

NO. 73903-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RODNEY WILLIS,

Appellant.

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Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Testimony of the lead investigating detective is alleged to have been impermissible opinion as to guilt. Is review of this claim barred because defense counsel elicited the testimony on cross-examination and did not object to the testimony at any time?

2. If the challenged statements were an expression of a current opinion as to guilt, were they harmless error in the context of all of the evidence, the jury instructions, and the defense theory of the case?

3. Has Willis failed to establish that the trial court's denial of the motion for new trial was a manifest abuse of discretion, where the detective's facial expressions in court that were the basis of the motion were not extrinsic evidence and were not prejudicial?

4. Should the claim of cumulative error be rejected where no error has been established?

5. Should an award of appellate costs be precluded?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Rodney Willis, was charged with murder in the first degree, contrary to RCW 9A.32.030(1)(c), for the killing of

Herman Tucker on September 7, 2012. CP 1-2. The Honorable Dean Lum presided over a jury trial that began on May 4, 2015. 1RP 4.¹ The jury found Willis guilty as charged, including a firearm enhancement. 6/11RP 3-6; CP 84,85.

Prior to sentencing, Willis moved for a new trial based on the lead detective's facial expressions while sitting at counsel table during trial. CP 87-88. The trial court denied the motion. 17RP 36-45; CP 187-92.

Willis requested an exceptional sentence below the standard range. CP 101. The court rejected that request and imposed a sentence of 420 months in prison, within the presumptive range based on Willis's offender score of seven, and including the 60-month firearm enhancement. 18RP 31; CP 157-65.

2. SUBSTANTIVE FACTS

It is undisputed that at about 3 a.m. on September 7, 2012, Herman Tucker returned to his room at a Motel 6 but could not get inside with his key card. 7RP 140; 8RP 31-35, 113; 9RP 44-45,

¹ The Report of Proceedings is referred to in this brief as follows: 1RP – 5/4/15; 2RP – 5/5/15; 3RP – 5/6/15; 4RP – 5/7/16; 5RP – 5/11/15; 6RP – 5/12/15; 7RP – 5/13/15; 8RP – 5/14/15; 9RP – 5/18/15; 10RP – 5/19/15; 11RP – 5/28/15; 12RP – 6/1/15; 13RP – 6/2/15; 14RP – 6/3/15; 15A RP – 6/4/15; 15B RP – 6/8/15; 16A RP – 6/9/15; 16B RP – 6/10/15; 6/11RP – 6/11/15; 17RP – 7/1/15; and 18RP – 8/21/15. As designated in the appellant's brief, RP 15 and 16 each include two dates; the dates are distinguished using letters A and B in this brief, as noted.

82-83. Inside the room were Earnetra Turner and, hiding in the bathroom, Willis, Qiantre Taylor, and Kavahn Matthews-Smith. 9RP 60, 73, 82-83; 13RP 301-05. Turner let Tucker in, and very soon after, Willis shot Tucker one time, striking him in the left hand and the right chest. 7RP 140-42; 9RP 82-83, 92; 10RP 247-48; 11RP 422-24; 14RP 633-34. Tucker ran out of the room but collapsed and died a short distance away, killed by the shot through both lungs and his aorta. 7RP 58; 11RP 426-29. The other four immediately fled the room; the three men had clothing or towels covering their faces. 9RP 93; 13RP 314; 14RP 710-14.

Turner was a 16-year-old² who hung out with the much older Tucker in order to smoke marijuana with him. 9RP 8, 15. He was providing the marijuana for free but soon told Turner that he wanted to have sex with her in return. 9RP 19-20. Turner continued to smoke Tucker's marijuana and refused to have sex with him. 9RP 20-22.

On February 6, 2012, Willis planned to rob Tucker. A couple of weeks earlier, Willis's twin brother Robert Willis³ had heard that a

² Willis incorrectly states Turner was 15 years old at the time of the crime, but she had turned 16 in May of 2012. 9RP 8; 13RP 147, 240.

³ In this brief, Robert Willis is always referred to by his full name to avoid any confusion.

man had \$20,000 hidden in his white SUV, and had gone with Amanda Gibson to find the SUV and steal the money. 13RP 174-77. They drove around and could not find the SUV, and during that time, Robert Willis learned that Herman Tucker was the man who owned the SUV. 13RP 177-78. Robert Willis went to jail on August 24, 2012, and was in custody at the time of this homicide. 13RP 175. Willis was present when this earlier theft was planned, and so were Taylor and Turner. 13RP 180-84. Willis acknowledged that he knew the target of that theft was Tucker. 14RP 679-80.

Willis knew Turner was seeing Tucker, who went by the nickname Downtown or DT. 9RP 12; 13RP 262. Both Turner and Willis agreed that they had been in contact mid-day on September 6, 2012. 9RP 23-24; 13RP 267. That day, Turner contacted Willis via his cellular telephone, number (206) 330-8715. 9RP 30.

Two cellular telephones were recovered in Room 224 of the motel, where the shooting occurred: a Samsung on the nightstand and an iPhone on the dresser. 9RP 174. The Samsung belonged to Abriana Rodriguez and was being used by Turner the night of the shooting; at the time it could not place calls, just send and

receive texts. 9RP 31, 178-79; 13RP 223-24, 234. The iPhone belonged to Tucker. 9RP 179-80.

Forensic examination of the telephones revealed text messages that indicated that Turner initiated contact with Herman Tucker on February 6, suggesting she wanted to get together with him; those messages began at 8:45 p.m. 10RP 326; Ex. 32, 33. The text messages arranging a meeting continued over several hours. 10RP 326-29, 352-55. After a 12:13 a.m. message from Tucker saying "Call, please," two brief calls from a blocked line came into Tucker's phone. 10RP 329-30.

The Samsung contained text messages exchanged with Willis's phone beginning at 11:57 p.m., when Turner texted: "he almost here to pick me up. Where you at nigga." 10RP 356. Turner texted that they might go to a motel. 10RP 356. The messages between the three phones establish that Turner informed Willis when Tucker arrived to pick her up. 10RP 357-58.

Willis asked where they were going, and as Willis arranged to find them, Willis texted: "he got the money," Turner responded, "IDK yet" (meaning I don't know); at 12:38 a.m., Willis replied "is he wearing jewelry?" and Turner responded, "Yeah, rings." 10RP

357-58. Turner testified that this exchange was with her brother, Willis. 9RP 31.

Turner testified that she and Tucker went to the Motel 6 and smoked marijuana. 9RP 44-48. Tucker checked in to the motel at 12:51. 8RP 31. Eventually, Tucker suggested they have sex and Turner refused – Tucker lost his temper and left. 9RP 50-52.

Turner continued to exchange text messages about her location with Willis while she was at the Motel 6, but Willis did not arrive until after Tucker had left. 9RP 52-57; 10RP 358-60.

Matthews-Smith testified that during the time they were trying to find the motel, Willis said, “my sister’s got a move for \$20,000,” which meant a crime, like robbery or burglary. 10RP 212, 216. The others in the car seemed eager about it. 10RP 218.

Willis arrived at the motel in a BMW driven by Amanda Gibson, with Taylor and Matthews-Smith also in the car. 9RP 57. Turner left with that group. 9RP 60. The occupants of the car asked Turner where Tucker was and asked her to try to get him to come back; they asked Turner to text Tucker and tell him he could have sex with her if he wanted. 9RP 61-63. Matthews-Smith testified that during this time, Willis was angry with Turner and pressuring her to call the target of the move. 10RP 224-29.

There was another series of text messages between the Samsung telephone that Turner was using that night and Tucker's telephone between 2:14 a.m. and 2:30 a.m. 10RP 331-33. In those messages, Turner asked Tucker to come back to the motel and told him, "I'm ready to be with you." 10RP 331-33. Then a five-minute telephone call was made from Willis's telephone to Tucker's. 10RP 333-34. The text messages between Turner and Tucker resumed at 2:56, with Turner asking Tucker, "Where you at?" 10RP 334. At 2:58, Tucker texted that he was outside, then "Let me see you naked." 10RP 335. That was the last text from Tucker's telephone. 10RP 335. He was dead minutes later.

Turner testified that Gibson had sent the messages luring Tucker back, at the direction of the others in the car. 9RP 72-73. The plan was that the men would hide in the bathroom of the motel room while Turner lured Tucker in, then the men would come out and rob him. 9RP 76-79. Willis was part of the plan. 9RP 77-79.

Gibson drove back to the Motel 6 with Willis, Turner, Taylor, and Matthews-Smith. 9RP 73-74. Gibson stayed with the car while the others went inside. 9RP 74; 10 RP 233-34. Willis told Gibson to keep the car running. 13RP 301.

Turner testified that just before Tucker arrived, the men put towels over their faces and went into the bathroom. 9RP 79, 82. When she let Tucker in, Taylor and Willis pointed guns at Tucker and demanded all his stuff; Tucker screamed and charged the others. 9RP 84-89. There was a struggle and while Tucker and Willis were struggling, Tucker grabbed at Willis's arm with the gun and the gun went off. 9RP 89-90.

Matthews-Smith testified that he thought they were just at the motel to pick up Turner's things when there was a knock on the door. 10RP 233, 240. He ran into the bathroom to throw away his marijuana and Taylor and Willis came into the bathroom and put on face coverings and gloves. 10RP 240-44. Matthews-Smith saw the others both pull out handguns. 10RP 245-46. When Tucker came in the door, Willis and Taylor left the bathroom, and Willis loudly and aggressively said, "What's up now, nigga?" 10RP 248-49. The man who had come in yelled "no" and then there was a shot. 10RP 249. Matthews-Smith did not see the confrontation, but when he came out of the bathroom, Willis's gun was smoking. 10RP 250-52.

Turner was originally charged with murder, but made a plea agreement with the prosecutor; in exchange for her testimony she

pled guilty to attempted first-degree robbery and was sentenced to 87 months.⁴ 9RP 8-9. Matthews-Smith was originally charged with murder, but made a plea agreement with the prosecutor; in exchange for his testimony he pled guilty to second degree robbery; he was awaiting sentencing with a presumptive range of six to twelve months. 10RP 204-05.

Willis was arrested in Ellensburg, Washington on September 16, 2012. 12RP 8. He gave a recorded statement in which he denied any involvement with the shooting. Ex. 52, 55, 76, 77.⁵

Willis admitted that he killed Tucker. 13RP 313. Willis claimed that he was at the Motel 6 waiting for Amanda's boyfriend to arrive with gas money, waiting in room 224 along with Taylor, Matthews-Smith, and Turner, when he was surprised by a knock on the door. 13RP 302-04. Willis said all three men hid in the bathroom while Turner answered the door. 13RP 304-05. He said Tucker came in and "groped" Turner, Willis saw it in a mirror and came out to defend his sister. 13RP 307. Willis said that when he

⁴ Willis refers to this sentence as "comparatively lenient," but there was no evidence that Turner ever was armed, or was aware that this would be a gunpoint robbery, and Turner was just 16 at the time.

⁵ Exhibits 52 and 76 are both recordings of the interview, played at trial, the latter with fewer redactions. Exhibits 55 and 77 are the respective transcripts used to assist jurors as they listened, and will be referred to in this brief for the court's convenience. 12RP 12-15; 16A RP 962-64.

tried to leave (and take Turner with him), Tucker punched him, a struggle ensued, the gun fell out of Willis's pocket, Willis picked it up, Tucker cocked the gun (in Willis's hand), and when Willis fell, the gun fired, killing Tucker. 13RP 308-13.

Willis admitted that he had prior convictions including theft, attempted second degree robbery, residential burglary, and second degree assault with a deadly weapon. 13RP 249. He said that in 2012 he was turning over a new leaf. 13RP 251. He testified that he was scheduled for court on his residential burglary on February 6 and went there, but left because his attorney did not appear. 13RP 270.

Willis was interviewed by defense psychiatrist Mark McClung. 15B RP 853. He told McClung that he never went to court on February 6, because he did not want to serve the 16 months in jail. 15B RP 920. Willis told McClung that after Tucker arrived at the motel, when Willis tried to leave, Tucker pushed him and Willis punched Tucker three or four times. 15B RP 923. Willis told McClung that the gun went off when he and Tucker were having a tug-of-war with Willis's arm that held the gun – that when Willis yanked away from Tucker, the gun went off. 15B RP 926.

C. ARGUMENT

1. DEFENSE COUNSEL ELICITED THE TESTIMONY TO WHICH WILLIS OBJECTS ON APPEAL AND WILLIS HAS WAIVED ANY ERROR.

Willis claims that testimony of the lead investigating detective, Christina Bartlett, included impermissible opinions as to guilt. This argument should be rejected. The testimony was elicited by defense counsel on cross-examination, so it cannot be the basis for reversal. Further, Willis did not object to any of the testimony in the trial court and has waived any error. Finally, in the context of all the evidence, the jury instructions, and the defense theory of the case, if it was improper opinion evidence, it was not reversible error.

- a. Relevant Facts.

Willis conceded during his testimony at trial that he had lied throughout his interview with detectives immediately after his arrest. 14RP 628. During that interview, Willis had denied that he had a younger sister, or that he knew a person named Earnetra. Ex. 77 at p. 14-16, 21. He said he had never heard of Herman Tucker. Ex. 77 at 46. He denied that he had gone to the Motel 6 at all during the night in question, and denied having any involvement in

the events leading to the killing of Herman Tucker. Ex. 77 at p. 17, 22, 32, 50. He said he had lost his phone before the events of that evening and did not know who had it. Ex. 77 at p. 3-4, 43. He gave the detectives names of people that he said would establish that he was somewhere else on the night of the murder. Ex. 77 at p. 25-26.

At trial, however, Willis admitted that he had killed Tucker. 13RP 313. Willis claimed that he was defending himself and his sister from Tucker and accidentally shot Tucker during the ensuing struggle. 13RP 306-13.

In her cross-examination of Detective Bartlett during the State's case-in-chief, defense counsel tried to establish that Willis was treated unfairly (*e.g.*, Willis was only 19; detectives would not let Willis call his mother or his attorney; it was an hour and half before the detective suggested the motive for the encounter that Willis eventually adopted). 12RP 43-44, 52, 48.

Defense counsel also asserted that Bartlett told Willis something that "wouldn't be true"⁶ by suggesting that it was to Willis's advantage if his plan was to rob Tucker, but not to murder him. 12RP 44-51. Defense trial counsel made it appear that this

⁶ 12RP 47.

was a false distinction; over the State's objection, defense counsel presented her own testimony that "according to the law" both acts would be murder and result in the same penalty. 12RP 44-47. The detective conceded that both would be murder. 12RP 46.⁷

Then defense counsel asserted that Bartlett had told Willis that he could have done only a burglary or a robbery and the penalty would be only 12 or 15 months; counsel asked Bartlett to agree, "that wouldn't be true, right?" 12RP 47.

The cross- examination continued:

Q. Let's go back to the page, where we were, 16, then. So you tell him, "I don't think you planned a murder, but I think this was a lick."

In fact, I counted, and I think you tell him about 12 times that you don't think he intended to murder anybody, but you do believe that he intended to rob somebody?

A. I do believe that he intended to rob Herman Tucker.

Q. So given that, that you are telling him over and over and over again and he is denying that he intended to rob him, but you absolutely are not listening to him. Do you ever offer him –

[State's objection (as argumentative), overruled.]

⁷ Willis repeats the assertion on appeal that it is false that it makes a difference whether Willis went to the motel intending to kill Tucker, stating that it would result in a murder charge in either instance. App. Br. at 20. However, a premeditated murder in furtherance of robbery is aggravated first degree murder, which carries a minimum sentence of life without parole, and is a significantly more serious crime than felony murder in the first degree, which has a minimum term of twenty years. RCW 9.94A.540(1)(a), 10.95.020(11), 10.95.030(1).

Q. Do you ever tell him, "Okay, then. If you didn't intend to rob him, what" -- for the first two hours, I don't hear you saying to him, "What was your intention?"

Did you ask him, did he have any other intention?

A. I did, and I don't know how many times. ...

12RP 47-48 (emphasis added).

Defense counsel returned to her argument that Bartlett had misled Willis by stating that if it was just a robbery, he would get 15 or 36 months. 12RP 48-52. Bartlett explained that she was saying that if Tucker had not died, that would be the penalty, and that she had suggested that Willis just "signed on to do a lick." 12RP 49.

During Willis's testimony, he repeated the theme that Bartlett was being deceitful. 14RP 617. He claimed that, contrary to Bartlett's testimony, he was told about the threats to his family before the recording began. 14RP 614. He also claimed that he had asked to call his lawyer before the recording. 14RP 615.

During the State's rebuttal case cross-examination, defense counsel tried to establish that the detectives repeatedly lied to Willis. Defense counsel asserted that Bartlett told Willis something that was "not true" when Bartlett stated that the results of a polygraph would not be admissible in court. 16A RP 975. The defense attorney asserted that it was "not true" because the

defendant's answers might be admissible without reference to the polygraph. 16A RP 975-76. Counsel suggested that Bartlett was devious because she did not tell Willis the subject of the interview, and if Willis had known, he might have invoked his right to counsel. 16A RP 976.

After brief re-direct examination, cross-examination resumed, and defense counsel accused Detective Bartlett of threatening Willis throughout the interview, by referring to Willis going to prison and to Willis's family being in danger. 16A RP 980. Then counsel asked, "So what you are saying is that it's okay for you to lie and use strategy, but he can't or he shouldn't because that seems to me that you and Detective Do were doing the same thing he was doing, right?" 16A RP 980. Bartlett admitted that she had suggested the detectives had surveillance video and Willis's fingerprints, when they did not.⁸ 16ARP 980.

Defense counsel pointed out that, late in the interview, when Detective Do said "Just want to see how truthful you are about all of this. And obviously you're not," Willis responded "I was uncovering

⁸ During the interview, Bartlett told Willis that there was a security video showing Willis dropping off Turner at the Motel 6 on the night of the murder. Ex. 77 at p. 18, 22, 32. Bartlett also implied that a fingerprint at the Motel 6 had been identified as Willis's print. Ex. 77 at p. 18, 49. During direct examination Bartlett had acknowledged that both of these statements were ruses and were not true. 12RP 17-18.

your guys' lie. Don't turn this around on me." 16A RP 981.

Counsel characterized the interview: "It seems that each of you were playing a game all the way throughout this interview. He said you're playing games. Don't bullshit me. And you said you're lying to me. Isn't that the tenor?" 16A RP 981. Det. Bartlett responded that the quoted section related to a specific point, whether the detectives had spoken to Matthews-Smith; Bartlett stated that this was not a game, it was about Tucker's life. 16A RP 981. The questioning continued:

Q. All right. Well, I understand that. And just – that was just an example. That one. But throughout the interview he's saying to you you're bullshitting me, and don't play games, and that's the tenor of much of – I mean, you're just kind of playing with each other back and forth. Not to suggest that it's a game, no. But isn't that the nature of the trying to hide from each other when you know or you're trying to find out things from each other?

A. I would say that definitely was the tenor of his portion of the interview. I however gave him every opportunity to tell me what happened. I gave him every opportunity to say he was trying to rescue his sister. And I believe his answer was that is a total fabrication.

Q. Okay. Well, let's see. You said you gave him every opportunity. But, in fact, there were eight times, and we can go through there, that you absolutely told him I don't believe you, and I think you did this for sure. Starting with number one on page 18.

A. I do believe that he committed this murder.

Q. Okay. And you –

A. That's not a lie.

Q. And no matter what he told you from page 18 all the way up to the last page you told him I don't believe you. Absolutely don't believe that I think maybe you didn't murder him, but I think you went there to do a lick, and I don't believe otherwise; isn't that true?

A. I said that I believe that you went there to rob him. I had the text messages and I believed it.

Q. Thank you. No further questions.

16A RP 981-83. Willis did not object to any of the detective's responses on cross-examination.

b. This Claim Is Not Reviewable Because Willis Elicited The Testimony, Inviting Any Error.

Testimony elicited by the defense cannot be the basis of a claim of error. It is a rule of long standing that a party may not set up error at trial and then on appeal claim to be entitled to reversal based on that error. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). This rule applies even to claims of constitutional error that can be raised for the first time on appeal. State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). In determining whether the invited error doctrine applies, courts

consider “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014).

Courts have repeatedly refused to review claims that improper opinion testimony occurred in cases where the testimony was elicited or invited by the defense. State v. Notaro, 161 Wn. App. 654, 670, 255 P.3d 774 (2011) (waived challenge to interrogating detective’s testimony that “I just didn’t believe the story,” by eliciting it during cross-examination); State v. O’Neal, 126 Wn. App. 395, 109 P.3d 429 (2005), aff’d, 159 Wn.2d 500 (2007) (defense opened the door to detective’s opinion as to another witness’s veracity by raising issue of detective’s opinion as to veracity on cross-examination of that other witness); State v. McPherson, 111 Wn. App. 747, 764, 46 P.3d 284 (2002) (waived challenge to detective’s allegedly improper opinion elicited on cross-examination); State v. Oughton, 26 Wn. App. 74, 77, 612 P.2d 812 (1980) (waived challenge to detective’s opinion re: veracity, where defense counsel raised the subject in cross-examination of another officer); State v. Vandiver, 21 Wn. App. 269, 273, 584 P.2d 978 (1978) (testimony re: defendant’s prior

convictions was elicited on cross examination, so it was invited error, precluding appeal).

The testimony here was elicited by Willis's line of cross-examination, which itself repeated Bartlett's statements of belief during the interview. Willis did not assert at trial that the answers were non-responsive, did not appear surprised by the answers, and repeated the questions that elicited the first challenged statement, during that cross-examination and during the later cross-examination of Bartlett during the State's rebuttal case.

Before the cross-examination occurring during the State's case-in-chief, jurors already had heard the detectives' interview of Willis, in which Detective Bartlett repeatedly said she thought Willis had gone to the Motel 6 to rob Herman Tucker. 12RP 15; Ex. 55. On cross-examination, Willis emphasized these statements during the interview, in an attempt to establish that the detectives did not give Willis the opportunity to offer his real motivation. 12RP 47.

In the first challenged statement, the detective appears to be correcting defense counsel's characterization of what the detective said during the interview: counsel said Bartlett had repeatedly said she believed Willis intended to rob "somebody," but Bartlett pointed out that she actually had said she believed Willis specifically

intended to rob Herman Tucker. 12RP 47. Bartlett echoes counsel's words, changing only the last word – from "somebody" to "Herman Tucker":

Q. I counted, and I think you tell him about 12 times that you don't think he intended to murder anybody, but you do believe that he intended to rob somebody?

A. I do believe that he intended to rob Herman Tucker.

12RP 47. In correcting the accuracy of a statement made by defense counsel, the testimony was directly provoked by defense counsel.

The second challenged statement was in response to defense counsel's assertion that the detectives were playing games with Willis and lied to him to get him to talk, justifying Willis's lies in response. 16A RP 980-83. Defense counsel asserted that detectives were lying to get information from Willis, and stated that the detective had said "eight times ... you absolutely told him I don't believe you, and I think you did this for sure." 16A RP 982. The detective's response appears to be an effort to clarify that at the time of the interview, she believed that Willis committed the murder. She stated "I do believe that he committed this murder," and continued, "That's not a lie." 16A RP 982.

At trial, Willis conceded he shot and killed Tucker, so Bartlett's opinion that he did so was inconsequential. Even if either of the challenged statements were understood to be a statement that at the time of trial Bartlett believed that Willis intended to commit a robbery, those statements were elicited by defense counsel: counsel emphasized that the detective repeatedly stated in the interview that she believed Willis intended to commit a robbery, and challenged the detective as deceptive during the interview. The responses were prompted by the defense questions on cross-examination. Willis cannot be heard to object.

c. RAP 2.5(a)(3) Bars Consideration Of This Claim.

Willis did not object to the testimony that he elicited, and RAP 2.5(a) bars consideration of this claim. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes an error

manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

As a general rule it is inappropriate for a witness to express his or her belief in the defendant's guilt, the defendant's intent, or the veracity of witnesses. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). But the limitations of RAP 2.5(a)(3) apply to opinion evidence challenged first on appeal. Id. at 595; State v. Curtiss, 161 Wn. App. 673, 696-97, 250 P.3d 496 (2012). In Montgomery, the court held that direct testimony of three state's witnesses (two detectives and a forensic chemist) as to the defendant's intent, which was the sole disputed issue at trial, was improper, but the defendant failed to preserve the issue for appeal – it was not manifest constitutional error. Id. at 595-96.

Important to the determination of prejudice is whether the jury was properly instructed that they are the sole judges of witnesses' credibility and are not bound by expert opinions. Montgomery, 163 Wn.2d at 591. The appellate court will presume the court followed the court's instructions absent evidence to the contrary, such as a written jury question. Id. at 596; Curtiss, 161 Wn. App. at 697-98.

As discussed above, Willis cannot complain of statements that he elicited, so the statements do not constitute error of any kind. In addition, in context, the statements appear to be statements of Bartlett's state of mind at the time of the interview, and not opinions of Willis's guilt based on the evidence presented at trial. Statements made during a pretrial interview as part of an interrogation strategy do not carry any special aura of reliability that would usurp the jury's role at trial. State v. Notaro, 161 Wn. App. at 669.

Bartlett's opinion at the time of the interview was of limited significance at trial, because at trial Willis conceded that he shot Tucker and killed him. Willis's story was that he went back to the motel with Turner and when Tucker arrived and immediately "groped" Turner, he defended her (and himself) and shot Tucker accidentally. 13RP 303-13. This explanation of events was not offered to Detective Bartlett at the time of the interview.

Willis's failure to object to these statements indicates that Willis did not believe they were unduly prejudicial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1980); State v. Miller, 66 Wn.2d 535, 537-38, 403 P.2d 884 (1965). Defense counsel purposely elicited this testimony by cross-examining the detective

about her interview tactics, alleging they were game playing and deceitful, and emphasizing the number of times Bartlett repeated that she believed Willis intended to rob Tucker. This strategy demonstrates that counsel thought the benefits of this challenge to Bartlett's interview tactics outweighed any prejudice of Bartlett confirming her belief. Because the jury heard the interview, which included those statements of Bartlett's belief, repetition of them during her testimony did not cause prejudice.

As to the first challenged statement, Bartlett simply corrected defense counsel's incorrect version of Bartlett's statements during the interview. Defense counsel must not have considered the statement prejudicial – she repeated that Bartlett told Willis over and over that Bartlett stated Willis intended to rob Tucker, pursuing the theory that Bartlett did not give Willis a chance to offer a different motive. 12RP 47-48. On cross-examination during the State's rebuttal, defense counsel pursued the same question without objecting to the first alleged improper statement and without requesting any limitation on further answers. Defense counsel repeated her theme, "And no matter what he told you ... you told hold him I don't believe you. Absolutely don't believe that I think maybe you didn't murder him, but I think you went there to do a lick,

and I don't believe otherwise, isn't that true?" 16A RP 982-83. Not only did defense counsel repeat Bartlett's statements of belief, but counsel knew she was inviting Bartlett to confirm that belief again, as Bartlett did: "I said that I believe that you went there to rob him. I had the text messages and I believed it." 16A RP 983. Counsel could not have been surprised and did not object.

Further, Bartlett did not suggest that she had additional evidence not presented at trial. She explained her opinion, "I said that I believe that you went there to rob him. I had the text messages and I believed it." 16A RP 983. The text messages were admitted into evidence and there was testimony as to the content of the messages. Ex. 32, 33; 10RP 321-35, 345-64. Willis acknowledged that whoever sent the messages was planning to rob Herman Tucker: he testified that he did not send or receive the messages on his cellular telephone, that they must have been communications to and from other people in the BMW that night. 13RP 291. Bartlett's testimony that she believed the person sending the messages planned to rob Tucker was not inconsistent with the defense.

The jury was properly instructed that they were the sole judges of the credibility of the witnesses and were not bound by the

testimony of expert witnesses. CP 44-45, 50. There is no indication that the jurors did not follow these instructions.

Willis's own arguments on appeal (in arguing that Bartlett's facial expressions during trial are reversible error) concede that these statements on cross-examination were not prejudicial. He characterizes the statements as "opinion that Willis lied during his interview in Ellensburg." App. Br. at 38-39. He asserts that her statements "did little to damage the defense case." App. Br. at 38.

Because the statements were invited by defense counsel, they do not constitute constitutional error. Willis has not established actual prejudice; he concedes the statements did little damage to the defense case. This court should decline review of this claim.

d. Willis Has Not Established That Defense Counsel's Tactics Constituted Ineffective Assistance Of Counsel.

Willis has included a claim that if the failure to object constitutes a waiver of this claim, his counsel was constitutionally ineffective. Willis has not established either deficient performance or resulting prejudice, so this claim also fails.

To establish ineffective assistance of counsel, the defendant must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Every effort will be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

Reviewing courts begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. The defendant must show "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Courts should recognize that, in any given case, effective assistance of counsel could be

provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

The decision of whether to object is a classic example of trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). In State v. Howell, this Court held that the defendant had not established deficient performance when counsel failed to object to a detective's opinion as to guilt, even when it was likely that the objection would be sustained. 119 Wn. App. 644, 651-52, 79 P.3d 451 (2003). The court observed that it could be sound trial strategy not to object where the testimony was consistent with the defense theory that the police were biased against the defendant. Id.

Even if the detective's statements challenged in the case at bar were improper, defense counsel had at least three tactical reasons not to object. First, objections would likely have been unsuccessful because the testimony was invited by defense questions on cross. Counsel "has no duty to pursue strategies that reasonably appear unlikely to succeed." State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (citing State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 1251 (1995)). Second, the testimony was a component of the defense theory that because Bartlett had already formed an opinion (that she kept repeating to

Willis), she did not give Willis a chance to tell his own story, and that Willis was justified in not trusting the detectives. Third, the testimony was hardly surprising, given Bartlett's statements during the interrogation, which the jury had heard. Objecting would only have highlighted the testimony, suggesting that defense counsel believed it was significant. Because an objection would have been fruitless and potentially damaging, failure to object was not deficient. Willis has not overcome the presumption that the questions and the failure to object to the answers were part of a legitimate trial strategy.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. The defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006).

No additional out-of-court information was presented or implied by the testimony at issue. Bartlett testified that she based her opinion that Willis intended to commit robbery on the texts that were sent and received on Willis's cellular telephone. 16A RP 983. The content and timing of the texts was admitted at trial. Willis conceded that the texts related to the planning of a robbery, testifying that he did not send or receive the texts. 13RP 291. On the second day of his testimony, Willis added that as they were driving to pick up Turner at the motel, other people in the car discussed a robbery, but he talked them out of it. 14RP 588-90. The jury was instructed that it was the sole judge of credibility. CP 44. The detective did not suggest that she had any special expertise or familiarity with Willis that would make her a better judge of Willis's credibility than the jury.

Willis's claim of prejudice is based solely on the assertion that a detective made the statement that she believed Willis intended to commit a robbery, which was a core issue in the case. Willis does not acknowledge that the statements were elicited as part of a larger defense strategy to minimize the significance of Willis's lies during the detectives' interview. Willis does not acknowledge that the jury had heard these statements when the

interview was twice played during trial. He does not acknowledge that the detective said her opinion was based on the text messages that were admitted at trial. Willis has not shown how the testimony prejudiced the defense theory that other people in the car sent the text messages, and they were planning a robbery but changed their minds. Without that showing of prejudice, the defendant's ineffectiveness claim must be rejected, even if the representation was deficient.

e. If Either Challenged Statement Was Improperly Admitted, The Error Was Harmless.

If this Court reviews this claim and concludes that either statement was an unconstitutional opinion as to Willis's guilt, any error was harmless beyond a reasonable doubt. Constitutional error is harmless if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). The statements were of virtually no relevance to the disputed issues at trial and would not have affected the verdict.

Unlike in Quaale, there was no suggestion here that Bartlett's opinion was based on any special expertise or was based on scientific principles. The jury twice heard recordings of the

interview of Willis and those recordings included many statements by Bartlett that she believed that Willis went to the motel to rob Herman Tucker. As previously noted, that was one point of the cross-examination, so Bartlett's confirmation of those statements would help the defense case, if anything.

Bartlett stated she was relying on the text messages, which were admitted at trial. 16A RP 983. She did not suggest she had evidence the jury did not have.

Willis did not dispute that he killed Tucker. Willis did not dispute the significance of the text messages – instead, he claimed that he had allowed the others in the BMW to use his phone and that they had been planning a robbery, which he talked them into abandoning. 14RP 588-90. Thus, Bartlett's opinion that the person who was exchanging those text messages intended to commit a robbery was not inconsistent with Willis's own testimony and was harmless beyond a reasonable doubt.

2. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL PREMISED ON THE DETECTIVE'S EXPRESSIVE FACE.

Willis contends that the trial court abused its discretion in denying his motion for a new trial, which was premised on the claim

that Detective Bartlett's facial expressions during trial constituted extrinsic evidence that deprived him of a fair trial. This claim is without merit. That a detective's unintentional facial expressions during trial were noticed by jurors is not the type of fundamental error depriving the defendant of a fair trial that requires vacation of this conviction, where those expressions were not remarkable enough to be noticed by any of the parties or the judge. The trial court properly denied Willis's motion for a new trial.

A trial court's decision on a motion for new trial is within its sound discretion and denial of a new trial will not be reversed on appeal unless the defendant makes a clear showing that the trial court abused its discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). An abuse of discretion will be found only if no reasonable judge would have reached the same conclusion. Pete, 152 Wn.2d at 552.

a. Relevant Facts.

On June 11, 2015, after the verdict was returned and the jury was discharged, a group consisting of the prosecutors (Donald Raz and Patrick Hinds), the defense attorneys (Theresa Griffin and

Christopher Carney), the defense investigator (Karen Zytaniak), and Detective Bartlett spoke with the jurors in the jury room. CP 187-88; 6/11/15 RP 6-7. Each later filed a declaration as to the jurors' remarks. CP 93-98, 219-26.

During this conversation, jurors told Detective Bartlett that she had a very expressive face and eyes. CP 188. Bartlett described the interaction: "A juror, to the agreement of the other jurors, stated that I was very expressive. They stated my eyes were expressive and they did not know if it was a response to the testimony, if it was an effort to affect or influence the jury, or if I just had a poor poker face." CP 220. During these comments, Bartlett said, the jurors laughed, and the comments appeared to be an attempt to tease her. CP 220. Bartlett was unaware she was making any observable expressions while at counsel table and did not intend to convey any message with any expressions. CP 220.

Willis repeats the characterization of events presented by the two defense attorneys. App. Br. at 27-28. Griffin reported jurors stating that Bartlett should not play poker because she did not have a good poker face. CP 93. Griffin stated that two jurors said Bartlett was telling jurors not to believe Willis (by her expressions). CP 93. Carney reported that jurors said Bartlett's

facial expressions captured their interest throughout trial. CP 95. Carney stated that when one juror said, "it was like you were trying to tell us not to believe" Willis when he testified, other jurors appeared to agree. CP 96.

Defense investigator Zytzniak did not recall jurors stating that they thought Bartlett was trying to tell them not to believe Willis. Zytzniak stated that jurors said they could not tell if Bartlett was trying to tell them something. CP 97. Jurors agreed with a comment that "the detective wins a prize for the most facial expressions." CP 97.

The State disagrees with Willis's assertion that the prosecutors did not contest the defense attorneys' version of what jurors revealed. App. Br. at 28. Raz and Hinds stated that the jurors commented on Bartlett's very expressive eyes and face, and when Bartlett responded with surprise, jurors laughed. CP 223, 225. Consistent with Zytzniak's description of the conversation, they did not hear any juror state that he or she thought Bartlett was trying to tell them not to believe Willis. CP 223, 225. Both prosecutors heard jurors say they could not tell if Bartlett was responding to testimony, if it was an effort to send a message, or if she just had a poor poker face. CP 223, 225.

Neither prosecutor noticed Bartlett making facial expressions toward the jury during trial. CP 223, 225. During trial, the defense attorneys never mentioned Bartlett making facial expressions. CP 223, 225.

On July 11, 2015, Willis brought a motion for new trial, on the grounds that the detective's facial expressions were unsworn opinion testimony upon which the jury relied. CP 90.

The trial court denied the motion. 17RP 45. The court stated that it "did not notice anything out of the ordinary during the trial. I was not looking at any one person, and sometimes looked at Detective Bartlett." 17RP 36. It noted that during the trial, defense attorney Carney sat four or five feet away from Bartlett at a right angle. 17RP 36. The court did notice that at times Bartlett whispered, conferring with counsel, and wrote notes, as was typical for every trial the judge had observed since 1982. 17RP 37. The court found there was no intentional effort to signal the jury and no intentional misconduct, which Willis does not dispute. 17RP 37-38. The court considered the evidence in the light most favorable to the defendant and concluded: "the jurors were clearly teasing the detective about her lack of, quote 'poker face' close quote, in that she was not intentionally trying to influence them with her facial

expressions, but that her feelings unintentionally showed through in that she, that is the detective, did not believe the defendant.” 17RP 38. The court noted that even if it considered matters that inhered in the verdict, as set out in the declarations before it, there was no evidence that the facial expressions affected the jurors’ decision as to Willis’s credibility. 17RP 38.

The court concluded that Detective Bartlett’s facial expressions were not evidence, as defined for the jury, and that if they were evidence, they were essentially cumulative of Bartlett’s testimony, particularly the opinions elicited on cross-examination, and the interview recordings played for the jury. CP 190-91; 17RP 40-43. The court concluded that if there was any impropriety, there were “no grounds to believe that it affected the verdict,” so any error was harmless beyond a reasonable doubt. CP 191.

- b. Willis Has Not Established That The Trial Court Manifestly Abused Its Discretion In Denying His Motion For A New Trial.

CrR 7.5 provides that a trial court may grant a new trial when a jury receives evidence or documents not allowed by the court, if it “affirmatively appears that a substantial right of the defendant was materially affected.” CrR 7.5(a)(1). More than a possibility of

prejudice must be shown to warrant a new trial. Lemieux, 75 Wn.2d at 91. Even if a jury has considered material not properly before it, a new trial should not be granted unless the defendant shows reasonable grounds to believe that he or she has been prejudiced. Id.

The trial court here considered declarations submitted by the parties, written briefing, and oral arguments, and reached a carefully reasoned decision addressing the motion for new trial. CP 187-92; 17RP 36-45. The court cited the proper legal standards for determining whether a new trial was warranted. Id. The court found that the facial expressions were not extrinsic evidence and that if there was any impropriety, there were “no grounds to believe that it affected the verdict.” CP 191. Willis has not demonstrated that these are conclusions that no reasonable judge would reach.

The question of the effect that extrinsic evidence may have had on a jury is a question left primarily to the sound discretion of the trial court because the trial court has observed all of the witnesses and trial proceedings. Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Extrinsic evidence, which is improper for a jury to consider, is defined as “information that is *outside all the evidence* admitted at trial, either orally or by

document.” Pete, 152 Wn.2d at 552-53 (quoting State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)) (emphasis in original).

In determining the issue, courts must not consider matters that inhere in the verdict. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). “The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions or beliefs” all inhere in the verdict and may not be used to impeach it. Id. at 777-78 (quoting Cox v. Charles Wright Academy, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)). As a result, if extrinsic evidence has been presented to a jury, a court determining a CrR 7.5(a)(1) motion can make only an objective inquiry into whether and how the extrinsic evidence could have affected the jury’s verdict, not a subjective inquiry into its actual effect on specific jurors or the deliberations. Richards v. Overlake Hospital Med. Ctr., 59 Wn. App. 266, 273, 796 P.2d 737 (1990).

In Pete, supra, the jury inadvertently received copies of two statements made by Pete to the police about the charged robbery, although they were not admitted at trial. 152 Wn.2d at 553. The

statements were contradictory and to some degree inculpatory, and the defendant had not testified at trial. Id. at 550, 554. The court granted a new trial, finding that the statements seriously undermined Pete's defense. Id. at 554-55. In contrast, the alleged extrinsic evidence in this case was apparently skeptical facial expressions of a detective, who testified twice during the trial and was cross-examined at length. The detective's expressions were a normal human attribute that did not defeat the fundamental fairness of the trial.

The trial court properly concluded that the facial expressions of the detective were not extrinsic evidence. The Supreme Court recently held that facial expressions and body language of a person present at counsel table are not testimonial. State v. Barry, 183 Wn.2d 297, 311, 352 P.3d 161 (2015). The court in Barry was addressing the issue as it related to the defendant, but its holding applies equally to a detective at counsel table. The court held that while facial expressions and body language might reveal a person's state of mind "in the most general sense," they do not communicate specific factual assertions or specific thoughts. Id.

The court in Barry also rejected the claim that there is any constitutional right to a verdict based solely on evidence presented

at trial, holding that such a rule would run counter to the long-standing rule that evidentiary errors are not presumptively reversible or presumptively prejudicial.⁹ Id. at 313-17. The court reiterated the principle that the courts can assure a fair trial, but not a perfect one. Id. at 316-17. Thus, if extrinsic evidence has been presented, it is reversible only if the defendant demonstrates that “within reasonable probabilities ... the outcome of the trial would have been materially affected had the error not occurred.” Id. at 317-18 (ellipsis in original, internal quotations marks omitted) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Willis’s specific challenges to the trial court’s findings and conclusions all lack merit. Any error in the court’s statement that it was not clear whether jurors were referring to facial expressions of Bartlett while she was at counsel table is irrelevant because the court assumed for purposes of its ruling that they were. CP 188. The trial court correctly found that the jurors were instructed that they were to consider only testimony, stipulations, and evidence

⁹ The Court noted that the defendant in that case did not provide any analysis of due process principles and refused to reach that issue. Barry, 183 Wn.2d at 313 n.12. Although Willis does mention “due process,” he also has failed to provide analysis of due process jurisprudence that would warrant consideration of that issue.

admitted at trial. CP 43¹⁰; 17RP 40. In the absence of evidence to the contrary, this court must presume that the jury followed the instructions. State v. Perez-Valdez, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011). No reasonable juror would conclude that the expressions of a detective seated at counsel table were evidence and no evidence in this case indicates jurors considered those expressions in reaching their verdict.

In analyzing possible prejudice of extrinsic evidence received by a jury, courts have thought it important to consider the purpose for which the extrinsic evidence was interjected. State v. Briggs, 55 Wn. App. 44, 55-56, 776 P.2d 1347 (1989); State v. Johnson, 137 Wn. App. 862, 870, 155 P.3d 183 (2007). If the purpose of the interjection is to influence deliberations, that increases the possibility of prejudice. In Briggs, for example, extrinsic information was provided by a juror in an effort to rebut testimony on a central issue. Briggs, 55 Wn. App. at 56. In the case at bar, the alleged extrinsic evidence was the personal reactions of the detective to testimony at trial, to the extent they

¹⁰ Instruction 1 stated in part: "The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during trial. If evidence was not admitted or was stricken from the record, then you are not to consider it." CP 43.

may have been apparent in her facial expressions while seated at counsel table. It is unreasonable to believe that the jurors ignored the testifying witnesses to attend to Bartlett's facial expressions and were guided by those expressions in their deliberations.

The court properly concluded that if Bartlett's facial expressions may have suggested skepticism about Willis's new story during his testimony at trial, that was "essentially indistinguishable" from Bartlett's attitude properly admitted as evidence in the interview played for the jury and in Bartlett's testimony at trial. CP 191. Evidence is not considered extrinsic if it is essentially indistinguishable from other evidence admitted at trial, or is cumulative of that evidence. Perez-Valdez, 172 Wn.2d at 817-18. While Willis argues that the expressions conveyed an "unmistakable opinion" that Willis "was lying on the stand," App. Br. at 39, facial expressions cannot convey that specific thought. Barry, 183 Wn.2d at 311. Expressions that convey skepticism would be a natural response to Willis's constantly changing story

and implausible claims. The testimony of Willis flatly contradicted testimony of Bartlett, so her skepticism was inevitable.¹¹

Willis has not established that there is reasonable probability that any error had a material effect on the verdict, so even if error occurred, it was not reversible. The trial court found that any error was harmless beyond a reasonable doubt, based on the court's own observations of the trial, including the detective's demeanor while testifying and during the recorded interview. As the court concluded, any skepticism as to Willis's testimony was cumulative of that evidence of Bartlett's attitude.

Willis now argues that the trial court also should have granted the motion for new trial under CrR 7.5(a)(5), as a trial irregularity, or under CrR 7.5(a)(8), on grounds that substantial justice has not been done, although trial counsel did not support those arguments with legal or factual support. The trial court could not abuse its discretion in declining to rule on arguments not presented. On appeal, Willis has presented no grounds for a new

¹¹ For example, Willis testified that he was advised of threats to his family before the recorded interview began. 14RP 614-16. Bartlett denied that and explained the tactical reason she would not have done so. Willis testified that he asked to call his attorney, while Bartlett testified that she did not. 14RP 615; 15B RP 949.

trial under the other two subsections that is distinct from the argument made under CrR 7.5(a)(1) .

Willis's claim that this court should grant a new trial based on ineffective assistance of trial counsel is meritless, as he has not established how the trial court's analysis would have differed or that the trial court would likely have granted a new trial under the other subsections, so he has not established the prejudice necessary to obtain relief based on this claim.¹² Strickland, 466 U.S. at 693-94.

Willis did not establish good cause warranting release of juror contact information, as required under GR 31(j), so the trial court's denial of that request was proper. State v. Blazina, 174 Wn. App. 906, 909, 301 P.3d 492 (2013). The court noted that the questions defense counsel proposed would have inhaled in the verdict. 17RP 36. Because the trial judge considered the evidence before it in the light most favorable to the defendant, and assumed that the jurors saw expressions at counsel table that could have communicated Bartlett's disbelief of Willis's testimony, there is nothing material that jurors could have added that would not inhere in the verdict. The record is sufficient to consider the merits of

¹² The same analysis applies to any independent arguments under the federal or State constitution, which also were denied by the trial court. 17RP 44.

Willis's claim and the trial court's denial of access to the jurors should be affirmed.

There is no allegation that Bartlett intentionally tried to communicate opinions from counsel table. There is no allegation that she shook her head, gestured, or made noises. Facial expressions are a natural aspect of human interaction. People who lack a "poker face" are unable to effectively conceal their emotional reactions. It would be virtually impossible to staff a prosecution team entirely with individuals who can effectively conceal all of their emotional reactions during trial. The detective's facial expressions were not dramatic enough to draw the attention of the judge or any of the four attorneys sitting nearby, including defense counsel sitting at a ninety degree angle, five feet away. Those expressions may have amused the jury, but they do not warrant a new trial.

3. BECAUSE NO ERROR OCCURRED, THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g., Coe, 101 Wn.2d

772 (discovery violations, three kinds of bad acts improperly admitted, hypnotized witnesses, improper cross-examination of defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched for victim's credibility). No trial error has been shown, so the cumulative error doctrine is inapplicable in this case.

4. THERE IS NO BASIS TO DENY APPELLATE COSTS.

Willis asks that this Court deny any State request for imposition of costs of this appeal, in the event the State prevails. This claim should be rejected. Because the record contains no information from which this Court could reasonably conclude that Willis has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

As in most cases, Willis's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. The record contains no information about his financial or employment

prospects, and the State did not have the right to obtain that information.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). The record is devoid of any information that would support a finding that the defendant is unlikely to have any future ability to pay appellate costs.

In State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016), this court held that costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was "no realistic possibility" that he could pay appellate costs in the future. This Court also recognized, however, that "[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible

exercise of discretion than to decide that they should always be imposed as a matter of policy.” Sinclair, 192 Wn. App. at 391.

Willis received a long prison sentence, but will be released at the absolute latest when he is 54 years old.¹³ He is eligible for early release under RCW 9.94A.729(3)(c), but this calculation assumes that he is awarded none. Thus, upon the latest possible release he will have many working years ahead of him. In State v. Caver, __ Wn. App. __, 381 P.3d 191, *5 (2016), this court concluded that there is a realistic possibility that a 53-year-old man will be able to pay costs in the future.

The record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs. Costs should be awarded if the State prevails.

¹³ Willis was taken into custody on September 16, 2012. 12RP 8. The term imposed was 420 months. CP 160. Thus, the latest possible release date is September 16, 2047. Willis's birthdate is February 28, 1993. CP 163.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Willis's conviction and sentence.

DATED this 7th day of November, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, David B. Koch, containing a copy of the Brief of Respondent in State v. Rodney Willis, Cause No. 73903-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

11-07-16

Date