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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 93074-1
(COA No. 72405-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
Apr 26, 2016
Court of Appeals
Division I
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

KENNON FASTRUP,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kennon Fastrup, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Fastrup seeks review of the Court of Appeals decision dated March 28, 2016, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The court's interference in Mr. Fastrup's private communications with his attorney violated his right to counsel and his right to meaningfully participate in jury selection under the Sixth Amendment and article I, sections 21 and 22.

2. The court denied Mr. Fastrup a fair trial by admitting allegations of uncharged misconduct that was more prejudicial than probative.

3. The court improperly commented on the evidence in violation of article IV, section 14 and the due process clause of the Fourteenth Amendment.

4. The court erroneously admitted prior consistent statements of an accuser under ER 801(d)(1)(ii).

5. The cumulative prejudice resulting from the court's erroneous rulings, comments on the evidence, and interference with Mr. Fastrup's right to counsel denied him a fair trial.

D. STATEMENT OF THE CASE

Firefighters found Denise Grisby's body in the trunk of a car that had been set on fire. 6RP 32; 9RP 50; 10RP 11. The medical examiner concluded Ms. Grisby had skull fractures from two blows to the head and was dead before the fire started. 8RP 36-37.

Shortly before her death, Ms. Grisby and her boyfriend Kennon Fastrup went to Michelle Backstrom's home; Ms. Backstrom was Mr. Fastrup's former girlfriend. 6/23/14RP 6; 6RP 101-02.
Ms. Backstrom had a number of hits of heroin. *Id.* at 13, 20, 130. She heard Mr. Fastrup and Ms. Grisby arguing about money; Ms. Grisby wanted to "turn a trick" to get money to stay in a motel and get high, while Mr. Fastrup did not want Ms. Grisby to do that. *Id.* at 21-22.

Ms. Grisby and Mr. Fastrup grappled in the kitchen, and Ms. Backstrom told both to get out of her home due to the noise. *Id.* at 23. *Id.* at 23. Ms. Grisby "grabbed a hold" of Ms. Backstrom's thumb "and

she bit and she wouldn't release" it. *Id.* Ms. Backstrom hit Ms. Grisby "in the hand with a meat cleaver" and Ms. Grisby released Ms. Backstrom's thumb. *Id.*

The three adults continued arguing in the garage. 6/23/14RP 24-25, 27-28. Ms. Backstrom claimed Mr. Fastrup picked up a cable and put it around Ms. Grisby's neck. *Id.* at 29. The two struggled for ten or twenty seconds as the cable slipped. *Id.* at 29-30. Ms. Backstrom picked up a lanyard after Mr. Fastrup dropped the cable, and she put it around Ms. Grisby's neck "to hold her." *Id.* at 30. Then, Ms. Backstrom said Mr. Fastrup picked up a part of a broken flashlight and hit Ms. Grisby in the head. *Id.* at 30, 32. Ms. Grisby slumped over. *Id.* at 31. Ms. Backstrom was holding Ms. Grisby by the lanyard while this occurred. *Id.* at 32-33. Ms. Backstrom described the incident as spontaneous and without communication between her and Mr. Fastrup. *Id.* at 24-34.

Ms. Backstrom bought gasoline. 6/23/14RP 42, 54, 56. Mr. Fastrup and Ms. Backstrom drove Ms. Grisby's car to a forested area and set the car on fire, according to Ms. Backstrom. *Id.* at 57-58.

Police tracked Mr. Fastrup through his cell phone, spoke to him on the phone several times, then arrested him and Ms. Backstrom after they hid in the woods for several days. *Id.* at 67; 9RP 35-36; 11RP 78-

82, 85-86. Ms. Backstrom initially minimized her involvement but during a lengthy post-arrest interview, she said Mr. Fastrup killed Ms. Grisby. 10RP 89-93, 99-102; 11RP 24-29. Mr. Fastrup later admitted helping dispose of Ms. Grisby's body. 9RP 58, 83, 86.

Ms. Backstrom plead guilty to second degree murder in exchange for no further charges being brought against her. 6/23/14RP 87, 90-91; 7RP 83-84. She testified against Mr. Fastrup as part of the plea agreement. *Id.* Despite extensive DNA testing, the police found no forensic evidence to corroborate Ms. Backstrom's account of events. 7/1/14RP 22-23, 26-27, 30-31, 37-39.

Mr. Fastrup was charged with and convicted of first degree premeditated murder; arson in the second degree; attempting to elude the police; and a separate count of misdemeanor violation of a no contact order that involved a prior no contact order between Mr. Fastrup and Ms. Backstrom. CP 24-25.

E. ARGUMENT

1. The court impermissibly interfered with Mr. Fastrup's right to confidentially consult with his attorney during trial.

The right to counsel is a bedrock procedural guarantee of a particular kind of relationship between an accused person and his

attorney. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); U.S. Const. amend. 6; Const. art. I, § 22. Its foundation is "[t]he constitutional right to privately communicate with an attorney." *State v. Pena Fuentes*, 179 Wn.2d 808, 820, 318 P.3d 257 (2014); *see also Patterson v. Illinois*, 487 U.S. 285, 290 n.3, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth Amendment involves a "distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship").

It is "universally accepted" that effective representation cannot be had without private consultations between attorney and client. *State v. Cory*, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963). "A defendant's constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney." *Pena Fuentes*, 179 Wn.2d at 818. The confidential attorney-client relationship is "pivotal in the orderly administration of the legal system, which is the cornerstone of a just society." *In re Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003).

In addition, an accused person has a right to participate in selecting an empaneled jury. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *State v. Irby*, 170 Wn.2d 874, 884-

85, 246 P.3d 796 (2011), U.S. Const. amends. 6, 14; Const. art. I, § 22. Peremptory challenges have "deep historical roots" and the Supreme Court has found that the "peremptory challenge is a necessary part of trial by jury." *Batson*, 476 U.S. at 91; *Swain v. Alabama*, 380 U.S. 202, 212, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

During the substantive portion of jury selection where the parties asked jurors about their abilities to serve impartially for case-specific reasons, Juror 35 was individually examined because he may have heard something about the allegations. 4RP 13. After an exchange with Juror 35 in court, the judge announced that her bailiff had overheard Mr. Fastrup communicating about this juror to his lawyer. 4RP 53; CP 119-21. The bailiff believed Mr. Fastrup had indicated his personal recognition of Juror 35. 4RP 53-55. Speaking directly to Mr. Fastrup, the judge requested that the defense explain what he knew about Juror 35. 4RP 53-54. Mr. Fastrup said Juror 35 looked like someone he knew from Renton High School. *Id.*

The prosecution struck this juror in its peremptory challenges even though the juror was sympathetic to domestic violence issues. 5RP 149. Mr. Fastrup filed a motion for a new trial based on the intrusion into private attorney-client communications. CP 105-06, 111-16; CP

119-21. Defense counsel complained that Mr. Fastrup had spoken to him confidentially, in a hushed tone, and the bailiff should not have overheard or reported his conversation to the court and prosecution. CP 120. This intrusion affected jury selection and also chilled the in-court attorney-client communications throughout trial. CP 120-21. The court denied the motion without an evidentiary hearing or an explanation of its ruling. CP 117-18, 163.

Eavesdropping to acquire confidential information intended for an attorney violates the right to counsel. *Pena Fuentes*, 179 Wn.2d at 819. Prejudice is presumed and the State has the burden beyond a reasonable doubt to show the defense was not prejudiced. *Id.* at 819-20.

A bailiff is the judge's agent and is subject to the same restrictions as a judge. *State v. Johnson*, 125 Wn.App. 443, 461, 105 P.3d 85 (2005). The bailiff eavesdropped on the private conversation between Mr. Fastrup and his attorney. CP 120. The conversation was conducted in the same "hushed tone" used throughout trial. CP 120. Mr. Fastrup's remarks were not directed at the bailiff. *Id.* The bailiff relayed this private conversation to the judge, who announced it in court and required Mr. Fastrup to state his thoughts about Juror 35 on the record. 4RP 53-54. Defense counsel said the effect of the bailiff's

eavesdropping chilled attorney-client communications throughout trial, giving Mr. Fastrup a reason to fear expressing himself to his lawyer and risk that his communications would be reported to the judge. CP 120. It also gave the State a reason to strike this juror who was close to Mr. Fastrup's age and could have been sympathetic. 5RP 149.

The bailiff's intrusion into Mr. Fastrup's private communications with his lawyer interfered with his right to counsel. It prejudiced the selection of jurors, affected the attorney-client relationship during the critical phases of the jury trial, and requires a new trial. *See Pena Fuentes*, 179 Wn.2d at 819-20; *Irby*, 170 Wn.2d at 886-87. This Court should grant review.

2. By admitting unduly prejudicial evidence painting Mr. Fastrup as a violent person based on uncharged conduct, Mr. Fastrup was denied a fair trial.

a. The right to a fair trial includes the right to be tried for only the charged offense.

There is no dispute that an accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The right to a fair trial includes the

right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L.Ed. 2d 708 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence is so extremely unfair that its admission violates fundamental conceptions of justice").

"ER 404(b) is a categorical bar to admission of evidence [of a prior bad act] for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Allegations that an accused person committed uncharged misconduct, or is a mean person, are presumed inadmissible. *State v. Everybodytalksabout*, 145 Wn.2d 456, 465–68, 39 P.3d 294 (2002).

Uncharged misconduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the

accused's propensity to commit certain acts, and (3) substantial probative value outweighs its prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing *Saltarelli*, 98 Wn.2d at 362); ER 404 (b).[1]

"This analysis must be conducted on the record." *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (internal citation omitted). The "trial court must also give a limiting instruction to the jury if the evidence is admitted," when requested. *Id.*

Gunderson explained the essential analysis in which the trial court must engage before admitting uncharged allegations of misconduct. "[C]ourts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high." *Id.* at 925. There is a "heightened prejudicial effect" from the jury hearing about uncharged domestic violence." *Id.*

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[1] Under ER 404 (b):
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

b. The State's witness told the jury that Mr. Fastrup committed many uncharged criminal acts and claimed he has a propensity to be violent, mean, and controlling.

Without the required preliminary analysis, the State elicited from Ms. Backstrom unrelated incident where she had been "pistol-whipped" by Mr. Fastrup. 6/23/14RP 9. Ms. Backstrom claimed that during this uncharged incident, Mr. Fastrup "pistol-whipped me," then "he continued to beat me some more," and later "he drove me down the road from my house, and then he beat me some more and he stole my phone and wallet." *Id.*

Over defense objection, the prosecution introduced a photograph of Ms. Backstrom to further show she was badly injured due to this uncharged, unrelated incident. 7RP 122; Ex. 58. The court let the State introduce the photograph "to corroborate" that she was beaten by Mr. Fastrup even though it was not a charged offense. Ex. 58; 7RP 122-23.

This incident occurred some unspecified time before the charged offense and had no connection to Mr. Fastrup's intent to harm Ms. Grisby, but it made him look like he routinely assaults women.

Ms. Backstrom cast numerous other allegations of Mr. Fastrup's propensity to engage in wrongful acts and was a mean person. When defense counsel objected or tried to stop the witness, the court did not

intervene. This testimony was markedly prejudicial and painted Mr. Fastrup as an irredeemably bad person for reasons unrelated to his alleged involvement in the offense.

For example, Ms. Backstrom said being selfish was "the norm" for Mr. Fastrup; he "likes to hit women" and gives "women black eyes all the time"; he hung a noose in the garage "so I could commit suicide one day when he left"; and he "is a control freak. That's how he is." 7RP 47, 53, 62. Ms. Backstrom said Mr. Fastrup "abused me for three years straight. He stole everything I had. I lived in fear of him." 7RP 62. "He would hold knives to me everyday, almost." *Id.* "He robbed my house repeatedly" and "[h]e threw gasoline at my house." 7RP 62-63.

Defense counsel tried to stop Ms. Backstrom as her comments were not responding to a question but could not quiet her. Even when the court directed her to stop, she continued accusing Mr. Fastrup of uncharged violent acts. 7RP 62-63. She called Mr. Fastrup a "hateful little person." 7RP 65. She gave her opinion, "he obviously did this," despite defense counsel's efforts to end the gratuitous comments she made after answering questions. 7RP 85. The court only intervened by asking Ms. Backstrom to wait for another question, but did not sustain Mr. Fastrup's objections. 7RP 85-86; 7RP 87-88.

Ms. Backstrom complained that Mr. Fastrup had gotten her and Ms. Grisby addicted to drugs. 7RP 87. Defense counsel objected but the court did not rule on the objection, instead telling Ms. Backstrom to wait for another question. *Id.*

The State further elicited the allegation that Mr. Fastrup threatened to attack Ms. Backstrom during the trial. The court initially ruled this purported threat was "unfairly prejudicial" and insufficiently probative but reversed its ruling after the prosecution said it needed to rebut Mr. Fastrup's statement to police that he was afraid of Ms. Backstrom. 10RP 74-75. Mr. Fastrup objected. 10RP 70-71.

These numerous allegations of Mr. Fastrup engaging in violent, selfish or threatening behavior outside the charged incident were not material to an essential element but showed Mr. Fastrup as a person with a propensity for mistreating others. The court should not have admitted this inflammatory evidence and should have stricken it when it was gratuitously offered.

c. The court's comments on the evidence further undermined the fairness of the trial.

A court "*must* give a limiting instruction where evidence is admitted for one purpose but not for another and the party against

whom the evidence is admitted asks for a limiting instruction." *State v. Hartzell*, 156 Wn.App. 918, 937, 237 P.3d 928 (2010) (emphasis in original). An instruction to the jury may not convey the judge's personal opinion about the merits of a case or instruct the jury that a fact at issue has been established. *Id.* (citing *State v. Levy,* 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)). The constitution prohibits judicial comments on the evidence "to prevent the trial judge's opinion from influencing the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Const. art IV, § 16.[2]

A violation of the constitutional prohibition arises where the judge's opinion is merely implied. *Levy*, 156 Wn.2d at 721. The presumption of prejudice may be overcome only if the record affirmatively shows no prejudice could have resulted. *Id.* at 725.

Here, the judge's limiting instructions conveyed a personal opinion about the value of evidence as if it was a settled matter. CP 47; 7RP 123; 11RP 68-69. The court told the jury: "Exhibit 58 was admitted for the limited purpose of corroborating Ms. Backstrom's description of the incident involving Ms. Backstrom breaking Denise

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[2] Article IV, section 16 reads, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Grisby's windshield with a hatchet; and also that, "Officer Gaw's statement was admitted for the limited purpose of allowing the State to refute the defendant's prior statements regarding his fear of Ms. Backstrom and his inability to defend himself." CP 47; *see also* 7RP 123; 11RP 68-69.

These instructions let the jury know that Exhibit 58 (the photo of injuries unrelated to the charge) *corroborated* Ms. Backstrom's testimony and Mr. Fastrup's threatening comment (to the jail guard) about Ms. Backstrom *refuted* his statement to police. *Id.* Mr. Fastrup complained the court's instruction was "too much commenting on the evidence" and noted his objection. 11RP 4-5.

Defense counsel requested limiting instructions after the court overruled his objections and he tried to describe the court's ruling, although still objecting. 7RP 90-92, 94-95; 10RP 70-71; 11RP 4-5, 68-70. If the court disagreed with the instructions proposed, the court was required to fashion the appropriate limiting instruction. *Hartzell*, 156 Wn.App. at 937. "[T]he trial court has a duty to correctly instruct the jury" even if defense counsel proposes a legally incorrect limiting instruction. *State v. Gresham*, 173 Wn.2d 405, 424-25, 269 P.3d 207

(2012). Instead, the court instructed the jury about its opinion of the specific importance of the contested evidence.

Giving instructions to the jury that convey the judge's opinion of the established value of this evidence, as evidence that "corroborated" the State's witness Ms. Backstrom, or "refuted" Mr. Fastrup's statement to police, were comments on the evidence that prejudiced Mr. Fastrup on central contested issues. *State v. Boehning*, 127 Wn.App. 511, 525, 111 P.3d 899 (2005) ("Asking one witness whether another witness is lying is flagrant misconduct."). The instructions exacerbated the harmful effect of improperly admitted evidence of uncharged wrongful acts by Mr. Fastrup.

d. The prosecution improperly bolstered the complainant's allegations with prior consistent statements.

A witness's prior consistent statements are inadmissible hearsay unless offered to rebut an accusation that the witness's testimony is a recent fabrication. ER 801 (d)(1)(ii). The requirement of recent fabrication means that the witness is challenged based on the claim that she had a reason to fabricate her story later. *State v. Bargas*, 52 Wn.App. 700, 702, 273 P.2d 470 (1988). "The alleged fabrication must be recent because if the statement was made after the events giving rise

to the inference of fabrication, it would have no probative value in counteracting the charge of fabrication." *State v. Makela*, 66 Wn. App. 164, 168, 831 P.2d 1109 (1992).

Here, the prosecution elicited Ms. Backtrom's "consistency" in her post-arrest statements to the police on direct and re-direct. 6/23/14RP 84-85, 88, 90-91; 7RP 117-18, 119-21, 124-27, 129-32. Detective Mark Mellis also recounted Ms. Backstrom's statement to police in great detail. *See* 10RP 92-102; 11RP 20-29, 37-42; 12RP 14-15. The court permitted the prosecution to elicit these statements to rebut an implication of recent fabrication, over repeated defense objections and a continuing objection. 7RP 117, 126, 127, 129, 132; 10RP 93, 98, 101, 103-04; 11RP 20, 22-23, 37; 12RP 14.[3] As a result, Ms. Backstrom and the lead detective gave extensive testimony about the consistency of Ms. Backstrom's allegations.

But Ms. Backstrom's motive to fabricate and shift blame had already arisen. She knew there were legal consequences from participating in the killing. Her prior consistent statements were

inadmissible under ER 801 (d)(1)(ii). The prosecution impermissibly bolstered the complainant's credibility by asserting that she must be truthful due to her consistent custodial statement to police and in-court testimony after her guilty plea.

e. The cumulative effect of the multiple errors requires reversal.

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

Mr. Fastrup was convicted of the most serious offense of premeditated murder based on Ms. Backstrom's testimony alone. The jury was instructed that Ms. Backstrom's self-interest as a participant in the event made her testimony suspect. CP 45. Even Ms. Backstrom said

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[3] Although the defense initially objected to Ms. Backstrom's testimony as leading and improper re-direct, it later complained about the improper elicitation of prior consistent statements from Ms. Backstrom and made this basis of its objection abundantly clear during Detective Mellis's testimony. *See, e.g.*, CP 99, 108-110; 10RP 93, 98, 101, 102, 103-04; 11RP 21-23, 37, 41.

the incident arose spontaneously in a verbal argument, yet Mr. Fastrup was convicted of premeditated murder.

No reasonable juror would have been unaffected by the litany of unrelated allegations Ms. Backstrom cast against Mr. Fastrup, combined with the court's comments that the evidence corroborated the State's case and refuted Mr. Fastrup's statement to police. The State used Ms. Backstrom to accused Mr. Fastrup of myriad bad acts and demeaning behavior over many years. The State incited further prejudice by showing a picture of Ms. Backstrom's injuries from an unrelated occasion, designed to inflame the jury for conduct that was not material to the charged offenses. Highlighting its prejudicial impact, the State included this photograph in its power point presentation in closing argument. Ex. 173, at 7. The erroneously admission of this evidence and the violation of the right to counsel, considered cumulatively, affected the jury and entitle Mr. Fastrup to a new trial. This Court should grant review to address these issues.

F. CONCLUSION

Based on the foregoing, Petitioner Kennon Fastrup respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 26th day of April 2016.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 MAR 28 AM 8:45

STATE OF WASHINGTON,	)	No. 72405-3-I
Respondent,	)	DIVISION ONE
v.	)	
KENNON GREGORY FASTRUP,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: March 28, 2016

BECKER, J. — Kennon Fastrup was convicted of the murder of Diane Grisby. He claims that his right to confidential communication with his attorney was violated during jury selection, but there is no evidence of this in the record. He argues that many of his ex-girlfriend's comments about his bad prior acts were improper. But at trial he did not object, objected on a different ground than he raises on appeal, or had improper comments stricken. He complains of improper jury instructions, but he proposed these instructions. Other evidence to which Fastrup objects was properly admitted after he opened the door or as rebuttal. Finding no error, we affirm.

FACTS

On May 5, 2012, firefighters responded to a report of a car on fire in Black Diamond, Washington. The firefighters discovered a charred human body in the

trunk of the car, later identified as the body of Diane Grisby, Kennon Fastrup's girlfriend.

An investigation followed. Grisby's mother said she had last seen Grisby at a car impound lot two evenings earlier with Fastrup and Michelle Backstrom, Fastrup's ex-girlfriend. Detectives began searching for Fastrup and Backstrom, who fled from law enforcement together. One week later, on May 11, 2014, detectives found Fastrup and Backstrom and, after a high-speed car chase, arrested them both.

Immediately after their arrest, both Backstrom and Fastrup were separately questioned by police. Backstrom admitted that she and Fastrup murdered Grisby in Backstrom's garage on the night of May 4, 2012. Backstrom told the police that she and Fastrup placed Grisby's body in the trunk of Grisby's car and, late the next night, drove the car to Black Diamond and lit it on fire in an attempt to dispose of Grisby's body.

Backstrom eventually entered into a plea deal with the State. She pled guilty to second degree murder, was sentenced to 15 years in prison, and agreed to testify against Fastrup. Fastrup was charged with first degree murder-domestic violence, second degree murder in the alternative, second degree arson-domestic violence, attempting to elude a pursuing police vehicle, and misdemeanor violation of a court order-domestic violence.

Fastrup's trial proceedings took place over the span of one month in June and July 2014. The State called 20 witnesses. Only 4 of these witnesses are relevant to Fastrup's appeal: Backstrom, two detectives who interviewed

Backstrom and Fastrup on the day they were arrested, and a jail guard. Fastrup did not testify. The defense did not call any witnesses. Fastrup's defense theory was that Backstrom murdered Grisby, then made up a story to pin the murder on him. Fastrup tried to show Backstrom was jealous and angry that Fastrup left her for Grisby.

A jury found Fastrup guilty of all charges on July 9, 2014. Fastrup appeals.

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

During jury selection, the trial judge returned from a morning recess and said: "OK, counsel, while we were on our morning break, my bailiff had come with some information to me. When Juror 35 was brought in for individual questioning, she noted that Mr. Fastrup had demonstrated non-verbal recognition of Juror 35. And so I wanted to inquire whether that was someone that he was familiar with or knew in any way." Fastrup stated that the prospective juror looked like someone he knew from high school. The court explained that "my bailiff came to me and indicated that she had noticed that Mr. Fastrup had responded when he saw Juror 35 in such a way that it looked like he knew Juror 35. So we just wanted to follow up and I understand that now Mr. Fastrup has indicated he thought he looked like someone he had went to high school with, so."

There was no further discussion about the bailiff until after the jury found Fastrup guilty. After the trial court denied his motion for a new trial, Fastrup moved the court to reconsider. In his motion to reconsider, Fastrup claimed for

the first time that the bailiff had eavesdropped on a confidential conversation between himself and his attorney during jury selection, in violation of his right to counsel. He renews this argument on appeal.

There is no evidence in the record that the bailiff overheard or observed any type of communication between Fastrup and his attorney. The bailiff's observations were based on Fastrup's apparent nonverbal recognition of the juror. For this reason, Fastrup's claim of interference with confidential attorney-client communication fails.

PISTOL-WHIPPING INCIDENT

During pretrial motions in limine, both parties agreed that they could question Backstrom about an incident where she broke the windshield of Grisby's car with a hatchet. On direct examination during its case-in-chief, the State asked Backstrom about this incident. Backstrom testified that Fastrup pistol-whipped her and stole her phone and other personal property. She said that when Grisby came to pick Fastrup up, he still would not give her phone back, so she hit Grisby's windshield with a hatchet and broke it. Fastrup did not object to this testimony.

On cross-examination, Fastrup asked Backstrom whether she broke Grisby's windshield because she was mad. She said yes, she was mad at Fastrup for beating her severely and stealing from her. Fastrup asked her whether she broke the windshield because Fastrup was dating Grisby. Backstrom answered no, she broke the windshield because Fastrup stole from her and beat her. Fastrup asked her if she was mad at Grisby for taking her

boyfriend. Backstrom answered no, she did not want to keep Fastrup because he abused her, stole from her and her family members, and committed other bad acts. Fastrup confronted Backstrom with her earlier statement to detectives that she was not mad at Grisby for anything besides taking her boyfriend. Backstrom explained that she was mad for the first couple days but quickly got over it. Fastrup followed up by asking her if she had learned that he and Grisby were going away on a trip together, "and that bothered you, right?" Backstrom answered no. Fastrup asked her if she had heard that he and Grisby were getting married. Later, he again asked Backstrom to confirm that he had fallen in love with Grisby, "and that didn't bother you?" She answered no.

After the defense finished cross-examining Backstrom, the State moved to introduce a photograph of the injuries Backstrom suffered when Fastrup allegedly pistol-whipped her. The State pointed out that the cross-examination of Backstrom made it look like she was jealous of Grisby. The State argued that the photograph would corroborate Backstrom's testimony that she was mad at Fastrup, not jealous of Grisby. Over Fastrup's objection, the trial court allowed the photograph for the specific purpose of corroborating Backstrom's testimony about why she broke Grisby's windshield. The trial court admitted the photograph after giving a limiting jury instruction proposed by Fastrup.

On appeal, Fastrup argues that Backstrom's testimony on direct examination that he pistol-whipped her and the photograph of Backstrom's

injuries from the beating should have been barred under ER 404(b).[1] To challenge a trial court's admission of evidence, a party must raise a timely objection on specific grounds. State v. Gray, 134 Wn. App. 547, 138 P.3d 1123 (2006), review denied, 160 Wn.2d 1008 (2007); see also RAP 2.5(a) (appellate court may refuse to review any claim of error not raised in the trial court). There is an exception to this rule for a manifest error affecting a constitutional right. RAP 2.5(a)(3). However, evidentiary errors under ER 404(b) are not of constitutional magnitude. State v. Powell, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). Because Fastrup did not object to Backstrom's testimony at trial, he waived any error with respect to her testimony.

As to the photograph, Fastrup opened the door to its admission. See, e.g., State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (where the defendant opens the door to particular subject, the State may pursue the subject to clarify a false impression). The State was entitled to admit the photograph to corroborate Backstrom's testimony that she broke Grisby's windshield out of anger towards Fastrup for pistol-whipping her and stealing her property, not because of jealousy towards Grisby. The trial court properly minimized any potential prejudice to Fastrup by giving the jury the limiting instruction he requested.

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[1] ER 404(b) states, in relevant part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

MIDTRIAL THREAT

Near the conclusion of Backstrom's cross-examination, the court recessed for lunch. During this recess, in the presence of at least one jail guard, Fastrup threatened to attack Backstrom when she returned to the witness stand and said that the jail guards were going to have to use force to stop him. The next day, the State moved to present evidence of this threat, arguing that it was evidence of Fastrup's guilty conscience and his intent to intimidate a witness in the case. Fastrup objected, arguing that any probative value was substantially outweighed by unfair prejudice. The trial court agreed with Fastrup and did not allow the jail guard to testify.

Later, as part of his effort to depict himself as frightened of Backstrom, Fastrup cross-examined one of the detectives and elicited certain statements Fastrup made to the detective on the day he was arrested. These included Fastrup's statement that he was "hella mad" at Backstrom, but "'what am I supposed to do, man?' . . . 'Fuck her up? No, fucking bitch will kick my ass, dude.'" In the interview, when the detective asked Fastrup why he did not confront Backstrom, Fastrup responded that he would have been in the exact same situation as Grisby—that is, dead. Fastrup told the detective that if he had refused Backstrom's request to help get rid of Grisby's car with her body in the trunk, Backstrom "'would have fucking put me there with her. I don't know, man. She sort of threatened me a couple times, you know.'" The intended effect of eliciting his own prior statements was to paint a picture that Fastrup could not

defend himself against Backstrom and that she compelled him to participate in the disposal of Grisby's body.

After this, the State renewed its motion to admit the jail guard's testimony. The State argued that by depicting himself as afraid to confront Backstrom, Fastrup opened the door to testimony that he had threatened to attack Backstrom on the witness stand. The trial court agreed that Fastrup had opened the door, determined that the probative value of the evidence now outweighed the potential prejudice, and admitted the jail guard's testimony with a limiting instruction proposed by Fastrup. The guard then testified that Fastrup told him "as soon as I took the handcuffs off he was going to jump over the table and run up there and beat the witness" and that jail guards would have to "fuck him up" to stop him.

Fastrup contends that the court erred by admitting the guard's testimony, citing ER 404(b). The decision to admit evidence of other wrongs or acts under ER 404(b) lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. See State v. Brown, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). The State may offer such evidence to rebut an assertion by the defendant. See, e.g., State v. Ciskie, 110 Wn.2d 263, 281, 751 P.2d 1165 (1988). In Ciskie, testimony from defendant's ex-wife that the defendant called her about his intent to kill the victim was permissible to rebut the defendant's testimony that he did not threaten to kill the victim. Ciskie, 110 Wn.2d at 281. Also, where the

defendant "opened the door" to a particular subject, the State may pursue the subject to clarify a false impression. Gefeller, 76 Wn.2d at 455.

Fastrup opened the door by bringing in his statements to the detective asserting that Backstrom would beat him, or even kill him, if he confronted her about Grisby's murder or did not cooperate in disposing of the body. These statements were material to Fastrup's defense theory that Backstrom alone killed Grisby and that Fastrup helped Backstrom get rid of the body only because he was afraid of her.

The State was entitled to rebut the impression that Fastup feared Backstrom with his contradictory statement that jail guards would have to forcibly restrain him from attacking Backstrom on the witness stand. The trial court properly minimized any prejudice to Fastrup by giving the jury the limiting instruction that he proposed. The trial court did not abuse its discretion in admitting Fastrup's mid-trial threat against Backstrom.

ADDITIONAL ER 404(B) OBJECTIONS

Fastrup also challenges other comments Backstrom made regarding his bad character and bad acts as inadmissible under ER 404(b). But at trial, Fastrup either did not object, or objected on a different ground than he raises on appeal, or was successful in having the comments stricken.

Backstrom testified that Fastrup is "selfish," a "control freak," a "hateful little person," and "abused me for three years straight. He stole everything I had. . . . I lived in fear of him." Fastrup waived any objection to these allegedly improper comments because he did not object at trial.

Backstrom testified that Fastrup got her and Grisby addicted to drugs and that Fastrup "obviously did this," referring to Grisby's murder. Fastrup objected to both of these comments as nonresponsive. On appeal, he contends they were inadmissible under ER 404(b). A party may assign error in the appellate court only on the specific ground of evidentiary objection made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Because Fastrup did not raise an ER 404(b) objection to these comments at trial, he may not raise this ground on appeal.

Backstrom testified that Fastrup gives women "double black eyes all the time," "got his licks in," and hung a noose in the garage "so I could commit suicide one day when he left." Fastrup moved to strike these comments. The trial court struck the comments and instructed the jury to disregard them. Courts generally presume that jurors follow instructions to disregard improper evidence. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). Because the trial court instructed the jury to disregard these allegedly improper comments, we assume that the jury disregarded them and accordingly reject Fastrup's argument that reversible error occurred when the jury heard them.

Backstrom testified that Fastrup "would hold knives to me every day, almost." Fastrup objected, but before he could state any basis for his objection, the court intervened on its own and tried to ask Backstrom to stop speaking. Backstrom blurted out that Fastrup "robbed my house repeatedly" and "threw gasoline at my house." We conclude the remarks did not deprive Fastrup of a

fair trial. In light of all the other evidence admitted against Fastrup, particularly the testimony by Backstrom about how Fastrup pistol-whipped her and stole her personal belongings, there is no reasonable probability that the outcome of the trial would have been materially different had the jury not heard Backstrom's list of additional accusations. See, e.g., State v. Kidd, 36 Wn. App. 503, 507-08, 674 P.2d 674 (1983).

LIMITING JURY INSTRUCTIONS

Fastrup proposed the following limiting jury instruction to be given before the photograph of Backstrom's injuries was introduced:

> You are about to be shown State's Exhibit 58. This exhibit is admitted for the limited purpose of corroborating Ms. Backstrom's description of the incident involving Ms. Backstrom breaking Denise Grisby's windshield with a hatchet. You are to consider it for no other purpose.

The trial court read this instruction exactly as proposed.

Fastrup proposed the following limiting jury instruction to be given before the jail guard testified about Fastrup's threat to attack Backstrom on the witness stand:

> You are about to hear testimony regarding a statement the defendant made to this witness. This statement is being admitted for the limited purpose of allowing the State to refute the defendant's prior statements regarding his fear of Ms. Backstrom. You are to consider it for no other purpose.

The trial court added the words "and his inability to defend himself" at the end of the second sentence, over Fastrup's objection. Besides this addition, the instruction was read as proposed.

Fastrup now argues that the words "corroborating" and "refute" in the instructions improperly conveyed the judge's personal opinion about the value of the evidence.

A party may not request a jury instruction and later complain on appeal that the requested instruction was given. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). This is a strict rule, and the Washington Supreme Court has rejected the opportunity to adopt a more flexible approach. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Fastrup requested these jury instructions, including the exact words that he now contends amounted to a comment on the evidence. He may not complain about them now.

PRIOR CONSISTENT STATEMENTS

The court allowed Backstrom to testify on direct examination about statements she made to detectives on the day she was arrested, one week after Grisby's murder. Fastrup contends Backstrom's testimony was improperly bolstered by the use of her prior consistent statements.

The statements were admitted under ER 801(d)(1)(ii). When offered to rebut a suggestion of recent fabrication, prior statements are not hearsay:

> A statement is not hearsay if—
> (1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

ER 801(d)(1)(ii).

A defendant's cross-examination suggesting that a witness may have a motive to fabricate her story in order to receive a plea agreement for testifying against the defendant triggers ER 801(d)(1)(ii). State v. Thomas, 150 Wn.2d 821, 866, 83 P.3d 970 (2004). On cross-examination, Fastrup questioned Backstrom in an attempt to show that the State's plea offer gave her a motive to fabricate:

> Q . . . And you ended up pleading to murder in the second degree, correct?
> A Yes.
> Q And the recommendation by the State was 15 years, correct? Is that right? Yes?
> A Yes.
> Q OK, now as part of that, you had done a statement of defendant on plea of guilty. Do you remember that?
> A Yes.
> Q And on that statement you had to give factual basis for entering into the plea, correct?
> A Yes.
> Q Now, had you not pleaded murder two and you had gone to trial, you would have been facing murder in the first degree just like Kenny, correct?
> A Yes.
> Q And amount of time would have been substantially more, correct?
> A Um, no. I was charged with murder two and arson. That's what I have been facing is murder two and arson.
> Q But had you gone to trial, the charges would have been amended to murder in the first degree, just like Mr. Fastrup, correct?
> A Um, I suppose.
> Q And you would have been facing a substantial, larger amount of time than you did by pleading to murder two, correct?
> A Yes.

Fastrup also repeatedly accused Backstrom of using the time after her initial interview with detectives on the day she was arrested to fabricate lies. For example, Fastrup questioned Backstrom about the fact that she did not tell

detectives on the day she was arrested that she hit Grisby's hand with a meat cleaver but admitted it in an interview two years later. Fastrup asked, "So you had time to think about what you were going to say, correct?" Fastrup asked Backstrom whether the events of the murder were fresher in her mind when she gave her initial statement to detectives on the day she was arrested. When Backstrom said that the events were fresher in her mind at trial, Backstrom asked if that was "because you have had two years to create your story?"

On redirect, over Fastrup's objections, the court allowed the State to question Backstrom about prior consistent statements that she made to detectives on the day of her arrest. A detective also recounted Backstrom's prior consistent statements, again over Fastrup's objections. Fastrup contends the prior consistent statements were improperly admitted. We review for abuse of discretion. State v. Makela, 66 Wn. App. 164, 168, 831 P.2d 1109, review denied, 120 Wn.2d 1014 (1992).

The record supports the court's decision to apply ER 801(d)(1)(ii) to Backstrom's prior statements. First, Fastrup implied that Backstrom's interest in making a plea deal gave her a motive to fabricate her story. Second, he accused Backstrom of using the two years from the time of her initial statement to create her fabricated story.

The party offering the prior consistent statement must show that the statement was made before the witness's motive to fabricate arose. Thomas, 150 Wn.2d at 865. The witness must have made the statement under circumstances indicating that she was unlikely to have foreseen the legal

consequences of her actions. Makela, 66 Wn. App. at 168-69. Fastrup argues that the State did not satisfy this test because Backstrom already had a motive to lie on the day she was arrested. At that time, Fastrup argues, Backstrom knew Grisby was dead and knew there were would be legal consequences for her participating in the murder. But a mere assertion that the witness had a motive to lie, without factual support, is insufficient to bar the witness's prior consistent statements. Makela, 66 Wn. App. at 173-74. Instead, the statements are admitted and it becomes an issue for the jury to decide who is telling the truth. Makela, 66 Wn. App. at 173-74.

Fastrup's general allegation that Backstrom had a motive to lie as soon as she was arrested is unsupported. On the day Backstrom was arrested, she could not have known how the murder investigation and later criminal charges against both her and Fastrup were going to unfold. It is speculation to assert that she was fabricating details of the crime in order to facilitate the future plea deal in which she would promise to testify against Fastrup in exchange for a lesser charge.

We conclude the trial court did not abuse its discretion in admitting Backstrom's prior consistent statements from the day she was arrested.

No. 72405-3-I/16

Affirmed.

Becker, J.

WE CONCUR:

Schindler, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72405-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project