SUPREME COURT NO. _____
NO. 80334-4-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM TALBOTT, II,

Petitioner.

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

The Honorable Linda Krese, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner William Talbott, II, asks this Court to grant review of the court of appeals' decision in State v. Talbott, No. 80334-4-I, filed February 12, 2024 (Appendix A). The court of appeals denied Talbott's motion for reconsideration on that same date and issued a substitute opinion (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is review warranted under RAP 13.4(b)(3) and (4), where there is insufficient evidence that Talbott was the one who killed two young Canadians in 1987?

2. Is review warranted under RAP 13.4(b)(3), where the court of appeals acknowledged there was conflicting evidence and gaps in the prosecution's case, yet held the multiple constitutional and evidentiary errors that occurred at Talbott's trial did not amount to cumulative error requiring a new trial?

3. Is review warranted under RAP 13.4(b)(3), where the trial court erred in excluding other suspect evidence that another

person confessed to the murders, which also impeached the police investigation?

4. This Court should also accept review of the issues Talbott raised in his Statement of Additional Grounds.

C. STATEMENT OF THE CASE

On November 18, 1987, 20-year-old Jay Cook and 18-year-old Tanya Van Cuylenborg left Victoria, British Columbia, for Seattle. 2RP 79. They drove the Cook family's Ford Econoline van. RP 918, 1187. Cook and Van Cuylenborg had been dating for about five months, though were experiencing some relationship troubles at the time. RP 828, 912.

Cook sometimes worked odd jobs for his father, an oil furnace mechanic. RP 907, 915. Cook's and Van Cuylenborg's plan was to drive to Seattle, sleep in the van overnight, buy furnace parts from Gensco, Inc., in the morning, and then return home to Victoria the next day, November 19. RP 823, 893, 1167-68.

Cook and Van Cuylenborg took the ferry from Victoria to Port Angeles. RP 818-19. They stopped in Hoodsport for snacks.

RP 1169. They stopped again in Allyn, south of Bremerton, to buy gas around 9:00 p.m. RP 1495-1500. They purchased a ferry ticket from Bremerton to Seattle at 10:16 p.m. on November 18. RP 1165. The Bremerton ferry terminal was their last known location. RP 1491-92.

Van Cuylenborg's body was found several days later, on November 24, down a steep embankment off Parson Creek Road, a rural wooded area in Skagit County. RP 968-69, 993-94. Van Cuylenborg was nude from the waist down. RP 970. She had a single, close-range gunshot wound to the back of the head. RP 1016-20. A bullet fragment was recovered from her skull. RP 1036. Two connected zip ties were found at the edge of the road. RP 1001-03. A shell casing was found underneath some leaves just off the road shoulder. 2RP 37.

The Ford van was found the next day at Essie's Tavern in Bellingham. RP 868. Underneath the deck at Essie's was Van Cuylenborg's wallet, a box containing .380 caliber Winchester Western bullets, a Minolta camera lens cap, zip ties, and two latex

gloves, indicating the killer wore gloves. RP 1344-45. The bullets were consistent with the shell casing from Parson Creek Road and the fragment from Van Cuylenborg's skull. 2RP 60-64. Near Essie's Tavern was a Greyhound bus station. RP 869.

Inside the Ford van was a money order made out to Gensco, Inc., indicating the pair never made it to their destination. RP 1167-68. Zip ties were found inside the van. RP 1170-71. A used tampon and a comforter with what appeared to be blood on it were found in the rear cargo area. RP 1158-63. The van was thoroughly searched for latent prints. RP 1178-82. Thirteen potential prints were lifted, including one palm print from the right-hand rear door of the van. RP 1225-34.

Cook's body was discovered on November 26 off High Bridge Road, near Monroe, about 70 miles south of Parson Creek Road. RP 1411-12, 1493, 1722. Cook had several blunt force wounds to his head, likely incurred while he was still alive. RP 1595-96, 1626. A pack of cigarettes had been shoved down his throat. RP 1592. Cook's cause of death was determined to be

strangulation by ligature, specifically twine and what appeared to be a red dog collar. RP 1612-13, 1623. Some "weathered" zip ties were found at the High Bridge scene. RP 1478-82, 1489.

Though zip ties were found at the various scenes, neither Cook nor Van Cuylenborg had any marks suggesting they had been bound. RP 1634. An unknown male DNA profile was developed from a semen stain on Van Cuylenborg's pants found inside the van. RP 1176-77; 1793-75. Van Cuylenborg's vaginal swab contained the same male DNA profile. RP 1795-96. A different contributor to non-sperm DNA on the vaginal swab was also identified. RP 1795-97. Cook was excluded as a contributor. RP 1795-96.

With detectives focused singularly on finding a DNA match, the case went cold. 2RP 119-20.

In 2018, through genealogy matching, Talbott was identified as the possible source of the unknown male DNA profile. 2RP 160-65. Undercover officers began surveilling Talbott and eventually collected a discarded coffee cup. 2RP 178-

81. Talbott's DNA from the coffee cup matched the male profile from Van Cuylenborg's pants and vaginal swab. RP 1808-11.

Talbott's palm print was compared to the latent print found on rear door of the Ford van. RP 1270. The print examiner initially determined there was no match. RP 1274. However, her peer reviewer instructed her to compare the prints again. RP 1274, 1294. Only then did the print examiner change her opinion and conclude there was a match. RP 1271, 1313. Apparently, she examined the print upside down the first time, because of the peculiar orientation of the palm print on the van door. RP 1276; Ex. 364. None of the other lifted prints could be matched to Talbott and, additionally, some could not be matched to either Cook or Van Cuylenborg. RP 1228, 1233-34.

No other evidence linked Talbott to Cook's and Van Cuylenborg's deaths. RP 1702-14, 1818-26. No tips ever came in regarding Talbott. 2RP 117. Talbott lived and worked in the Puget Sound area his entire life. RP 26-30, 1865-71. He had his commercial driver's license and was working as a short-haul

trucker at the time of his arrest. 2RP 190; RP 1865-67. Fifty-five years old at the time of his arrest, Talbott had no criminal history of any kind. CP 27-29; RP 1679, 2068.

Talbott's friends, testifying for the prosecution, explained Talbott was never known to own any guns or have any interest in firearms. RP 1556-57, 1655. Talbott did not smoke and did not let people smoke in his car. RP 1655. Talbott did not have a dog. RP 1656. Van Cuylenborg's missing Minolta camera was later found in a Portland pawn shop, but no link to Talbott was ever established. RP 1706; 2RP 121-22.

The prosecution made much of the fact that Talbott's parents lived seven miles from High Bridge. RP 1534-35, 1716-19. But there was no evidence Talbott lived with his parents at the time of the murders or that he was familiar with High Bridge. RP 1551-53, 1723.

The prosecution nevertheless charged Talbott with two counts of aggravated first degree murder. CP 262-63. After deliberating for three days, a jury found Talbott guilty as charged.

RP 2000-01; CP 142-46. The court sentenced Talbott to mandatory life without parole. CP 32.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **There is insufficient evidence to sustain Talbott's convictions, a significant constitutional question warranting review under RAP 13.4(b)(3).**

On appeal, Talbott challenged the sufficiency of the evidence, maintaining that the prosecution failed in its burden to prove he was the one who killed Cook and Van Cuylenborg. Br. of Appellant, 10-15; Reply Br., 1-7. Talbott acknowledged the well-established principle of law that all reasonable inferences must be drawn in the prosecution's favor on appeal. Br. of Appellant, 10. However, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The prosecution "'must do more than pile inference upon inference'" to obtain a conviction. United States v. McDowell, 498 F.3d 308, 314 (5th Cir. 2007) (quoting United States v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993)).

The gravamen of the prosecution's case was its theory that Talbott raped Van Cuylenborg. RP 1919-23. There was no dispute Talbott had sexual contact with Van Cuylenborg, based on the DNA match. RP 1808-11. And, for purposes of sufficiency analysis on appeal, the palm print on the rear door of the van established Talbott's physical contact with the van, likely from intercourse with Van Cuylenborg in the back of the van. RP 1271. But these two facts—the only pieces of evidence linking Talbott to Van Cuylenborg—do not establish Talbott raped and then shot Van Cuylenborg in the head or that he bludgeoned and then strangled Cook to death.

Considering Van Cuylenborg's murder first, there was no evidence linking Talbott to violence of any kind, including sexual violence. Though Van Cuylenborg was found nude from the waist down, she did not have any signs of vaginal trauma that might indicate rape, such as bruising or tearing. RP 1047. No ligature marks indicated she had been bound. RP 1056. In fact, she had no physical injuries at all that could be linked to the homicide,

except the single, fatal gunshot wound to the head. RP 1015-16. Generally speaking, there is no dispute a rape can occur without injury. But, in this case, there is simply no evidence of Van Cuylenborg's lack of consent.

The fact that Van Cuylenborg was dating Cook does not mean she would not consent to intercourse with Talbott. There was no evidence establishing Cook and Van Cuylenborg were in a serious monogamous relationship in November of 1987. The only testimony about their relationship came from Van Cuylenborg's brother and Cook's sister. Van Cuylenborg's brother testified she came to visit him at university in September of 1987 and knew she was dating Cook at the time. RP 883-84. But he never met Cook in person and did not know anything else about their relationship. RP 884, 902. Cook's sister testified Cook and Van Cuylenborg started dating in June of that year, but explained she had virtually no memory of Van Cuylenborg. RP 912, 932, 940.

Conversely, there was testimony the two were having relationship problems. RP 828. Additionally, Cook was excluded

as the third unidentified contributor to non-sperm DNA found on Van Cuylenborg's vaginal swab. RP 1794-97.

Meanwhile, the gun used to kill Van Cuylenborg was never found and Talbott was never linked to any murder weapon. 2RP 61-62, 72. Talbott was never known to possess firearms or have any interest in them. RP 1556-57, 1655. Neither DNA nor fingerprints belonging to Talbott were found anywhere else in the van, despite exhaustive searching and testing. RP 1799-1801, 1818-26. Nothing is known about what happened between November 18, Van Cuylenborg's and Cook's last known location at the Bremerton ferry terminal, and November 24, when Van Cuylenborg's body was found in Skagit County. The record indicates only that Talbott had intercourse with Van Cuylenborg, which, by itself, does not establish he raped and killed her.

Even less connects Talbott to Cook's murder. To prove Talbott killed Cook, the prosecution's case rested solely on Cook's connection to Van Cuylenborg and Talbott's supposed familiarity with the High Bridge area, where Cook's body was found. No

connection between Talbott and any of the items at the High Bridge scene was ever established. RP 1702-14. Cook had a pack of cigarettes shoved down his throat, but Talbott was never known to smoke and did not even let people smoke in his car. RP 1655. A "weathered" zip tie was found at the High Bridge scene, similar to those found at the other scenes. RP 1489. But neither Cook nor Van Cuylenborg had any physical injuries indicating they were bound. RP 1056, 1634.

The prosecution tried but failed to demonstrate Talbott was familiar with High Bridge. Talbott's friend, Michael Seat, testified one time he and Talbott went to a boat launch on the Skykomish River and then walked across some fields to photograph Monroe Prison. RP 1544-45. But Seat, who was familiar with High Bridge, testified regarding this excursion, "I don't remember anything about a bridge." RP 1553. Otherwise, the prosecution established only that Talbott's parents' home was approximately seven miles from High Bridge Road, but not that Talbott was living with his parents at the time of the murders. RP 1723.

The court of appeals acknowledged Talbott "correctly identifie[d] conflicting evidence and gaps in the State's case." Opinion, 5. The court noted the prosecution's "foundational argument that, because Van Cuylenborg and Cook traveled together, Van Cuylenborg would not have had consensual sexual intercourse with Talbott and therefore Talbott must have raped Van Cuylenborg." Opinion, 5-6. However, the court stressed, that theory "rest[ed] on a number of presumptions about the relationship between the couple which simply cannot be known and is undercut by testimony that reflects the pair had been dating only four months and 'had been having some problems lately.'" Opinion, 6. The court likewise recognized "there was no evidence regarding Van Cuylenborg's sexual interests, proclivities, practices, or desires." Opinion, 6.

The court nevertheless went on to conclude, in seeming contradiction, that there was sufficient evidence to sustain Talbott's convictions "based on the DNA evidence, condition of Van Cuylenborg's body, and details of her trip with Cook."

Opinion, 7. This significant question of constitutional law warrants review under RAP 13.4(b)(3). Furthermore, given advances in DNA technology and genealogy matching in recent years, charges in cold cases like this one are abounding. Whether a DNA match alone is sufficient in such cases is also an issue of substantial public interest. RAP 13.4(b)(4).

2. **The court of appeals found numerous constitutional and evidentiary errors occurred at Talbott's trial, yet concluded cumulative error did not require reversal, also warranting review under RAP 13.4(b)(3).**

a. *The court of appeals agreed the lead detective offered an improper opinion on Talbott's guilt, testifying the DNA match meant "the case was solved."*

The lead cold case detective and prosecution's managing witness, James Scharf, explained at trial how Talbott was identified as a potential suspect through genealogy matching. 2RP 164-66. Detective Scharf testified he organized surveillance of Talbott that led to collection of a coffee cup that fell from Talbot's truck. RP 1674-75. Detective Scharf submitted the cup to be

analyzed for DNA. RP 1678. The next day, he received the results that Talbott's DNA matched the male profile recovered from Van Cuylenborg's pants and vaginal swab. RP 1678. Detective Scharf then testified, "Well, I called my sergeant, Scott Fenner, *and told him that the case was solved*." RP 1678 (emphasis added).

The court of appeals agreed with Talbott that Detective Scharf's statement "the case was solved" constituted an improper opinion on guilt, which "effectively communicated to the jury that he believed Talbott committed the crime, interfering with the jury's ability to determine every fact beyond a reasonable doubt." Opinion, 12. The court of appeals recognized Scharf "was not just any law enforcement officer; he was the lead cold case detective and was given leave by the court to sit with the prosecuting attorneys at counsel table throughout the trial." Opinion, 12-13. The court held this fact "greatly impact[ed] the weight jurors likely gave to his conclusion that the 'case was solved.'" Opinion, 13.

b. *The court of appeals agreed the trial court improperly allowed a prolonged description of Talbott's arrest 30 years after the murders.*

Detective Scharf also testified at length regarding his arrest of Talbott over 30 years after Van Cuylenborg's and Cook's deaths. RP 1679-84. Scharf explained he went to arrest Talbott at his workplace on May 17, 2018, accompanied by several backup units. RP 1679-81. Scharf told Talbott only that he was with the sheriff's office, but not which one, and told Talbott nothing about the investigation. RP 1681. Scharf testified Talbott twice refused to provide his identification, which prompted Scharf to inform Talbott he was under arrest for murder and "to signal my backup units to move in." RP 1681-82. The trial court overruled a defense objection to relevance based on the prosecution's representation that the testimony went to "state of mind." RP 1682-83.

The inquiry into Talbott's arrest continued. Detective Scharf explained, "I told him to turn around and put his hands behind his back, and he didn't comply." RP 1683. Scharf testified he reiterated his command and Talbott again "didn't comply." RP

1683. Scharf explained, "I said I told you you're under arrest, and with my left hand, I reached out, and spun his right shoulder to turn him around, and at that point he finally did comply." RP 1683. Scharf went on to explain Talbott's shoulders were so broad that he needed another set of handcuffs to restrain him. RP 1683-84.

The defense objected to relevance again and, outside the presence of the jury, objected to the prosecution's attempt "to make Mr. Talbott look like a villain and a criminal by describing the manner in which he is arrested." RP 1684. The prosecution admitted it sought to elicit details regarding Talbott's arrest "to demonstrate his state of mind." RP 1685. The court believed the initial questions "were relevant to state of mind" because "they weren't oral statements," but admitted, "I have some concern that some of what we've been hearing could be used by the jury in a way that is not relevant." RP 1686. The court instructed the prosecution to "to wrap this up more quickly," but did not sustain the defense objection or strike any of the testimony. RP 1686-87.

The court of appeals again agreed with Talbott that the prosecution failed to demonstrate the necessary "'reasonable and substantive inference' between Talbott's actions and consciousness of guilt." Opinion, 15. The court recognized "the significant passage of time between the murders and Talbott's arrest"—30 years—"undercuts any relevance with regard to consciousness of guilt." Opinion, 15. The court of appeals therefore held there was "so little probative value in the evidence of Talbott's arrest that the court abused its discretion in admitting the testimony." Opinion, 15.

c. *The court of appeals agreed there were multiple instances of prosecutorial misconduct in closing and rebuttal arguments*.

At the very beginning of closing argument, the prosecutor speculated about Cook's and Van Cuylenborg's hypothetical futures, inviting the jury to step into the shoes of not just Cook and Van Cuylenborg, but their grieving family members, as well:

> Tanya was 18, and Jay was 20 in November of 1987. Today, Tanya would be 50, Jay would be 52. What would their lives have looked like?

> At this young age, all of life's important decisions were still in front of them. Would they go to college? Or University? They were Canadian, after all. What would they choose as a career? What friends would they make along the way? Would they travel the world? Would they marry? Would they have children? If so, how many? Boys? Girls? These are all questions that their family and friends have asked more than once in the softer moments. But there are also questions that they have asked over and over again over the past 31 years, questions that frame their grief and their loss.

RP 1906-07. The court of appeals agreed with Talbott that "[t]his argument improperly appealed to the jury's passion and prejudice in addition to inviting the jury to speculate on evidence outside the record." Opinion, 20.

The prosecution revisited this theme in rebuttal, asking the jury to deliver justice for Cook's and Van Cuylenborg's families:

> And you are all experienced and intelligent enough to know that the decision you are about to make will have a significant impact on people's lives. On Mr. Talbott's life. On his friends and family. *On the lives of the friends and family of Tanya van Cuylenborg and Jay Cook, who have been waiting for justice for 30-something years*. You know this. And you recognize the weight --

RP 1977-78 (emphasis added). The defense objected to improper rebuttal, but the trial court "allow[ed] a little leeway here." RP 1978. The court of appeals likewise agreed with Talbott that "[t]his argument worked to appeal to the emotions of the jurors, rather than reminding them of their duty to weigh the evidence and the law and come to a logical conclusion as to the State's burden." Opinion, 19-20.

The prosecutor also made reference to the AIDS crisis and speculated how it might have impacted Van Cuylenborg's choices:

> We also know, this is 1987. And the presence of semen would suggest, especially on her vaginal swab, that this sexual encounter occurred without a condom. At the height of the AIDS crisis in 1987. Under what circumstances, again, how plausible is it that she would have a consensual sexual encounter with a stranger that night under those circumstances?

RP 1929. The court of appeals agreed with Talbott that "[t]his comment plainly refers to facts outside of the evidence. There was no evidence presented during trial regarding the AIDS crisis generally, or any evidence that Van Cuylenborg was fearful of HIV or AIDS, or that the global health crisis surrounding the

virus impacted her sexual decision-making." Opinion, 21 (footnote omitted).

Finally, the prosecutor in rebuttal questioned why Talbott would vigorously cross-examine the print examiner as he did if the sexual encounter with Van Cuylenborg had been consensual:

> That the defense response, both in the course of the trial and in closing argument, to the fingerprint or palm print evidence is interesting. Because if the theory that the defense wants you to accept is that at some point, under some circumstances, beyond comprehension, Mr. Talbott and Tanya met and had a consensual sexual encounter, then why are we so worried about his palm print on the van? If there is this innocent alternative explanation for why his semen is here, which again, we haven't heard, then why are we so worried about the palm print? Why expend so much energy attacking the witness on the stand, and trying to discredit the evidence in closing argument if it's just part of this innocent alternative explanation for their encounter?

RP 1986. The court of appeals agreed with Talbott that "[t]his argument by the State was an improper comment on Talbott's constitutional right to confront and cross-examine witnesses." Opinion, 23. The court held "[o]ffering an innocent explanation

for certain evidence is not a waiver of the right to vigorously challenge the State's witnesses and evidence." Opinion, 23.

The only prosecutorial misconduct claim of Talbott's that the court of appeals rejected was a burden shifting challenge to the prosecutor's argument that was "no evidence whatsoever of a consensual sexual counter." RP 1929-30 (closing), 1983 (rebuttal, same). The prosecutor went as far as to argue, "[Defense counsel] mentioned again and again in her closing argument this innocent explanation, this innocent alternative explanation for why Mr. Talbott's DNA, his semen, would be on Tanya. Where is it? What is it? Have you heard it? Because there is no evidence of anything but rape." RP 1983. The court of appeals held these arguments were a fair response to the defense's argument in closing that there was an innocent explanation for Talbott's DNA. Opinion, 22. This conclusion warrants review under RAP 13.4(b)(3).

d. *Despite these several errors in a case with "conflicting evidence and gaps in the State's case," the court of appeals did not find there to be cumulative error*.

The cumulative error doctrine "applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). Additionally, "'the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)).

Despite finding that multiple errors occurred at Talbott's trial, the court of appeals nevertheless held the cumulative error doctrine did not require reversal.[1] Opinion, 28. This holding is

[1] The court of appeals initially did not even address Talbott's cumulative error argument, doing so only after Talbott moved for reconsideration. 12/4/23 Opinion, 30 n.8.

untenable, particularly in light of the court's recognition of "conflicting evidence and gaps in the State's case." Opinion, 5. The court criticized the prosecution's theory of the case as resting "on a number of presumptions about the relationship between the couple which simply cannot be known" and being "undercut by testimony that reflects the pair had been dating only four months and 'had been having some problems lately.'" Opinion, 6. The court even chastised the prosecution for the repeated misconduct and took the "opportunity to remind the State of its duty to the accused under the law to refrain from improper arguments." Opinion, 24.

This is not the kind of case where multiple trial errors can be swept under the rug. Talbott elected not to testify. The irrelevant testimony regarding his arrest was the only insight jurors had into his supposed state of mind. The obvious purpose of the testimony was to suggest Talbott tried to conceal his identity and resist arrest because he knew he was guilty of the murders. Indeed, the prosecution emphasized the evidence for

that very purpose in rebuttal argument. RP 1976. Searching for an explanation from Talbott, jurors likely gave significant weight to the speculation into his state of mind at the time of his arrest. Additionally, by the court of appeals' own recognition, the jury likely gave great weight to Detective Scharf's improper opinion that the DNA match meant "the case was solved." RP 1678.

On top of these errors, the pervasive prosecutorial misconduct inflamed the passion and prejudice of the jury, inviting jurors to imagine the lives Cook and Van Cuylenborg might have led and evoking sympathy for their grieving families. The prosecutor referred to facts not in evidence, sparking jurors' fears of the AIDS epidemic. The prosecutor then penalized Talbott for exercising his constitutional right to subject the prosecution's witnesses to the crucible of cross-examination. This misconduct encouraged the jury to infer Talbott's consciousness of guilt from his cross-examination—again, incredibly harmful given Talbott's decision not to testify along with the improperly admitted arrest evidence.

Review is appropriate under RAP 13.4(b)(3), where these multiple errors undermined the integrity of Talbott's trial, and the result is Talbott serving life without parole.

3. The trial court improperly excluded other suspect evidence that another person confessed to the murders.

The trial court excluded evidence that another suspect confessed to an associate that he and his brother (the Maltos brothers) killed Cook and Van Cuylenborg. 2RP 128-32. The brothers knew an unusual detail about the Cook murder—that a cigarette pack had been stuffed down his throat. 2RP 128. Another informant also identified the brothers as the killers. 2RP 128. Law enforcement investigated the Maltos brothers but ultimately excluded them as suspects because of no DNA match. 2RP 129.

On appeal, Talbott asserted the trial court's ruling violated his Sixth Amendment right to present a defense. Br. of Appellant, 28-41. Talbott argued a confession directly connects a person to the crime and "tend[ed] to create reasonable doubt" as to his guilt.

State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). Combined with the brothers being identified by another informant and knowing an unusual detail about the Cook murder, the evidence established a nonspeculative link between the Maltos brothers and the murders.

Alternatively, Talbott argued, even if the Maltos confession was not admissible as other suspect evidence, it was admissible to impeach the police investigation. Br. of Appellant, 41-44. A key component of Talbott's defense was that law enforcement developed tunnel vision, focusing singularly on finding a DNA match, to the exclusion of all other potential suspects. Well-established law holds the accused has the right to expose inadequacies of the police investigation. Kyles v. Whitley, 514 U.S. 419, 446, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

The court of appeals held the defense's offer of proof regarding the Maltos brothers was "lacking in that the connections are too attenuated and do not meet the baseline standard of admissibility." Opinion, 10. The court therefore held the defense

failed to establish the relevance of the proffered testimony and so the trial court properly excluded it. Opinion, 10. Given the implications for Talbott's constitutional right to present a defense, this holding warrants review under RAP 13.4(b)(3).

4. This Court should also accept review of the issues Talbott raised in his Statement of Additional Grounds for Review.

In his Statement of Additional Grounds, Talbott advanced several arguments, including: (1) the transcripts from his trial are incomplete and inaccurate (SAG, 2-4, 13); (2) there was additional evidence of other suspects that should have been investigated and admitted at trial, especially after the prosecution opened the door to that evidence (SAG, 7-9); (3) defense counsel was ineffective in multiple ways, including failing to obtain security footage of Talbott's arrest, failing to obtain his prior employment records to impeach a state's witness, and failing to adequately cross-examine the state's DNA expert (SAG, 9-11); and (4) the prosecutor committed misconduct by repeating the word "rape" 25 times in closing argument and defense counsel was ineffective for failing

to object (SAG, 11-13). The court of appeals rejected Talbott's arguments. Opinion, 28-31. Talbott also respectfully requests review of these issues.

E. CONCLUSION

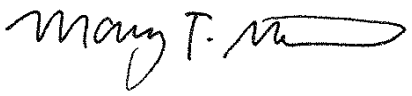
For the reasons discussed, this Court should grant review and reverse the court of appeals.

DATED this 12th day of March, 2024.

I certify this document contains 4,958 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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Appendix A

FILED
2/12/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM EARL TALBOTT II, Appellant.	No. 80334-4-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — William Earl Talbott II appealed from a guilty verdict on two counts of aggravated murder in the first degree, asserting numerous evidentiary and constitutional errors. On remand from the Supreme Court, we hold that Talbott fails to demonstrate a basis for reversal and affirm his convictions. However, we remand for the trial court to strike the erroneous firearm enhancement on Talbott's judgment and sentence.

FACTS

This case comes to us on remand from our Supreme Court. *State v. Talbott* (*Talbott* II), 200 Wn.2d 731, 733, 521 P.3d 948 (2022). The underlying facts are set out in detail in this court's unpublished opinion and only briefly summarized here. *See State v. Talbott* (*Talbott* I), No. 80334-4-I, slip op. at 1-3 (Wash. Ct. App. Dec. 6, 2021) (unpublished) https://www.courts.wa.gov/opinions/pdf/803344.pdf. In November 1987, the bodies of Jay Cook and Tanya Van Cuylenborg were found in rural Snohomish and Skagit counties, respectively. *Id.* at 2. A DNA profile was

developed from semen collected from Van Cuylenborg's pants and vaginal swab; this profile was matched to Talbott through genealogy mapping nearly three decades later. *Id.* at 2-3. After a jury trial, Talbott was found guilty of two counts of aggravated murder in the first degree. *Id.* at 3. Talbott appealed, and this court reversed, holding that the seating of a juror who expressed actual bias necessitated reversal. *Id.* at 12-13. The State of Washington petitioned for review by our State Supreme Court, which was granted. *Talbott* II, 200 Wn.2d at 737. The Supreme Court reversed and held that "Talbott is not entitled to have his for-cause challenge to juror 40 considered on appeal" because he "did not attempt to strike juror 40 with an available peremptory challenge, he did not exhaust his peremptory challenges on other jurors, and he affirmatively accepted the jury panel as presented." *Id.* at 748. The Supreme Court reversed and remanded to this court "to address the claims it did not reach in its prior opinion." *Id.* We reach those issues here.

ANALYSIS

I. Sufficiency of Evidence

Under the due process clause of the federal constitution, the State must prove every element of a crime beyond a reasonable doubt. *State v. Chacon*, 192 Wn.2d 545, 549, 431 P.3d 477 (2018) (citing U.S. CONST. amend. XIV). When analyzing whether evidence is sufficient to uphold a jury's verdict, this court applies a deferential standard of review. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). We view "the evidence in the light most favorable to the State," to determine whether "any rational trier of fact could have found guilt

beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* We defer to the jury to make determinations on the credibility of witnesses, resolve conflicting evidence, and evaluate the persuasiveness of the evidence. *State v. Francisco*, 148 Wn. App. 168, 175, 199 P.3d 478 (2009). Both direct and circumstantial evidence may be considered to support the jury's verdict and "[a] trier of fact may rely exclusively upon circumstantial evidence to support its decision." *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008).

Here, Talbott was convicted of two counts of aggravated murder, one count for Van Cuylenborg and a second for Cook. The State was required to prove the following elements:

> (1) That on or about the 18th day of November, 1987, through the 24th[1] day of November, 1987, the defendant acted with intent to cause the death of [Van Cuylenborg and Cook];
> (2) That the intent to cause the death was premeditated;
> (3) That [Van Cuylenborg and Cook] died as a result of the defendant's acts; and
> (4) That any of these acts occurred in the State of Washington.

In addition to finding these elements were met, the jury found the following aggravating circumstances:

> a. There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person; or
>
> b. The murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first degree or second degree, rape in the first or second degree, or kidnapping in the first degree.

[1] The date range charged by the State as to Cook's murder was set out in the charging document and jury instructions as on or about November 18 through 26.

Talbott asserts the State failed to prove that he caused the deaths of Van Cuylenborg and Cook beyond a reasonable doubt. He concedes that he had sexual contact with Van Cuylenborg and made physical contact with the van the couple was driving, as demonstrated by the presence of his DNA on Van Cuylenborg's pants and body and his palm print found on the van's back window, but he argues this evidence is insufficient to meet the State's burden of proof as to the aggravated murder of both victims.

At trial, much of the State's case rested upon circumstantial evidence. First, the State relied on the particulars of Van Cuylenborg and Cook's trip to Washington. The couple left their homes in Victoria, B.C., on November 18 to retrieve furnace parts for Cook's father. They planned to drive to Seattle, sleep in the van overnight, purchase the parts from Gensco Inc. the next morning, and then return home to Victoria later that day, November 19. The pair took the ferry from Victoria to Port Angeles. They were seen together in two different locations as they made their way to the Bremerton ferry terminal, where they arrived at around 10:00 p.m. on November 18. Van Cuylenborg and Cook were unfamiliar with the area; they got lost on their way to the Bremerton ferry and were redirected by a store clerk in Hoodsport. Van Cuylenborg's and Cook's bodies were found in separate counties, each in a remote area, while their van was located in a third county.

Second, the State relied on the condition of the bodies when they were found. When Van Cuylenborg's body was discovered, she was nude from the waist down, wearing socks but no shoes, with her bra pushed above her breasts.

She had been shot in the back of the head, suffering "a very close contact wound." The medical examiner determined Cook's cause of death was asphyxia due to ligature strangulation. Officers found zip ties connected together at each location where Van Cuylenborg and Cook's bodies were found, as well as in the van, though neither of the victims appeared to have been bound by zip ties or any other item.

Third, the State relied on Talbott's familiarity with the general area where Cook's body was found. Talbott had previously lived seven miles from the scene and had spent time with a friend photographing the area near the Skykomish River and Monroe Correctional Complex (a state prison), several miles from the location where Cook's body was found.

Talbott correctly identifies conflicting evidence and gaps in the State's case. The only physical injury identified as to Van Cuylenborg was the gunshot wound; there was no evidence presented of vaginal trauma or ligature marks indicating she had been bound. Talbott also notes that there was no testimony that Van Cuylenborg would not have consented to sexual activity and there was an unidentified non-sperm DNA profile resulting from the vaginal swab "indicat[ing] a third person there." Van Cuylenborg was killed by a gunshot wound and Cook was strangled with a dog collar and found with a pack of cigarettes shoved down his throat; Talbott was never known to possess firearms, smoke cigarettes, or own a dog.

Throughout trial and on appeal, the State relied on the foundational argument that, because Van Cuylenborg and Cook traveled together, Van

Cuylenborg would not have had consensual sexual intercourse with Talbott and therefore Talbott must have raped Van Cuylenborg. The State's theory rested on the inference that Talbott killed both either in furtherance of, flight from, or to cover up the rape. This argument rests on a number of presumptions about the relationship between the couple which simply cannot be known and is undercut by testimony that reflects the pair had been dating only four months and "had been having some problems lately." The State also maintains Van Cuylenborg was unlikely to have sexual intercourse with a stranger because she was menstruating. However, the only evidence presented that Van Cuylenborg was menstruating was the discovery of a used tampon in the van that was never tested for DNA and therefore never conclusively determined to be hers; the autopsy report did not indicate that she was menstruating at the time of her death. Ultimately, there was no evidence regarding Van Cuylenborg's sexual interests, proclivities, practices, or desires.

"'Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.'" *Jackson*, 145 Wn. App. at 818 (internal quotation marks omitted) (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.01, at 124 (2d ed. 1994). Our case law permits the jury to rely entirely on this type of evidence in reaching its verdict. *Id.* Further, under our well-established jurisprudence, we must "defer to the trier of fact on issues of conflicting testimony, witness credibility and persuasiveness of the evidence." *State v. Higgs*, 177 Wn. App. 414, 436, 311 P.3d 1266 (2013); *see also*, *e.g.*, *State*

v. Merritt, 200 Wn. App. 398, 408, 402 P.3d 862 (2017), *State v. Bryant*, 142 Wash. 417, 418-19, 253 P. 450 (1927). Accordingly, we defer to the jury here to navigate the conflicting evidence and evaluate its overall persuasiveness.

Under our deferential standard of review, there is sufficient evidence in the record for a rational juror to find the State met its burden of proof. A reasonable juror could have agreed with the State's theory of the case that, based on the DNA evidence, condition of Van Cuylenborg's body, and details of her trip with Cook, Talbott raped Van Cuylenborg and subsequently shot and killed her. A rational trier of fact could have likewise found Talbott committed the murder in the course of, furtherance of, or in immediate flight from the rape of Van Cuylenborg. Further, a reasonable juror could have agreed with the State's theory that Talbott killed Cook based on the connection between the victims and scenes. A rational juror could have found Talbott committed both murders as part of a common scheme or plan or as the result of a single act. Viewing all evidence and reasonable inferences in the light most favorable to the State, a reasonable juror could have found the State met its burden to prove the elements of the crimes as well as the aggravators.

II. Exclusion of Evidence of Other Suspects

Talbott next alleges the trial court erred by excluding other suspect evidence, infringing on his right to present a defense. The United States Constitution and our state constitution guarantee all defendants the right to present testimony in their own defense. *State v. Broussard*, 25 Wn. App. 2d. 781, 785, 525 P.3d 615 (2023). However, this right "is not absolute" and "does not extend

to irrelevant or inadmissible evidence." *State v. Strizheus*, 163 Wn. App. 820, 830, 262 P.3d 100 (2011). Generally, irrelevant evidence is inadmissible. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

We apply "a two-step standard of review when considering whether an evidentiary decision violated a defendant's due process 'right to present a defense.'" *Broussard*, 25 Wn. App. 2d at 786 (quoting *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019)). First, we "review the trial court's individual evidentiary rulings for an abuse of discretion" and then "consider de novo the constitutional question" of whether those rulings deprived the accused of their right to present a defense. *Arndt*, 194 Wn.2d at 797-98. This court only reaches step two, the constitutional question, "if the ruling was either within the trial court's discretion, or an abuse of discretion but harmless." *Broussard*, 25 Wn. App. 2d at 786.

The right to present a defense is not absolute; the evidence the accused seeks to admit must be at least minimally relevant. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime." *State v. DeJesus*, 7 Wn. App. 2d 849, 866, 436 P.3d 834 (2019) (internal quotation marks omitted) (quoting *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014)). Essentially, this requires "a nonspeculative link between the other suspect and the charged crime." *Franklin*, 180 Wn.2d at

381. "This inquiry, properly conducted, focuses on whether the evidence offered tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the guilt of the third party beyond a reasonable doubt." *DeJesus*, 7 Wn. App. 2d at 866. The defendant bears the burden to establish other suspect evidence is admissible. *Strizheus*, 163 Wn. App. at 830.

During Talbott's cross-examination of former Snohomish County Sheriff's Department (SCSD) Detective Gregg Rinta, counsel sought to elicit testimony about two brothers who had been suspects early in the investigation, but whom the police ultimately ruled out because they did not match the DNA profiles. An informant had reported to his parole officer that a friend told him an individual had confessed that he and his brother "killed the two kids." Talbott's counsel argued that tips about "two brothers . . . who one of them had supposedly made some sort of confessional statement" and an informant who apparently indicated they heard a confession when they met one of the brothers in prison in 1990, provided an adequate foundation from which to elicit the other suspect evidence from Rinta. Counsel explained:

> Then there was an interview with the informant. . . . He's the one that was at the Honor Farm.[2] His parole officer stated that [the informant] might have information about the murders. [The informant] denied involvement or knowledge of the murders. Sometime later [the informant] called Johnson, who was his parole officer. [The informant] said that when Johnson had left the trailer, a friend of his . . . came over to visit. The two of them started talking, and the subject of the murders came up. [The friend] began telling [the informant] the details of the murder, including the fact that a pack of cigarettes had been stuffed down the throat of the male victim. [The friend] told [the informant] that [a pair of brothers] killed the two kids, and that [one of the brothers] had told him about it.

[2] This appears to be a reference to a now-defunct program run by the Department of Corrections which was formally titled "Washington State Reformatory Farm."

> The Court: When is the time frame for all of this?
>
> [Defense counsel]: Well, the interview that the DOC [Department of Corrections] officer has with [the informant] was October 10, 1994. That was the date Detective Rinta spoke with Johnson, who is the DOC officer, the parole officer. And this is said to him during a visit some time—it says during a visit to [the informant]'s trailer in Snohomish some time that year, referring to 19—probably 1988. So some time after he was released June 22, 1988.

The court ruled that this offer of proof was insufficient to tie the specific individuals to the case and determined that the fact that someone had escaped from Honor Farm near the time of the murder was too tenuous a connection between the brothers and the present case. However, the court did allow defense counsel to question Rinta about how many other suspects were excluded solely on the basis of DNA.

The offer of proof by the defense as to this matter is lacking in that the connections are too attenuated and do not meet the baseline standard of admissibility. An offer of proof for other suspect evidence requires a more direct and admissible connection. *See State v. Ortuno-Perez*, 196 Wn. App. 771, 786-88, 385 P.3d 218 (2016). Talbott's offer of proof to the court lacked the requisite foundation to properly introduce this other suspect evidence and, as such, the trial court did not abuse its discretion in its evidentiary ruling. Without the necessary foundation to properly raise the other suspect evidence, Talbott failed to establish the relevance of the proffered testimony. Exclusion of evidence which is not minimally relevant under ER 401 does not violate the right to present a defense, and as such there was no constitutional error here.

III. Improper Opinion Testimony

Talbott next argues SCSD Deputy James Scharf improperly opined on his guilt, invading the province of the jury. This court reviews a trial court's ruling to admit or exclude evidence for an abuse of discretion. *State v. Demery*, 133 Wn.2d 753, 758, 30 P.3d 1278 (2001). "Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant 'because it invades the exclusive province of the jury.'" *Id.* at 759 (internal quotation marks omitted) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). Both experts and lay witnesses may offer opinion testimony in certain instances. *See* ER 701; ER 702. However, "[b]efore opinion testimony is offered, the trial court must determine its admissibility." *State v. Montgomery*, 162 Wn.2d 577, 591, 183 P.3d 267 (2008). To determine whether statements constitute impermissible opinion testimony, the court should consider the circumstances of the case, including the following: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" *Demery*, 144 Wn.2d at 759 (quoting *State v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

As a general rule, this court will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). However, a party may raise a manifest error of constitutional dimension even where there was no objection at trial. RAP 2.5(a)(3). "The defendant must identify a constitutional error and show how the alleged error actually affected the

defendant's rights at trial." *Kirkman*, 159 Wn.2d at 926-27. "It is a showing of actual prejudice that establishes the error as 'manifest,' allowing appellate review." *Id.* at 927 (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Scharf testified that he told his sergeant "that the case was solved." While the State contends this statement merely conveys the next steps taken by Scharf in his investigation, rather than an opinion on guilt, this is plainly incorrect. In *State v. Fleeks*, the trial court played a recorded interview between a detective and the defendant, wherein the detective stated "'this is probably your last chance to try to make yourself not look so cold-hearted and stuff like that.'" 25 Wn. App. 2d 341, 369, 523 P.3d 220 (2023). Our court held this statement "improperly commented on Fleeks's intent and effectually directed the jury to not believe Fleeks's self-defense theory," because the opinion "could easily appear to the jury as a belief that Fleeks was guilty of murder, not acting in self-defense" which "could interfere with the jury's ability to determine every fact beyond a reasonable doubt." *Id.* at 370. Similarly, here, Scharf's statement that "the case was solved," though perhaps made in the context of explaining what he said to his sergeant after receiving DNA results, effectively communicated to the jury that he believed Talbott committed the crime, interfering with the jury's ability to determine every fact beyond a reasonable doubt. "[A]n opinion as to the defendant's guilt is particularly prejudicial when it is expressed by a government official, such as a police officer." *State v. Thompson*, 90 Wn. App. 41, 46, 950 P.2d 977 (1998). Critically, Scharf was not just any law enforcement officer; he was the lead cold case detective and

was given leave by the court to sit with the prosecuting attorneys at counsel table throughout the trial. Scharf's prominent role in the investigation of the case and presence alongside prosecutors for the duration of the trial, which necessarily signaled his importance to the State in Talbott's apprehension and prosecution, greatly impacts the weight jurors likely gave to his conclusion that the "case was solved."

However, counsel for Talbott not only failed to object, but affirmatively used this comment to bolster their case theory in closing argument. The defense theory was that the DNA evidence that linked Talbott to Van Cuylenborg was insufficient to establish criminal activity, however law enforcement developed "tunnel vision" as to the recovered DNA and later match to Talbott. This improper comment by Scharf supported the defense theory of the case and, rather than object, counsel strategically utilized the comment in their final argument to the jury. Because it appears counsel's failure to object was a strategic one, there is no prejudice sufficient to establish a manifest error under RAP 2.5(a)(3). *See Kirkman*, 159 Wn.2d at 937. Talbott has failed to demonstrate entitlement to relief on this issue.

IV. Evidence of Arrest

Talbott next contends the trial court abused its discretion when it admitted Scharf's prolonged description of his arrest. A trial court's ruling "to admit or exclude evidence is reviewed for an abuse of discretion." *State v. Scherner*, 153 Wn. App. 621, 656, 225 P.3d 248 (2009). As a preliminary matter, in its response brief, the State argues Talbott did not preserve this issue because counsel's objection was based on relevance, rather than objecting that "this evidence was

not relevant *as evidence of flight*." (Emphasis added.) The State is incorrect. "The propriety of an evidence ruling will be examined on appeal if the specific basis for the objection is 'apparent from the context.'" *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (quoting *State v. Pittman*, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)). Trial counsel need not "cite a particular rule of evidence," so long as the legal basis for the objection "can be inferred from the context of the objection made below." *Id.* Here, counsel for Talbott objected "as to relevance." The court overruled the objection, and Scharf continued detailing his arrest of Talbott, drawing another objection, again based on relevance. Counsel then explained that "there is no relevance to doing a second-by-second recap of my client being handcuffed and arrested," and "[t]his is just a way to make Mr. Talbott look like a villain and a criminal by describing the manner in which he is arrested." The precise basis for the defense objection is abundantly clear from the record.

Evidence must be relevant to be admissible. ER 402. "Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'" *State v. McDaniel*, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010) (internal quotation marks omitted) (quoting *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001)). This court will not accept "[p]yramiding vague inference upon vague inference [to] supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn." *State v. Bruton*, 66 Wn.2d 111, 113, 401 P.2d 340 (1965). Further, even admissible evidence of

flight "tends to be only marginally probative as to the ultimate issue of guilt or innocence." *Freeburg*, 105 Wn. App. at 498. The Court of Appeals has analyzed the admissibility of evidence of flight under both ER 403 and ER 404(b). *See Id.* at 497-98 (ER 404(b)); *McDaniel*, 155 Wn. App. at 853-54 (ER 403). Both appear in our state rules of evidence underneath the title "Relevancy and Its Limits." Counsel's objection that the evidence was not relevant was sufficient to preserve this issue; the basis for the objection is both clear from the record and sufficient for this court's review.

The State failed to demonstrate a "reasonable and substantive inference" between Talbott's actions and consciousness of guilt. Though Talbott initially refused to provide identification and failed to immediately turn around and put his hands behind his back,[3] Talbott did not flee and complied with commands after Scharf moved to physically engage him. Further, the significant passage of time between the murders and Talbott's arrest undercuts any relevance with regard to consciousness of guilt. In *McDaniel*, the court held evidence that a defendant resisted an arrest which took place nine months after the crimes had occurred made any inference as to consciousness of guilt too speculative. 155 Wn. App. at 855. Here, Talbott was arrested 30 years after the crimes took place. There is so little probative value in the evidence of Talbott's arrest that the court abused its discretion in admitting the testimony.

[3] Scharf testified that, upon approaching Talbott at his place of employment, he had identified himself as "Detective Scharf from the Sheriff's Office, but [] didn't tell him which sheriff's office," nor did he explain the reason for his contact prior to asking for Talbott's identification. This context is significant in light of the State's argument that Talbott's initial noncompliance demonstrated consciousness of guilt.

However, an evidentiary error only requires reversal where, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Because the probative value of the testimony was so low, the likelihood that it affected the outcome of the trial is also low. Talbott failed to meet his burden to demonstrate prejudice given that his conduct as described by Scharf was innocuous to the point that it was not relevant, which renders it unlikely to have materially affected the outcome of the trial.

V. Prosecutorial Misconduct

Talbott asserts that repeated prosecutorial misconduct during closing argument and rebuttal deprived him of a fair trial. A prosecutor is required to "seek convictions based only on probative evidence and sound reason." *State v. Castañeda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991). The State "'should not use arguments calculated to inflame the passions or prejudices of the jury.'" *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE std. 3-5.8(c) (2d ed. 1980)). While the prosecutor has "wide latitude to argue reasonable inferences from the evidence, it is misconduct for a prosecutor to urge the jury to decide a case based on evidence outside the record." *State v. Teas*, 10 Wn. App. 2d 111, 126, 447 P.3d 606 (2019). It is also misconduct for a prosecutor to suggest a defendant has a duty to present evidence or otherwise shift "the State's burden to prove guilt beyond a reasonable doubt." *State v. Osman*, 192 Wn. App. 355, 366, 366 P.3d 956 (2016). "However, a prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case." *Id.* at 367. A prosecutor

may not take any "action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (quoting *United States v. Jackson*, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)).

Talbott assigns error to a number of remarks by the State. First, he challenges the prosecutor's statements at the beginning of closing argument that asked the jury what Van Cuylenborg and Cook's lives might have looked like had they not died. He further argues this misconduct was repeated on rebuttal, where the prosecutor asserted the decision the jury made would have a significant impact on the lives of the defendant, the victims' families, and the victims' friends. Talbott contends these arguments were made solely to trigger an emotional response and appeal to the sympathy of the jurors. Talbott next challenges the prosecutor's reference to the AIDS[4] epidemic in the 1980s as not based on evidence contained within the trial record. Talbott finally avers the prosecutor made several statements that shifted the burden of proof, and improperly commented on Talbott's exercise of his rights to silence and to present a defense.

A. Preservation

In a prosecutorial misconduct claim, the burden is on the defendant to establish that the challenged conduct was improper and prejudicial in the context of the entire record. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). To demonstrate prejudice, Talbott must show that there exists a

[4] Acquired immunodeficiency syndrome.

substantial likelihood that the misconduct affected the jury's verdict. *Id.* "Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (internal quotation marks omitted) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)).

While Talbott concedes that he did not make contemporaneous objections to many of the arguments he now challenges on appeal, he avers that defense counsel's postverdict motion for a new trial under CrR 7.5, based in part on those statements, preserved the errors for appellate review. However, defense counsel did timely object to the prosecutor's comment that the jury's decision would significantly impact the friends and family of the victims on the basis that it was not rebuttal. Talbott did not challenge the prosecutor's comment about the AIDS epidemic in his CrR 7.5 motion.

Talbott cites *State v. Lindsay* to argue a contemporaneous objection is not the only way to preserve an issue for the lower standard on review, the analysis does apply here. 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014). In *Lindsay*, our Supreme Court determined that the defense motion for mistrial directly following the prosecutor's closing argument, but prior to deliberation, had the same functional effect as a contemporaneous objection. *Id.* at 430-31. However, the trial court in *Lindsay* still had an opportunity to cure via instruction. *See Id.* Talbott's motion for arrest from judgment and a new trial under CrR 7.4 and 7.5 is

distinct from an objection at trial or a motion prior to the jury's deliberation in that it was brought postverdict, and provided the trial court no opportunity to give a curative instruction before the jury determined its verdict.

Accordingly, only the prosecutor's comment during rebuttal closing, that the jury's decision would significantly impact the friends and family of the victims, was preserved such that the lower standard of review applies.

B. Specific Claims of Prosecutorial Misconduct

"Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Having determined which test applies for each instance of alleged prosecutorial misconduct, we now turn to Talbott's specific challenges to determine if he is entitled to appellate relief on these bases.

i. Impact of Verdict on Friends and Family of Victims

The only comment by the State to which Talbott contemporaneously objected was the prosecutor stating to the jury that

> you are all experienced and intelligent enough to know that the decision you are about to make will have a significant impact on people's lives. On Mr. Talbott's life. On his friends and family. On the lives of the friends and family of Tanya Van Cuylenborg and Jay Cook, who have been waiting for justice for 30-something years. You know this.

Defense counsel objected that the statement was "not rebuttal." The trial court agreed, but stated, "I'm going to allow a little leeway here." This argument worked to appeal to the emotions of the jurors, rather than reminding them of their duty to

weigh the evidence and the law and come to a logical conclusion as to the State's burden. However, Talbott fails to establish prejudice from this argument as the members of the jury were surely aware that their deliberation and verdict would have an impact on the lives of the numerous parties involved in this case.

ii. Speculating on Victims' Hypothetical Futures

The prosecutor began his closing argument by asking the jury to imagine what the lives of Van Cuylenborg and Cook would have been like had the crimes not occurred:

> Tanya was 18, and Jay was 20 in November of 1987. Today, Tanya would be 50, Jay would be 52. What would their lives have looked like?
>
> At this young age, all of life's important decisions were still in front of them. Would they go to college? Or University? They were Canadian, after all. What would they choose as a career? What friends would they make along the way? Would they travel the world? Would they marry? Would they have children? If so, how many? Boys? Girls? These are all questions that their family and friends have asked more than once in the softer moments. But there are also questions that they have asked over and over again over the past 31 years, questions that frame their grief and loss.

This argument improperly appealed to the jury's passion and prejudice in addition to inviting the jury to speculate on evidence outside the record. *See State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1168 (2012). However, any prejudice could have been cured by an instruction from the court in response to a timely objection by the defense. The court instructed the jury that "the lawyers' statements are not evidence," and they "must disregard any remark, statement, or argument that is not supported by the evidence or the law." The jury was also instructed to "not let your emotions overcome your rational thought process," and

instead to "reach your decision based on the facts proved to you and on the law given to you." A curative instruction from the court would have adequately addressed any prejudice from the prosecutor's improper comment.

iii. Reference to AIDS Crisis

Talbott also points this court to the prosecutor's reference to the impact of AIDS and, in particular, fear around the disease which was prevalent in the 1980s:

> We also know, this is 1987. And the presence of semen would suggest, especially on her vaginal swab, that this sexual encounter occurred without a condom. At the height of the AIDS crisis in 1987. Under what circumstances, again, how plausible is it that she would have a consensual sexual encounter with a stranger that night under those circumstances?

This comment plainly refers to facts outside of the evidence. There was no evidence presented during trial regarding the AIDS crisis generally, or any evidence that Van Cuylenborg was fearful of HIV[5] or AIDS, or that the global health crisis surrounding the virus impacted her sexual decision-making. However, any prejudice could have been cured by an instruction or admonition by the court, reminding the jury it could only consider the evidence presented and to disregard the prosecutor's reference to matters outside the record.

iv. Burden Shifting and Evidence of Consent

Talbott argues the prosecutor improperly shifted the burden of proof when he commented that there was no evidence of a consensual sexual encounter. The prosecutor argued:

> [Defense counsel] mentioned again and again in her closing

[5] Human immunodeficiency virus. If left untreated, HIV can lead to the development of AIDS.

> argument this innocent explanation, this innocent alternative explanation for why Mr. Talbott's DNA, his semen, would be on Tanya. Where is it? What is it? Have you heard it? Because there is no evidence of anything but rape. To suggest, again, that there was a consensual encounter between the defendant and Tanya runs contrary to all of the evidence.

The prosecutor reinforced this by stating, "There is simply no evidence to suggest a consensual sexual encounter."

Again, the accused "has no duty to present evidence, and it is error for the prosecutor to suggest otherwise." *Osman*, 192 Wn. App. at 366. A prosecutor's actions constitute misconduct where they "shift[] the State's burden to prove guilt beyond a reasonable doubt." *Id.* Generally, the prosecutor may not "'comment on the lack of defense evidence because the defense has no duty to present evidence.'" *State v. Fedoruk*, 184 Wn. App. 866, 887, 339 P.3d 233 (2014) (quoting *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)). A prosecutor may, however, "point out the improbability" of the defense's theory of the case, *Osman*, 192 Wn. App. at 367, or "argue that the evidence does not support the defense theory." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

The prosecutor's comments here respond to defense counsel's argument that "there is an innocent explanation for [Talbott's] DNA," and "there are innocent explanations to why that DNA is present on [Van Cuylenborg], associated with [Van Cuylenborg]." Considering the evidence and closing arguments as a whole, the prosecutor's comments on this issue are directed at undercutting the explanation provided in Talbott's closing argument which purported to demonstrate consensual sexual activity. More critically, even if the statements were improper,

an instruction from the court as to the State's burden of proof could have cured any prejudice.

v. Comment on Cross-Examination of Print Analyst

Finally, the prosecutor questioned why Talbott would cross-examine the fingerprint analyst at length during the presentation of evidence if the sexual encounter with Van Cuylenborg had indeed been consensual. The prosecutor stated:

> That the defense responds, both in the course of the trial and in closing argument, to the fingerprint or palm print evidence is interesting. Because if the theory that the defense wants you to accept is that at some point, under some circumstances, beyond comprehension, Mr. Talbott and [Van Cuylenborg] met and had a consensual sexual encounter, then why are we so worried about his palm print on the van? If there is this innocent alternative explanation for why his semen is here, which again, we haven't heard, then why are we so worried about the palm print? Why expend so much energy attacking the witness on the stand, and trying to discredit the evidence in closing argument if it's just part of this innocent alternative explanation for their encounter?

This argument by the State was an improper comment on Talbott's constitutional right to confront and cross-examine witnesses. *See Rupe*, 101 Wn.2d at 705 ("[T]he State may not draw adverse inferences from the exercise of a constitutional right."). Offering an innocent explanation for certain evidence is not a waiver of the right to vigorously challenge the State's witnesses and evidence. "Cross-examination is the principal means by which the believability of a witness and the truth of [their] testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The confrontation of witnesses "'helps assure the accuracy of the fact-finding process.'" *State v. Chicas Carballo*,

17 Wn. App. 2d 337, 346, 486 P.3d 142 (2021) (quoting *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)). This misconduct by the State, however, could have been cured by an instruction from the court which directed the jury to disregard the comment and reminded jurors that they may not draw an adverse conclusion from Talbott's exercise of his constitutional rights.

Ultimately, Talbott fails to meet his heightened burden of demonstrating that the prosecutor's improper conduct in closing argument had a substantial likelihood of affecting the verdict and that such prejudice could not have been cured with an instruction had counsel timely objected.[6] *State v. Emery*, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012). However, we take this opportunity to remind the State of its duty to the accused under the law to refrain from improper arguments. A prosecutor is "the representative of the people in a quasijudicial capacity in a search for justice," and as such "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Monday*, 171 Wn.2d at 676.

VI. Ineffective Assistance of Counsel

In a related assignment of error, Talbott asserts counsel was ineffective for failing to object to those comments he identifies as prosecutorial misconduct. In a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's performance was deficient and that the deficient performance resulted

[6] Talbott also argues that the cumulative effect of the prosecutor's improper comments in closing and rebuttal argument "incurably prejudiced the jury." "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), *adhered to on recons.,* 173 Wn. App. 1027 (2013). Here, just as the improper comments were not prejudicial individually, they were not so repetitive or flagrant as to have caused incurable prejudice collectively. Rather, any initial prejudice that may have resulted could have been cured by jury instructions.

in prejudice. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is considered deficient if it falls "below an objective standard of reasonableness based on the consideration of all the circumstances." *McFarland*, 127 Wn.2d. at 334-35. "Specifically, 'the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *McFarland*, 127 Wn.2d at 336). Trial counsel's decision about when, and how, to object is a "classic example of trial tactics." *Id*. The defendant must demonstrate that, had counsel made the proposed objection, it would have succeeded. *Id.* A showing of prejudice requires a reasonable "probability that, 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "Courts engage in a strong presumption counsel's representation was effective." *McFarland*, 127 Wn.2d at 335.

Here, counsel affirmatively stated the decision not to object was a strategic one. In Talbott's postverdict motion for a new trial, defense counsel explained that he "was faced with a Hobson's choice of risking alienation of the [jury] by objecting," particularly where the court had given wide latitude to the prosecutor and, as such, did not object to other instances of misconduct.[7] The decision to forego an objection due to the risk of it being overruled, therefore calling further

[7] For example, the court agreed the prosecutor's argument that the jury's decision would impact the victims' family and friends was "not technically rebuttal" but had expressly ruled to "allow a little leeway" to the prosecutor.

attention to the matter at the heart of the objection, is a classic strategic choice. Given the risk of alienating the jury, the choice not to object during closing and then pursue relief through a postverdict motion, while unsuccessful, was a reasonable tactical decision. Because he fails to demonstrate deficient performance, Talbott has not met his burden under *Strickland* to establish ineffective assistance of counsel.

VII. Firearm Enhancement

Talbott next asserts the trial court erroneously included a firearm enhancement in the sentence it imposed, as recorded in the judgment and sentence. The jury found Talbott was armed with a firearm during the commission of the crimes. However, a firearm enhancement only applies to "felony crimes committed after July 23, 1995." RCW 9.94A.533(3). The jury expressly found both crimes were committed in November 1987. Accordingly, the statutory firearm enhancement does not apply to the crimes at issue here as a matter of law. The State properly concedes this was error. We remand for the trial court to strike the firearm enhancement and correct the judgment and sentence.

VIII. Youthfulness

In supplemental briefing, Talbott contends he is entitled to a new sentencing hearing so the judge may consider his youthfulness[8] under *In re Personal Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021). In *Monschke*, our State Supreme Court held mandatory sentences of life without the possibility of parole

[8] Talbott was 24 years old at the time the crimes were committed.

are unconstitutional when imposed on youthful offenders because sentencing courts must retain discretion to consider the mitigating qualifies of youth. 197 Wn.2d at 325-26. However, *Monschke* dealt with 19- and 20-year-old defendants; the Supreme Court has not extended its application to include individuals up to 24 years of age, like Talbott was. As an intermediate appellate court, we decline to extend the temporal bounds of our Supreme Court's holding from *Monschke* to include 24-year-olds.

IX. Cumulative Error

"Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *Emery*, 174 Wn.2d at 766. However, "[t]hat doctrine applies only if there were several trial errors, none of which standing alone is sufficient to warrant reversal, that when combined may have denied the defendant a fair trial." *State v. Hartzell*, 156 Wn. App. 918, 948, 237 P.3d 928 (2010).

Talbott claims that the cumulative error doctrine applies because "multiple errors occurred at his trial." We have identified three errors in our review of Talbott's case. While we note Scharf's improper testimony where he told his sergeant "the case was solved," that error was not preserved based on the lack of objection and failure to establish manifest constitutional error under RAP 2.5(a)(3), based largely on the fact that defense counsel strategically utilized this testimony which supported Talbott's theory of the case. We next concluded that the trial court erred in allowing Scharf's prolonged description of Talbott's arrest, however that error was not only harmless, but also "innocuous to the point that it was not

relevant." Finally, we identified improper comments by the State in closing argument, however, the sole claim of prosecutorial misconduct that was not waived was based on the prosecutor's comment to the jury regarding the impact that the verdict would have on the friends and family of the victims. While this statement was an improper appeal to the jurors' emotions, Talbott failed to establish any prejudice and we plainly noted that the jurors were already aware of the practical implications of any verdict they reached.

Accordingly, we only consider the impact of two preserved harmless errors under the framework of cumulative error; Scharf's testimony concerning Talbott's arrest and the prosecutor's comment regarding the significant impact of the verdict. Even when combined, these errors were not so significant as to result in a fundamentally unfair trial. With the two harmless errors at issue here, the cumulative error doctrine is simply inapplicable. *See State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006) ("The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial."). On this record, Talbott fails to establish that these errors "produced[d] a trial that was fundamentally unfair." *Emery*, 174 Wn.2d at 766.

X. Statement of Additional Grounds for Review

Talbott raises a variety of issues in his pro se statement of additional grounds for review (SAG). Under RAP 10.10(a), a defendant may file an additional brief "and discuss those matters related to the decision under review that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." We will "only consider arguments that are not repetitive of

briefing." *State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496 (2013). A defendant may not raise "issues that involve facts or evidence not in the record" in a SAG, but must raise those issues in a personal restraint petition. *Id.* While "[r]eference to the record and citation to authorities are not necessary or required," a defendant must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). We decline to reach Talbott's argument regarding incomplete or inaccurate verbatim reports of proceedings as it references evidence not in the record. We also decline to reach Talbott's pro se assignment of error regarding the insufficiency of evidence as repetitive of his counsel's briefing already analyzed herein.

Talbott argues there was additional evidence of other suspects that should have led to investigation pretrial and testimony at trial. The legal nature of this assignment of error is ambiguous; it is not clear if Talbott is asserting the prosecutor committed misconduct by arguing that "tips were ruthlessly followed up on" and that "[p]rints from the van were also compared to persons of interest over the years" in light of Talbott's assertion in his SAG that there were other suspects whose prints were not compared to those on the van and other tips that were not investigated, or if he is arguing defense counsel was ineffective for failing to point out these purported contradictions. As we are unable to discern the nature and occurrence of the alleged error from Talbott's SAG, we do not consider this challenge.

Talbott also argues his trial counsel was ineffective for failing to obtain employment records for State's witness Tim McPhearson and security camera

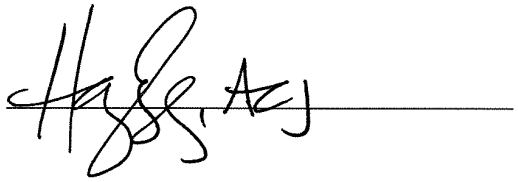
footage of his arrest, not adequately cross-examining witnesses, and failing to object to prosecutorial misconduct. Talbott does not explain how McPhearson's employment records would have been used at trial or how they would have undercut McPhearson's testimony, which was, in turn, a small portion of the lengthy trial. To the extent Talbott references facts outside the record to support this assignment of error, we may not reach that challenge. *See Calvin*, 176 Wn. App. at 26-27. As to the arrest footage, defense counsel's decision to not obtain or seek admission of arrest footage was a reasonable strategic decision given that counsel sought to exclude Scharf's testimony about Talbott's arrest as irrelevant.

Talbott also contends counsel was ineffective for failing to question forensic analyst Lisa Collins about another source of DNA found on Van Cuylenborg and failing to argue that Van Cuylenborg had another recent sexual encounter which produced the second DNA profile. However, the record represents that his defense attorney cross-examined Collins on the second DNA profile and elicited testimony that the profile was consistent with bodily fluids such as saliva or vaginal secretions. As such, counsel's performance was not deficient.

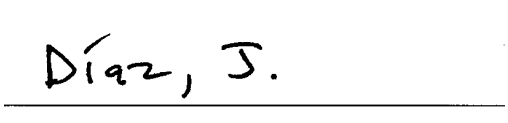
Talbott next alleges counsel was ineffective for failing to object to the prosecutor's misconduct, namely the State's use of the word "rape" over 25 times in closing argument and the prosecutor's final words in rebuttal that "Mr. Talbott bound raped, then killed Tanya Van Cuylenborg." As to the repetition of the word rape, this was proper argument and counsel's performance was therefore not deficient for failing to object. Talbott's challenge to the prosecutor's final words relies on facts outside the record and as such we may not consider it. *See Id*.

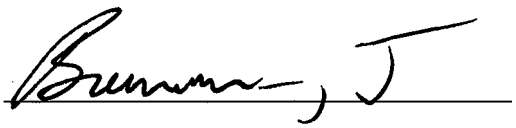
Talbott finally contends prosecutorial misconduct warrants reversal in this case. He again challenges the prosecutor's repeated use of the word "rape" and the prosecutor's final words in rebuttal, which he recalls as "Mr. Talbott bound raped, then killed Tanya Van Cuylenborg." Talbott does not argue that the number of times the word rape was used was misconduct, but that since "there were no charges of rape or forensic evidence of rape," use of the word was improper. While there was no separate charge of rape filed by the State, an aggravating circumstance based on rape was alleged in the charging document and presented to the jury. The State's theory of the case was that Talbott raped Van Cuylenborg and then killed her and Cook to cover up the rape. As such, the use of the word "rape" was proper as it was a key aspect of the State's theory of the case and evidence presented at trial. Again, Talbott's argument regarding the prosecutor's final words relies on facts outside the record and as such we may not consider it. *See Id*.

We remand for the trial court to strike the firearm enhancement from Talbott's judgment and sentence, but otherwise affirm.[9]



WE CONCUR:





[9] After Talbott's case was remanded to this court, he moved to file a supplemental opening brief, raising additional issues. This court granted his motion and authorized the State to file a response, which it did. Talbott then filed a reply brief. We exercise our discretion to not reach the supplemental assignments of error and decline to consider these additional issues.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM EARL TALBOTT II, Appellant.	No. 80334-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

Appellant filed a motion for reconsideration on December 18, 2023. This court called for an answer on December 21, 2023, which respondent filed on January 5, 2024. After review of the motion and answer, a panel of this court has determined that the motion for reconsideration shall be denied. The court has further determined that the opinion filed December 4, 2023 shall be withdrawn and a substitute opinion filed.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the opinion filed December 4, 2023 shall be withdrawn and a substitute opinion filed.

Hazelrigg, ACJ

Díaz, J.

Bremmer, J

NIELSEN KOCH & GRANNIS P.L.L.C.

March 12, 2024 - 4:09 PM

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