremptory strike arose, which is addressed later in the *Batson* inquiry. *Seattle v. Erickson*, _ Wn.2d _, 398 P.3d 1124, 1130-31 (2017). In the context of corpus delicti, the prosecution must make a “prima facie showing” of evidence independent of the defendant’s statement if it “would support a logical and reasonable inference of the facts sought to be proved,” taking all reasonable inferences in the light most favorable to the prosecution. *State v. Baxter*, 134 Wn. App. 587, 596, 141 P.3d 92 (2006). And the “prime facie showing” necessary to survive a Knapstad motion to

dismiss means the court assesses whether “the evidence creates a prima facie showing of guilt when it is viewed in a light most favorable to the State.” *State v. Nelson*, 195 Wn. App. 261, 272, 381 P.3d 84 (2016).

Here, the court received a juror’s declaration complaining of various instances of racial animus in the jury room that affected her role in the deliberations and the verdict reached. Under the prima facie threshold set forth in *Jackson*, the court must take Juror 6’s allegations in the light most favorable to Mr. Berhe. *Jackson*, 75 Wn.App. at 543-44. Juror 6’s declaration creates a troubling claim of jurors making decisions based on the shared minority race of Mr. Berhe and Juror 6, and mocking and deriding Juror 6 because she was African American like Mr. Berhe, which affected her verdict. CP 475-76.

The court’s truncated inquiry, relying solely on declaration of some jurors without allowing a full investigation or evidentiary hearing was inadequate. Due to the difficulty of recreating deliberations two years after they occurred, the remedy required in *Jackson* also applies here, and a new trial should be ordered. 75 Wn. App. at 544-45.

2. The erroneously admitted evidence overstating the scientific reliability and accuracy of ballistics comparisons affected the verdict.

a. Mr. Berhe clearly objected to the testimony at issue on appeal.

Raising a straw man of reconstituting Mr. Berhe's challenge to forensic ballistic comparison opinion evidence as some sort of poorly written *Frye* challenge, the prosecution distracts the Court. The issue on appeal – like the issue raised in the trial court – is whether the court improperly rejected Mr. Berhe's challenge to opinion testimony that is likely to confuse the jury because it substantially overstates the validity and accuracy of its findings in a way lay jurors will not understand.

“Evidence that is admissible under *Frye* must still pass the two-part test under ER 702: (1) whether the witness is qualified as an expert and (2) whether the expert testimony is helpful to the trier of fact.”

State v. King County Dist. Court West Div., 175 Wn. App. 630, 637, 307 P.3d 765 (2013).

Mr. Berhe did not mount a *Frye* challenge to the ballistics comparison science, recognizing that *Frye* is limited to novel scientific methods. *State v. Copeland*, 130 Wn.2d 244, 259-60, 922 P.2d 1304 (1996); *see also Commonwealth v. Dengler*, 890 A.2d 372, 382 (Pa.

2005) (*Frye* “applies only to proffered expert testimony involving novel science”). But this does not mean a court abandons its obligation to ensure jury verdicts rest on reliable and accurate scientific information.

“ER 702 has independent force and effect, which we have both recognized and emphasized.” *Copeland*, 130 Wn.2d at 259. “[I]n this state ER 702 has a significant role in admissibility of scientific evidence aside from *Frye*.” *Id.* at 260.

b. Expert testimony should not be elicited when it confuses jurors or encourages them to unduly rely on questionable scientific practices.

Even for scientific evidence considered generally reliable, like DNA evidence, courts prohibit experts from overstating the scientific basis of the inculpatory evidence. *State v. Cauthron*, 120 Wn.2d 879, 907, 846 P.2d 502 (1993).

Mr. Berhe asked to prohibit witnesses from calling toolmark comparisons “science” and from testifying that the bullet cases necessarily came from a particular firearm. CP 37-38. His argument rests on case law and scientific critiques of forensic toolmark analysis.

The response brief simply ignores the recent case law casting doubt on open-ended admission of firearm identification testimony. *See Gardner v. United States*, 140 A.3d 1172, 1183-84 (D.C. 2016)

(explaining recent criticism of ballistics-match opinion evidence); *Com. v. Pytou Heang*, 942 N.E.2d 927, 938 (Mass. 2011) (collecting cases where courts expressed “concerns” about scientific reliability and subjective nature of forensic ballistics comparisons).

Instead, the prosecution contends that the President’s Scientific Council Report found little wrong with ballistics comparisons, grossly distorting the detailed report issued by many experts in the field. President’s Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016).

The Council Report expanded upon the National Academy of Sciences Report condemning toolmark comparison testimony as fundamentally flawed, lacking foundational validity and validity as applied, meaning repeatability in general and based on an expert’s application of principles and methods. Council Report, at 4-5, 105; National Research Council of the National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 154 (2009). This type of comparison lacks standards for the number of individual characteristics needs for a positive identification and lacks

data on the variability of individual characteristics. NAS Report at 149, 155.¹

Ballistics examiners simply eyeball markings on bullets or casings, relying on their own experience to conduct a comparison, and without clear, documented standards differentiating markings for every firearm of a certain model or manufacturer from individual markings that denote a specific weapon fired the bullet.

Mr. Berhe reasonably asked the court to minimize the likelihood the jurors would be confused or place outsized reliance on evidence beyond its scientific limits. But the court refused to take any steps to discourage jurors from putting undue faith in a purported science that lacks grounding in principles of documentation, proficiency testing, and evidence of reliability. CP 37, quoting *United States v. Green*, 405 F.Supp.2d 104, 109 (D. Mass. 2005). The court instead gave the prosecution full range to declare the examiner's opinion was "science" that is generally accepted, widely used and never debunked. 2/1RP 2695, 2472 ; *see also* 2658, 2694, 2969, 2698, 2702, 2730; 2/24RP

¹ Contrary to the prosecution's rosy description of the Council Report, it condemns studies of toolmark match accuracy as fundamentally inadequate, with "impossible" questions about false positives and "problematic" study designs. Council Report at 107, 109, 110 (concluding most studies to date inappropriate

3261, 3342. The court thereby allowed jurors to rely on misleading scientific evidence, undermining the reliability of the proceedings.

c. The court's refusal to limit scientific testimony was markedly harmful in the case at bar when the firearm's purported connection to the crime was critical to the case.

The harmful effect of this material evidence lies in the specific conclusions offered by the toolmark examiner and the prosecution's use of this testimony. The prosecution insisted her opinions rested on established, valid "scientific" principles, refusing to acknowledge the on-going debate and serious criticism by forensic scientists outside of the field of toolmark examiners. The jurors had no reason to discount this testimony and likely relied on it, as "people apparently believe, quite strongly and with little justification, that forensic science is hardly ever wrong." Jonathan J. Koehler & John B. Meixner Jr., *An Empirical Research Agenda for the Forensic Sciences*, 106 J. Crim. L. & Criminology 1, 32 (2016). There is a strong risk of prejudice from the improperly admitted opinion evidence of toolmark matching. *See Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

and likely "seriously underestimate the false positive rate").

3. Mr. Berhe's post-arrest statements to police and related video were inadmissible and impermissibly prejudicial.

a. Mr. Berhe invoked his right to remain silent when he said to interrogating detectives, "I don't want to talk to you."

When Mr. Berhe told interrogating detectives three times, "I don't want to talk to you," he invoked his right to remain silent. The prosecution only half-heartedly defends the trial court's ruling that this statement was not an unequivocal invocation of his right to remain silent. It contends that Mr. Berhe had a "confrontational and argumentative manner," so the court could infer Mr. Berhe did not really mean he wanted to stop talking when he said he did. Resp. Brief at 37.

But this spinning of events is both inaccurate and unsupported by the law. First, Mr. Berhe was consistently reluctant to answer any questions even without immediately invoking his right to remain silent. The interrogation started at 10 a.m., after Mr. Berhe sat alone for seven hours in a bare interrogation room throughout the night. From the start, he expressed frustration with the questions when the police already knew the answers, such as his name and the name of the person he was with when arrested. Ex. 63 RP 3, 4. He accused the police of playing games and said he did not want to play this game with the police

“anymore.” Ex. 63 RP 8. The detectives kept pressing him to “talk” to them, telling him it would “go faster” if he answered their questions, “the sooner we get through this, the sooner it’ll conclude,” and they needed him “to talk” to figure out what is going on. Ex. 63 RP 3, 7, 8. He refused to answer some questions. Ex. 63 RP 4, 5, 7, 8. Contrary to the prosecution’s portrayal of an engaging conversation in which Mr. Berhe willingly participated, Mr. Berhe was reluctant to respond to any questions asked by the police and then clearly stated he did not want to talk, but the police pressed on with more questions.

Second, the prosecution implies that the detective’s subjective impression of Mr. Berhe’s interest in talking controls. In fact, the test is objective and reviewed *de novo*. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). This objective test asks whether the suspect has “at a minimum, [made] some statement that can reasonably be construed” to express a desire to cut off questioning. *Id.*; see *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014).

If a statement facially asserts the right to silence, questioning must cease. *Davis*, 512 U.S. at 459; *Piatnitsky*, 180 Wn.2d at 412.

Third, Mr. Berhe's statement was clear. It did not signal the detective should continue asking questions rather than respecting his right to stop the interrogation.

Again the prosecution puzzlingly omits any mention of this Court's controlling precedent. As explained in Mr. Berhe's opening brief, once the right to remain silent is invoked, "all questioning must cease." *State v. Nysta*, 168 Wn. App. 30, 42, 275 P.3d 1162, 1168 (2012). There is nothing ambiguous in saying, "I don't even want to talk to you, dog. I don't even want to talk to you. I don't even want to talk to you or you." CP 153.

As the Supreme Court explained in *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 684, 327 P.3d 660 (2014), it is "objectively unreasonable" to conclude a suspect's declaration, "I don't want to talk" is equivocal. 180 Wn.2d at 684. But the prosecution's response brief does not cite or discuss *Cross*.

Once Mr. Berhe said he did not want to talk to the police, custodial interrogation should have ended. It is "irrelevant" that he continued to answer the detective's questions after invoking his right to remain silent. *Cross*, 180 Wn.2d at 684

b. Mr. Berhe's statements to police after he invoked his right to stop questioning are presumptively and markedly prejudicial.

The prosecution downplays the post-invocation statements that were improperly admitted. These statements are presumptively prejudicial and the prosecution must prove their admission is harmless beyond a reasonable doubt. *Nysta*, 168 Wn. App. at 42. This Court must find the prosecution proved there is “no reasonable possibility that the evidence complained of might have contributed to the verdict.” *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed.2d 171 (1963).

The response brief asserts jurors saw Mr. Berhe make the same comments on a dash cam video but never cites where the video contains the same remarks. Resp. Brief at 38. In fact, the dash cam video was largely redacted and does not portray the conduct asserted by the prosecution. *See, e.g.*, 1/21RP 384, 392-400, 1/26RP 596-604-05, 1/29RP 1029-30 (discussing redactions). The testimony about Mr. Berhe's conduct when he was arrested showed he was “very nice” initially, but got upset and confrontational when told he was stopped because he was a black male. 2/1RP 1107. Officer Hunt did not recall Mr. Berhe using profanity but rather remembered him saying some “off the wall” stuff and seeming upset. 2/1RP 1112.

The prosecution does not meet its burden of proving presumptively prejudicial statements were harmless beyond a reasonable doubt by summarily casting the notion aside. It does not cite to the record in its harmless error analysis to show where this other comparable evidence was elicited, so that this Court could review it and Mr. Berhe could respond.

As Mr. Berhe explained in his opening brief, the improperly elicited statements highlighted his extreme disrespect for the officers and made him appear angry, dangerous, and hostile. Opening Brief at 36-37. It was the jurors' only opportunity to hear Mr. Berhe's own words when being calmly questioned by detectives, cementing the likelihood the jurors would pay close attention to his words and conduct in deciding a case with far from overwhelming evidence. The prosecution has not proved the admission of his improperly obtained statements did not contribute to the verdict and therefore cannot show it was harmless beyond a reasonable doubt.

c. The court improperly admitted the video of custodial interrogation despite its plain irrelevance and prejudicial effect.

The defense objected individually to admitting most of the conversation before Mr. Berhe invoked his right to remain silent and

also objected to the video's admission generally, arguing that it was largely irrelevant and misleading to the jury under ER 403. 1/20RP 338, 339, 343-44, 346-49, 351, 352-54. 356, 358; 2/11RP 2325-26. It contained multiple references, implicit and explicit, to Mr. Berhe's prior contact with these same detectives and highlighted Mr. Berhe's disinterest in speaking with the police while the police emphasized the importance of him answering their questions, which he never did. *Id.*

The prosecution concedes that it failed to redact, as it promised it would, the statement that "I already got a bad history with you." Ex 63 RP 342.

But the prosecution insists the video was important to its case because it showed Mr. Berhe lied to detectives, even though his "lies" were actually his refusal to answer the questions the police posed to him and his complaints about being treated "like shit" by detectives who were just "playing games" with him.

A suspect is entitled to selectively refuse to answer questions posed by police and the prosecution may not use that silence against him. *State v. Fuller*, 169 Wn. App. 797, 805, 832, 282 P.3d 126 (2012). But the prosecution again fails to address important precedent in its response brief, not mentioning *Fuller* or related precedent.

Even if Mr. Berhe's claim he did not know the name of the person who was driving the car, who was arrested alongside him, is viewed as a "lie" as opposed to a refusal to answer a police question, lying to police is at best weak evidence of guilt with a strong possibility of prejudice because the lie is often explained by things that the jury does not know about. *See State v. Freeburg*, 105 Wn. App. 492, 498, 20 P.3d 984 (2001). The court unreasonably admitted a custodial statement that contained multiple improper and prejudicial statements that were not probative of his involvement in the incident and encouraged jurors to use his silence and lack of cooperation with police, and his bad blood with the detectives, against him.

d. The improper admission of videotaped custodial interrogation was markedly prejudicial.

The improperly admitted videotaped interrogation is both presumptively prejudicial once Mr. Berhe clearly asserted his right to remain silent and demonstrably prejudicial as it encourages jurors to dislike and disdain Mr. Berhe due to his lack of cooperation with police for reasons unrelated to whether he committed the charged crime.

4. The prosecution properly concedes some of the State's closing argument was improper, but mistakenly contorts and downplays the likely harm of the many instances of improper argument.

The prosecution engaged in a litany of improper tactics during closing argument, addressed in the opening brief. The response brief distorts or misunderstands several of the fundamental flaws in the State's closing argument tactics.

a. The prosecution's vouching by injecting the State's own knowledge and belief into the case is in no way similar to defense counsel's discussion of evidence presented.

The prosecution tries to excuse the prosecution's insertion of its office and its own prestige into the case by claiming the defense also said "we" during closing argument. Resp. Brief at 47. But there are critical differences.

First, the prosecution misleadingly points to any instance where the defense said "we" in its closing argument in some tit-for-tat claim,² but it fails to mention that the defense used it differently -- to remind jurors of what was said in defense counsel's opening statements, the

prosecution’s argument, or witness testimony, which is entirely permissible. *See, e.g.*, 2/24RP 3284 (defense counsel says, “we told you at the beginning . . .”); *Id.* at 3286 (“we heard the State arguing . . .”); *Id.* at 3288, 3290, 3294, 3298, 3304, 3313, 3314, 3317 (defense noting “we heard” or “we did not hear” from various witnesses).

The prosecution did not object because the defense did nothing wrong when speaking about information before the jury. On the other hand, the defense was upset enough about the prosecution’s continued misuse of “we know” to obtain a standing objection. 2/24RP 3271.

Second, the defense’s comments came after the prosecution had made its improper argument, and after the court overruled the defense’s objection and endorsed this approach, which did not invite the error.

Third, the prosecution and defense have different roles. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Only the prosecution is a quasi-judicial officer. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Only it is charged with ensuring the

² The State counts each time the defense used the word “we,” but performs no such count for the prosecution, even though it used the word “we” word 30 times in just the first five pages of its closing argument, 128 times in its closing argument, and 22 times in the context of “we know.” 2/24RP 3250-3346. The defense does not contend no one can ever use this pronoun, but rather that the prosecution used it improperly.

defendant's fair trial. *State v. Boehing*, 127 Wn. App. 511, 517, 111 P.3d 899 (2005). Only its closing argument "represent[s] the state" and "throw[s] the prestige of his public office . . . into the scales against the accused." *Monday*, 171 Wn.2d at 677, quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); see also *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 2000) (prosecution "carries a special aura of legitimacy" as a representative of the State).

After repeatedly framing of the evidence as something "we know," the prosecution drew the conclusion that what "we know" is "we are convinced that Berhe is the shooter, right?" 2/24 RP 3267. And it claimed Mr. Berhe was the shooter because, "We know those things to be true. We know those things beyond a reasonable doubt. We know what happened." 2/24RP 3284. Thus, the prosecution improperly vouched for and bolstered its case by injecting its own opinions and the prestige of its office behind its belief that "we know" Mr. Berhe is the perpetrator.

b. The State agrees it should not have appealed to jurors' moral sense of what feels right.

The prosecution concedes it should not have encouraged jurors to find Mr. Berhe guilty because "it will feel right." It paints this

phrasing as “inartful” but arose in an effort to explain a confusing case to jurors. Resp. Brief at 55, 63. However, these remarks appear canned, and are repeatedly almost verbatim in another pending case from the same prosecutor’s office. *See State v. Bacani*, COA 76371-7-I, Opening Brief at 37-38.³ The prosecutor’s words were not a mistake but part of a planned tactic to appeal to jurors by virtue of the trust jurors place in the prosecution’s office.

The defense’s vouching objection is not different from the argument raised on appeal. As raised in the shorthand permitted during trial, the defense was complaining that jurors should vote for what “feels right” to the prosecution, which is impermissible vouching as well as a forbidden emotional appeal urging jurors to vote for what they “feel” rather than what has been proven. 2/24RP 3257, 3284.

c. The prosecution misrepresents how it improperly shifted the burden of proof.

The prosecution told the jury that the “defense argument” “requires” the jury “to buy off on” three “principles” involving how Mr. Berhe was deliberately framed. 2/24RP 3331. It insisted to the jurors

³ Available at: http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.searchRequest&courtId=A01.

“you have to buy off on all three because if one of them collapses, the whole defense argument collapses.” *Id.*

The problem with this argument, as the defense immediately noted in its timely objection, is that it tells jurors the defense is “required” to prove certain points and if they have not proven “all three” the “whole defense argument collapses.” 2/24RP 3331. And even when the defense objected to burden shifting, the court overruled the objection and the prosecution continued by telling the jurors the defense had not produced “evidence” of its theory and nothing supports it. It continually exaggerated the defense argument, denigrated it, and insisted that unless each exaggeration contention was proven, the defense collapsed. See 2/24RP 3341-43.

The defense was not claiming a “deep conspiracy” but rather a group of people who were not aligned to help Mr. Berhe for various reasons and who were caught in lies or obfuscations. The prosecution unfairly impugned the defense and shifted the burden of proof, over objection.

d. The prosecutor's efforts to sway jurors for improper reasons requires reversal.

Based on these arguments and other discussed at length in the opening brief, the prosecution encouraged jurors to convict Mr. Berhe for improper reasons.

Rather than “cure” these improper arguments by instructions, the court endorsed them by overruling the defense objections, giving legitimacy to the improper argument. *State v. Davenport*, 100 Wn.2d 757, 764, 763, 675 P.2d 1213 (1984). Given that the trial court legitimized the prosecutor's argument, its general instruction to “[d]isregard any remark, statement or argument that is not supported by the evidence” did not cure the prejudice. CP 250-54; *see State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015) (presumption jury follows court's instruction “is rebutted” where the court overruled an objection to an improper argument).

“Repetitive misconduct can have a cumulative effect.” *Allen*, 182 Wn.2d at 376. Here, the prosecution repeatedly encouraged jurors to rely on the prosecution's opinions and what it knows about the case to reach the “right” verdict of convicting Mr. Berhe. It attacked the defense for failing to prove something it did not seek and was not

required to prove. It misstated the law. None of these tactics were necessary, most were legitimized by the court's overruled objections, and all were likely to affect the jurors.

5. The court misunderstood its sentencing discretion to depart from the standard range.

The recent Supreme Court decision in *State v. McFarland*, _ Wn.2d _, _ P. 3d _, 2017 WL 3381983, *2 (2017), underscores the trial court's authority to depart from the standard range, including imposing concurrent or other reduced sentences for firearm prosecutions, despite some statutory language indicating consecutive sentences are required.

The Sentencing Reform Act "seeks to ensure" the punishment is "proportionate to the seriousness of the offense and the offender's criminal history." *McFarland*, _ Wn.2d _, _ P. 3d _, 2017 WL 3381983, *2 (2017) (quoting RCW 9.94A.010(1)). While the SRA provides structures the presumptive sentence for a court to impose, it "does not eliminate discretionary decisions" by sentencing courts. *Id.*, citing RCW 9.94A.010.

In *McFarland*, the court similarly held that despite statutory language indicating firearms offenses shall be punished consecutively, the court retains discretion to depart from the standard range. 2017 WL

3381983, * 2. The court emphasized that no statute “preclude[s] exceptional sentences downward” for firearm-related offenses. *Id.* at *3. It held that if the court believes the presumptive sentence is “clearly excessive,” it “has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences.” *Id.* at *4.

At Mr. Berhe’s sentencing, the judge found mitigating factors favored departing from the standard range but believed she lacked authority to impose a concurrent firearm enhancement. 5/26RP 172. *McFarland* shows otherwise. A new sentencing hearing should be ordered.

B. CONCLUSION.

As argued above and in Appellant’s Opening Brief, Mr. Berhe’s convictions should be reversed and a new trial ordered.

DATED this 30th day of August 2017.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75277-4-I
v.)	
)	
TOMAS BERHE,)	
)	
Appellant.)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF AUGUST, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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