NO. 47007-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAYCEE FULLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff
The Honorable Ronald Culpepper

No. 09-1-01865-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was mail from defendant's mother lawfully screened for contraband despite his unpreserved claim it contained *pro se* work product since his mother was not an attorney entrusted to send uninspected legal mail into the jail?

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B. STATEMENT OF THE CASE.

1. Procedure

Defendant was convicted as charged with deadly weapon enhanced premediated and first degree felony murder for killing Mohamud Ahmed during an attempted robbery. CP 1-2; ***State v. Fuller***, 169 Wn. App. 797, 811, 282 P.3d 126 (2012). This Court reversed for a comment on post-arrest silence. *Id.* at 813. Evidence of the robbery defendant contemplated three months before the murder was ruled inadmissible. *Id.* 828-29.

Defendant proceeded *pro se* with standby counsel. RP (6/26/13) 15. The court told him he could not bypass jail contraband screening by putting materials described as *pro se* work product in mail exchanged with his mother.[1] Evidence of boot tracks heading from the crime scene to his apartment was admitted over his untimely and inconsistent objections.[2] Midtrial, he "inform[ed]" the court of a message on a "Twitter" account assigned to the Prosecutor's Office. It announced the Prosecutor's opening statement in the case, which was identified by a summary of the incident.[3] There is no evidence jurors exposed themselves to the message despite

[1] RP (10/1/12) 13-19, 35-37; (9/4/13) 10; (3/27/14) 122-24, 139, 144.
[2] RP (10/28/14) 137-39; (11/3/14) 75-76, 81-83, 112-14; (11/4/14) 15-18, 248-49, 25-28, 48-51, 53-59; (11/6/14) 356-58, 387-89; Ex. 30, 75.
[3] RP (11/12/14) 5-10, 43-57.

repeated instructions to avoid social media about the case.[4] Defendant did not request any relief related to the message below. *Id.*

The evidence challenged on appeal as insufficient to support the convictions consists of 207 exhibits and testimony from 43 witnesses. CP 469-502. A properly instructed jury convicted defendant as charged a second time.[5] While denying his motion for a new trial, the judge most familiar with the evidence concluded the jury "made the right decision." RP (12/19/14) 50. A 280 month sentence was imposed, based in part on the point defendant received for possessing a controlled substance in jail. CP 597. His notice of appeal was timely filed. CP 615.

2. Facts

Defendant's downward spiral culminated in the murder of Somali taxi driver Mohamud Ahmed on March 8, 2009. In January, defendant's habit of wrecking the Yellow Cab taxis he drove for a living resulted in his termination. *Id.*[6] By that time, he was known for his animosity toward immigrants—people he perceived as "foreigners" that took American jobs.[7] He was also known to carry a knife and wear a striped beanie

[4] RP (10/27/14) 16; (10/28/14) 64-65, 79, 106-08, 128-29; (10/30/14) 20-22; (11/3/14) 94, 176; (11/4/14) 119; (11/10/14) 7; (11/19/14) 15.
[5] CP 503-35; RP (11/25/14) 187-97.
[6] RP (11/5) 265, 278. The trial occurred in 2014, so pertinent portions of the record will be identified by month/day.
[7] RP(11/5) 267, 270; (11/20) 40.

bearing the "Keg" restaurant's logo.[8] Within two months of his termination from Yellow Cab, the beanie was found near Ahmed's dead body.[9] Ahmed's throat had been slit with a knife. Some of his blood was on the outside of the beanie. Defendant's DNA was on the inside with a 10 ½ inch hair containing mitochondria from his rare maternal line.[10] Defendant received the beanie at the Keg's 2006 employee party, where it was only distributed to attendees.[11] He wore it over his pony tail while washing dishes for the restaurant. *Id.* A Yellow Cab manager saw him wearing it over a similar pony tail two years later when she terminated his lease.[12]

With the Yellow Cab lease went the customers defendant relied on for income. RP (11/24) 50. He briefly leased a cab from Farwest Taxi, but it "just [did]n't pa[n] out" as comparable calls for his service never came. RP (11/24) 50. His lease was terminated for non-payment in February. RP (11/5) 285-86. He remained "frustrate[ed]" with the King Cab Company Ahmed drove for because it hired non-English speaking "Somalis and other foreigners."[13] "[F]oreigners" that allegedly "scoop[ed]" fares from English-speaking drivers like him. *Id.* Their "scooping" made him angry

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[8] RP (11/4) 21; (11/5) 267-69, 275, 278, 280; Ex.124.
[9] RP (11/6) 327-28; Ex. 120, 124.
[10] RP (11/10/P) 13, 16, 28-30, 68-71. The VRP for 11/10/14 was divided into an AM and PM docket. This Response uses includes an "A" in citations to the morning calendar and "P" in citations to the afternoon calendar.
[11] RP (11/4) 19-20; (11/5) 128-30, 133, 136; (11/24) 81-82, 140-41.
[12] RP (11/5) 275, 266-67, 278.
[13] RP (11/4) 85-86; (11/20) 50-51; (11/24) 51, 104-07.

because it took "money out of another ... driver's pocket." RP (11/24) 106. He was reduced to pawning items on 6th Avenue and giving blood for money.[14] Yet it was not enough to pay his rent.[15] He knew taxis to be "rolling cash boxes."[16] And he "hated King Cab" because it hired Somalis and would not hire him. RP (11/12) 72.

Ahmed's life was moving in a far more positive direction before the murder. He was a twenty two year old refugee from war-torn Somalia. RP (11/4) 84; Ex 27. He lived with his family and was studying English. *Id.* at 85-87. He found work at the Goodwill, then King Cab. *Id.* On March, 8, 2009, he was driving a King Cab taxi along 6th Avenue near the Masa restaurant.[17] At 2:01 a.m.[18] Masa's door camera recorded a man matching defendant in a number of respects, *i.e.*, age, pony tail, facial hair, stature, gait, dark clothing, boots, and beanie.[19]

Ahmed picked up his last fare near Masa five minutes later.[20] The presence of defendant's DNA in the beanie found where the fare ended joined with other evidence to prove he was that passenger.[21] The taxi's

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[14] RP (11/4) 111-12, 114-16; (11/24) 57; Ex.236-38.
[15] RP (11/19) 77; (11/20) 93-94.
[16] RP (11/5) 238; (11/24) 107-08, 132.
[17] RP (11/4) 93; Ex. 233-34.
[18] There was a one-hour deviation between the time reflected on surveillance cameras and the actual time due to conclusion of day light saving time in the relevant 24 hour period.
[19] RP (11/4) 64-70, 72, 105; (11/6) 369-70, 372, 379; (11/19) 38-39, 44-54, 108, 114-34; (11/24) 62; Ex. 245; Ex. 142, 241-42, 245, 343.
[20] RP (11/4) 94; (11/5) 218; (11/6) 320; (11/19) 38-40; Ex. 233-34, 242.
[21] RP (11/6) 42-47; (11/10/A) 46-47.

GPS and area video proved Ahmed drove about 3.1 miles to an isolated parking lot near the El Po Po apartments where defendant lived via a road mostly used by the Yellow Cab Company where he used to work.[22]

Ahmed pulled the taxi into the lot fifteen minutes after the trip began.[23] What occurred next is known by what was left behind. CP 508. Within moments of arriving, defendant attempted to take control by holding the edge of a knife under Ahmed's chin. This left a sharp-force injury characteristic of prolonged pressure.[24] Ahmed failed to activate his panic button, as if directed not to by one with defendant's likely awareness of its existence.[25] A King Cab business card and dollar bill "out of place" on the taxi's tidy rear floorboard marked an exchange between them.[26]

Eight deep tendon-severing and superficial cuts across Ahmed's right hand attested to an effort to pull the knife from his neck.[27] Further proof of their struggle was manifest in scratches seen on defendant's face after the murder.[28] Defendant repositioned the knife to Ahmed's throat, pushed the blade into his flesh and cut across to his right ear.[29] It severed the carotid artery, jugular vein, and several muscles. RP (11/12) 143-44.

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[22] RP (11/5) 214-22, 266, 250(11/6) 317-20; (11/10/A) 42-44; (11/19/14) 39-45; Ex. 233-34, 242, 247.
[23] RP (11/3) 51-52, 70; (11/5) 214-18, 221-22; (11/6) 320; 30; 32.
[24] RP (11/3) 153; 155, 160-61; (11/10/A) 40-41; (11/12) 142-43, 152, 155; Ex 226.
[25] RP (11/4/) 95-96; (11/5) 205-06, 209-10, 239, 260-61, 267.
[26] RP (11/3) 56, 90-91, 142, 154; Ex. 97-98.
[27] RP (11/12) 144-45, 151, 157; (11/19) 89; Ex. 216, 219-20, 230.
[28] RP (11/10/A) 55-56; (11/19) 20, 25.

Death followed as blood pumped toward Ahmed's brain only to "spur[t]" out the severed artery as returning blood "drain[ed]" from the severed vein. RP (11/12) 153.

Defendant subsequently plunged the knife into Ahmed's liver. RP (11/12) 144. The sequence was expressed by the relative lack of blood in the abdominal wound, signifying previous loss of pressure. RP (11/12) 153-54. Blood nevertheless seeped into the $160 folded in Ahmed's right coat pocket, making it an undesirable target for theft.[30] $49 in cash was haphazardly arranged in a different pocket.[31] It is unknown if any property was stolen, but drivers tend to keep money in several places, so robberies will not result in a total loss.[32] Ahmed's apparently undisturbed wallet was empty. RP (11/3) 149. A running meter proved the fare went unpaid. RP (11/5) 220-22. Defendant fled toward his apartment.[33]

Approximately three hours later police found Ahmed's taxi idling with its lights on and meter running. Blood flowed backward from taxi into the lot.[34] Ahmed's body was face down on the ground in a pool of blood with his left arm tangled in the driver's seatbelt.[35] The center

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[29] RP (11/6) 321; (11/10/A) 55-56; (11/12) 143; Ex. 224, 226.
[30] RP (11/10/A) 26-27 (11/12) 148; Ex.215; 223.
[31] RP (11/6) 368; (11/10/A) 27
[32] RP (11/3) 175; (11/4) 86-88; (11/5) 256-57.
[33] RP (11/4) 14-16, 18, 23, 25-26, 28, 53-59.
[34] RP (11/3) 52-53, 56, 74-75, 128; (11/6) 309-10, 312, 315; Ex. 30, 32.
[35] RP (11/3) 55-57, 59; (11/6) 309-10; Ex. 181-82.

console had been torn back. RP (11/3) 56, 9. Overlapping blood smears, swipes and castoff proved Ahmed was attacked from behind.[36]

Tracks in the snow aligned with the taxi's GPS data to prove the taxi traveled through the lot past the Keg beanie containing Ahmed's blood and defendant's DNA.[37] There was a steep bark-covered hillside twenty feet from the beanie with fresh tracks bounding down to a ten foot retaining wall.[38] The wearer jumped from the wall, leaving deep tracks in the bark below. RP (11/4) 15.[39] They were measurable in a way the tracks on the hillside were not, and proved to be just over thirteen inches long.[40] Slight heel depressions typical of boots were discernable. RP (11/4) 54-55. The tracks headed north along the natural escape route to defendant's apartment.[41] A pair of 13 ½ inch boots were found in his bedroom. RP (11/4) 23-26, 54.

Cameras alerted police to an eviction-related removal of property from defendant's apartment a month after the murder.[42] The dumpster was empty when they arrived. RP (11/6) 336. Police intercepted the garbage truck before it was dumped. RP (11/16) 337. Defendant's trash was

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[36] RP (11/3) 128, 161-63, 165-66.
[37] RP (11/3) 57, 73, 75-76, 81-82, 109-10; (11/4) 14-15, 19; (11/6) 326-32; (10/10/A) 28-30; (11/10/P) 13, 16, 68-71; (11/19) 90-91; Ex. 48, 60 75, 78, 120.
[38] RP (11/3) 75-76, 82; (11/4) 15, 48; Ex. 78.
[39] RP (11/4) 12, 56-58.
[40] RP (11/4) 16-18, 49-51; (11/6) 357-58.
[41] RP (11/4) 15-16, 28, 52-53, 58-59.
[42] RP (11/6) 336; (11/20) 93-94.

isolated according to the truck's first-in-first-out design and his apartment's location at the beginning of the route. RP (11/6) 337-38. Police found items bearing his name next to dark clothing comparable to clothing worn by the suspect. A bag of hair with mitochondria matching his rare maternal line was found nearby.[43] It matched hair clinging to a pair of scissors in his bathroom. *Id.*; (11/10/A) 60-62. All of which corresponded to his post-murder act of cutting off the long hair he was known to "love."[44] Two newspapers were found within three feet of his hair and belongings.[45] The first was from March 9, 2009—one day after the murder. *Id.* Its headline read: "Taxi Driver Killed in Tacoma." RP (11/6) 340. The second newspaper was from the next day. RP (11/6) 341. A headline in the lower left corner read: "Police release details about killing of taxi driver." RP (11/6) 341. Those three week old editions were the only newspapers in the pile containing his property. RP (11/10/A) 54. A maintenance worker recalled removing newspapers from defendant's apartment. RP (11/12) 41.

Defendant's longtime friends, Curtis Alm and Lucretia Randle, took him in at the end of March because he was homeless.[46] Randle was "shock[ed]" to see him without long hair. As was Alm, for it was

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[43] RP (11/4) 108-09; (11/6) 339; (11/12) 17-35.
[44] *Id.*; (11/6) 341; (11/10/A) 34-35.
[45] RP (11/6) 339; (10/10/A) 53-54; (11/10/P) 42-46; Ex. 197, 199, 382.

defendant's "pride and joy."[47] Randle observed he didn't seem like the person she remembered. RP (11/12) 123. Defendant brought up the murder, claiming people teased him about being the killer.[48] He said he lost the beanie people associated with him jumping from a third story window that scratched his face.[49] He then claimed the beanie was lost the day he received it.[50] While discussing the taxi business, he mentioned "hat[ing]" King Cab for hiring Somalis.[51] He said King Cab would replace other "race[s]" with any Somali who applied. RP (11/12) 106. Defendant "scared the daylights out of [Randle] saying ... Somalians ... stick together ... if you hurt one, they all come after you." RP (11/12) 120.

Defendant brought "a bunch of knives, swords [and] daggers" when he moved in. RP (11/12) 82. Alm knew defendant regularly carried a knife in a difficult to detect shoulder holster. RP (11/12) 68, 70. According to Alm: "[n]obody would ... know it was there until he pulled it...." RP (11/12) 70. Defendant turned off his cell phone within days of moving in to avoid "people trying to find him." RP (11/12) 106. A subsequent analysis of the phone revealed the absence of user activity in the 9 ½ hour

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[46] RP (11/12) 64-65.
[47] RP (11/12) 65, 67, 105-04.
[48] RP (11/12) 100-01, 105, 118.
[49] RP (11/12) 68-69, 100-01.
[50] RP (11/12) 106, 118.
[51] RP (11/12) 72, 106, 117-18.

period around the murder. RP (11/19) 33. Several text messages were selectively deleted. RP (11/24) 20-21.

Defendant was arrested after the only other person of interest was eliminated as a suspect.[52] Defendant was briefly interviewed. RP (11/19) 73, 77. He acknowledged financial difficulties culminating in his eviction. RP (11/19) 77-78. He was the first to mention the beanie's presence at the scene. He admitted to wearing a similar beanie, but claimed it was left at the party where he received it. RP (11/19) 78. He answered a hypothetical question about a person confronted with the circumstances of his life and Ahmed's murder. RP (11/19) 81-82. Defendant characterized that murder as a mistake. RP (11/19) 81-82.

Defendant's mother tried to obtain his computer. RP (11/12) 70, 125-26. He was the only person who used it before his arrest. RP (11/12) 121-22. Afterward, Alm had the password overridden, deleted a game and pawned the computer. RP (11/12) 71, 88, 96. A forensic analysis showed the absence of user activity in the twelve-hour period surrounding the murder, which impeached the alibi that defendant was playing the deleted game when the murder occurred.[53] Remnants of such activity would have remained if ever present.[54]

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[52] RP (11/12) 84-85, 124; RP (11/19) 29-31, 55-56.
[53] RP (11/10/A) 68-70, 73-74, 76-77.
[54] RP (11/10/A) 70, 73-74, 76-79; (11/10/P) 8-9

Defendant testified at trial. He explained the post-murder scratches on his face as a girlfriend's response to oral sex. RP (11/24) 74. He similarly explained his characterization of the murder as a mistake. According to defendant, he failed to appreciate the import of his answer because at the time he perceived the armed task force that arrested him could only have been responding to sex he had with a girlfriend in a taxi, speeding or some marijuana use. RP (11/24) 93-94. He conceded being the first to mention the beanie's presence at the crime scene. RP (11/24) 91. He claimed to recall exactly how he disposed of it five years before despite being unable to recall associated details. RP (11/24) 84-85. Defendant was unable account for how someone could have taken the beanie from where it was allegedly left and placed it near the body of a person with the precise combination of ethnicity, immigration status, and employment defendant disdained. RP (11/24) 84-90.

Defendant's credibility was further impeached. He testified that he only owned "[k]itchen knives and a pocket knife," but conceded on cross-examination he owned a collection that included a "sword," "hunting knife" and "a couple throwing knives." RP (11/24) 115. He originally said his experience with knives was limited to cooking, but then admitted using a shoulder holstered knife to hunt. RP (11/24) 124. He also admitted exaggerating earnings in an earlier proceeding to cast himself in a falsely

positive light.[55] And he exposed the jury to a histrionic display of revulsion while being questioned with a crime-scene photo after maintaining composure during earlier presentations of similar evidence.[56]

C. ARGUMENT.

1. THE MAIL DEFENDANT EXCHANGED WITH HIS MOTHER WAS LAWFULLY SCREENED DESPITE HIS UNPRESERVED CLAIM IT CONTAINED PRO SE WORK PRODUCT AS HIS MOTHER WAS NOT AN ATTORNEY ENTRUSTED TO SEND UNINSPECTED LEGAL MAIL INTO THE JAIL.

Jail security justifies the regulation of inmate mail. ***O'Keefe v. Van Boening***, 82 F.3d 322, 326 (9th Cir. Wash.) (1996); ***Thornburgh v. Abbott***, 490 U.S. 401, 413, 109 S. Ct. 1874 (1989). The Supreme Court rejects a *per se* rule against intruding into attorney-client communications. ***Weatherford v. Bursey***, 429 U.S. 545, 97 S. Ct. 837 (1977). It has held "[t]he possibility ... contraband will be enclosed in letters, even those from apparent attorneys, ... warrants [jail] officials opening the letters." ***Wolff v. McDonnell,*** 418 U.S. 539, 576-77, 94 S. Ct. 2963 (1974). "It would also certainly be permissible that [jail] authorities require ... a lawyer desiring to correspond with a[n] [inmate], ... identify himself [or herself] ... to assure ... letters marked privileged are actually from

[55] His first trial. RP (11/24) 119-20, 133-34
[56] Compare RP (11/24) 125-27 with (11/12) 135-60 (Medical Examiner's testimony).

members of the bar." *Id.* (emphasis added). Rules enabling inmates to be present "when mail from attorneys is inspected" "perhaps" do "even more ... than the Constitution requires." *Id.*

Defendant had standby counsel capable of transmitting *bona fide* legal mail to him throughout the pendency of his case.[57] He nonetheless raised concerns about the jail looking through mail exchanged with his mother, who was not an attorney.[58] He withdrew his request for relief because the jail somehow accommodated his preference. RP (10/1/13) 14-18, 34-37. A jail sergeant made a record of the procedure for processing mail, which included opening it and searching it for contraband. None of defendant's mail was copied or sent to the prosecution. *Id.* at 14-18.

The issue came up again six months later. RP (3/27/14) 122-30. Defendant was frustrated with the jail opening what he characterized as legal mail from his mother while conceding it was sometimes comingled with social mail. *Id.* at 126-27. His argument appeared to be that by choosing to represent himself he was automatically vested with the unique privileges attending admission to practice, which included being entrusted to exchange uninspected mail with anyone he designated to be his legal assistant. *Id.* at 126-27, 139-43. He conceded there was no evidence of the

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[57] *E.g.* RP (6/26/13); (10/1/13) 4, 13-14.
[58] RP (9/4/13) 9-10; (10/1/13) 14-18, 34-37.

jail improperly transmitting legal mail to the prosecution. The exhibit he filed documented an instance where he had to open "legal mail" in the presence of a guard tasked with verifying the absence of contraband. *Id.* at 129. He characterized this as misconduct. *Id.* at 122-30, 139-41, 145. The Court denied the motion to dismiss without prejudice, inviting defendant to come forward with proof of his claim. *Id.* at 148-50. He never did. At trial, defendant's mother disavowed doing "paralegal" work for him. According to her, it was "a lot of mom work...." RP (11/20/14) 63. Despite defendant's proclaimed commitment to the rules of practice, he was convicted for unlawfully possessing a controlled substance in jail. RP (12/19/14) 37, 43.

a. Defendant failed to preserve this issue.

Appellate courts will not typically review tentative rulings. ***State v. Riker***, 123 Wn.2d 351, 369, 869 P.2d 43 (1994); ***State v. Koloske***, 100 Wn.2d 889, 896, 676 P.2d 456 (1984); ER 103; RAP 2.5. And a trial court's denial of a motion to dismiss is reviewed for an abuse of discretion. ***State v. Michielli***, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Dismissal for "speculative prejudice" is not allowed. ***State v. Rohrich***, 149 Wn.2d 647, 652-58, 71 P.3d 638 (2003).

The trial court expressed its willingness to reconsider the motion to dismiss when defendant produced evidence to support his claim. RP (3/27/14) 148-50. Defendant's failure to make good on the court's invitation precludes review. Even if reviewable, the court's decision to deny the motion *without* prejudice pending the production of supporting evidence cannot be fairly characterized as manifestly unreasonable, so it should be affirmed.

b. There is no merit to the contention *pro se* inmates can bypass contraband screening.

Jails may inspect inmate legal mail to address security concerns. ***Wolff***, 418 U.S. at 576-77; ***State v. Garza***, 99 Wn. App. 291, 301, 994 P.2d 868 (2000). While inspections of mail exchanged between inmates and "their attorneys" should be limited, no similar restraint is placed on other mail. *See* ***Garza***, 99 Wn. App. at 301; ***State v. Granacki***, 90 Wn. App. 598, 602, 959 P.2d 667 (1998). The special status of mail sent by attorneys can be understood in terms of the position of trust they hold as officers of the court in our criminal justice system:

> [T]he danger ... a letter from an attorney, an officer of the court, will contain contraband is ordinarily ... remote....

Wolff, 483 F.2d 1059, 1067 (8th Cir. 1973)(*rev'd in part* 418 U.S. 576).

Underlying this assumption are safeguards attending admission to the bar—a privilege reserved for those with a proven history of adherence to the rule of law. ***Wolff***, 418 U.S. at 576-77; APR 1, 3, 5. Once admitted, deterrents common to all are reinforced by the threat of professional discipline or disbarment.[59] This accountability extends to unlicensed members of an attorney's staff since their conduct is underwritten by the attorney. RPC 5.3. No similar assurances exist among *pro se* litigants and the unlicensed staff they recruit.

Putting aside unfounded speculations about the jail's *capacity* to mishandle mail defendant exchanged with his mother, the evidence proved the jail's adherence to procedures appropriate for inspecting mail sent by attorneys. RP (3/27/14) 129; ***Garza***, 99 Wn. App. at 296-97 (citing ***Wolff***, 418 U.S. at 576-77). So it was a legitimate means of inspecting mail sent by defendant's mother, who sometimes comingled legal materials with personal items. *Id.* at 126; (11/20/14) 63. The notion of a misguided parent sneaking unauthorized instruments of escape or comfort into jail for incarcerated sons or daughters borders on cliché. Perhaps defendant's conviction for possessing a controlled substance in jail sheds light on his resistance to having his personal mail inspected. It is a powerful reminder of why inspections were necessary. They did not render him incapable of

[59] *E.g.*, RPC 3.3, 4.1, 4.2, 8.4, 8.5.

protecting work product since it could have been more confidentially exchanged through his standby counsel. The decision not to dismiss the murder charges for imagined misconduct should be affirmed.[60]

2. DEFENDANT FAILED TO PROVE IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ADMIT MATERIAL EVIDENCE OF BOOT TRACKS HEADING TOWARD HIS APARTMENT ALONG A NATURAL ESCAPE ROUTE FROM THE PARKING LOT WHERE HE MURDERED THE VICTIM.

The admission of evidence should be affirmed absent a manifestly unreasonable abuse of discretion. Evidentiary rulings are unreasonable when no rational judge would have entered them. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004); ***State v. Hughes***, 118 Wn. App. 713, 724, 77 P.3d 681 (2003). To be manifestly unreasonable, they must be obviously based on untenable grounds or reasons. *Id.*; ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

Defendant created a convoluted record on this issue, yet his failure to secure a final ruling on his motion to exclude the boot track evidence before it was admitted is clear. The evidence consisted of testimony, video

[60] Defendant incorrectly urges the Court to remand for a reference hearing so he can supplement the record he neglected to perfect despite the trial court's express invitation for him to do so, but "[w]here, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995).

and photographs of tracks on a bark-covered hillside along the natural escape route from the crime scene to his nearby apartment.[61] He explained the motion as *exclusively* predicated on the tracks appearing roughly ½-inch shorter than his 13 ½-shoe size. RP (10/28) 138. The court reserved ruling to evaluate the testimony. *Id.* 139.

Defendant failed to renew the motion when crime-scene video depicting the tracks was admitted. RP (11/3) 75; Ex.33. He objected on the ground it was "a waste of time," but did not challenge the relevancy of the video's content and he does not assign error to time taken for publication. RP (11/3) 72; Ex.33. He subsequently objected to the relevance of two photographs of the tracks, but did not challenge two others or related testimony, which he developed through cross-examination.[62] It was only after the evidence had been explained by two witnesses that he objected to similar testimony, which he characterized as speculative. RP (11/4) 54-58. After a third witness testified about the tracks, defendant sought reconsideration of his motion, citing an illusory inconsistency in the testimony. RP (11/6) 386-89. The motion was denied. *Id.*

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[61] RP (10/28) 137-38; (11/4) 15-16, 28, 52-54, 58-59.
[62] RP (11/3) 81-83, 112-14; (11/4) 14-19, 24-26, 48-52, 54-58; (11/6) 356-58; Ex. 75, 78/ 248-49.

a. Defendant failed to preserve this issue by failing to timely renew his motion.

Defendant proceeded to trial *pro se*, yet remains bound by the court rules. ***State v. Sullivan***, 143 Wn.2d 162, 189, 19 P.3d 1012, 1026 (2001)(Talmadge, J. concurring)(citing ***State v. Smith***, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985); ***State v. Bebb***, 44 Wn. App. 803, 806, 813, 723 P.2d 512, *aff'd*, 108 Wn.2d 515, 740 P.2d 829 (1987). One such rule precludes review of a motion to exclude evidence that was not timely renewed after the ruling was reserved pending further developments. ***Riker***, 123 Wn.2d at 369; ***Koloske***, 100 Wn.2d at 896; ER 103; RAP 2.5.

Defendant failed to preserve his motion to exclude the boot tracks by neglecting to timely reassert it when the evidence was admitted through the testimony of three witnesses, two photographs and crime-scene video. Evidence rule 103 required a "timely" challenge stating the "specific ground," if it was not clear from context. The rule combines with RAP 2.5 to preclude review of errors trial courts were not given a chance to correct. ***Smith v. Shannon***, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

The boot tracks were first admitted through the crime-scene video. Defendant interposed a "waste of time" objection to "how long it would take," without challenging its content. RP (11/3) 72. That limited objection did not renew his pretrial motion, for it invoked "waste of time" under ER

403, which assumes relevance. Defendant refrained from objecting as three witnesses explained the tracks. Renewal of the motion came later. RP (11/6) 386-89. By that time he invited the claimed error by developing the evidence through cross-examination that rendered the portion adduced by the State harmless, if error. *See* ***State v. Mahmood***, 45 Wn. App. 200, 204, 724 P.2d 1021, 1024 (1986); ***State v. Flores***, 164 Wn.2d 1, 19, 186 P.3d 1038, 1047 (2008). The untimeliness of his objection precludes review. ***Riker***, 123 Wn.2d at 369; ***Bebb***, 44 Wn. App. at 806; ER 103.

b. Defendant's current challenge is based on a new and inapplicable theory under ER 702.

The denial of a motion to exclude evidence typically cannot be appealed under a different theory than the one asserted below. *See* ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); ER 103(a)(1). This is because trial courts do not err by failing to consider unasserted claims. ER 103(a); RAP 2.5(a)(3); ***State v. Roberts***, 158 Wn. App. 174, 181-82, 240 P.3d 1198 (2010), *review granted,* 172 Wn.2d 1017, 262 P.3d 64 (2011).

Defendant maintains the boot track evidence should be excluded under ER 702 and ***Frye v. United States***, 293 F. 1013, 1014 (D.C.Cir. 1923). App.Br. 25 (citing ***State v. Brewczynski***, 173 Wn. App. 541, 555, 294 P.3d 825 (2013)). Yet he never challenged it pursuant to those rules below, so it was properly admitted without regard to their applicability.

The argument is also meritless. Rule 702 permits experts to testify about scientific matters. ***Frye*** requires general acceptance of the associated principles. Defendant invokes these standards by mischaracterizing information about the tracks as "footwear impression" evidence, which refers to expert comparisons of unique markings shoes acquire over time. ***United States v. Mahone***, 328 F.Supp.2d 77, 90-91 (D.Maine.2004). Whereas the challenged boot track evidence consists of lay inferences from perceived shape, freshness and relative position. ER 701; ***State v. Ortiz***, 119 Wn.2d 294, 308, 831 P.2d 1060, 1068 (1992) *disapproved on other grounds by* ***State v. Condon***, 182 Wn.2d 307, 343 P.3d 357 (2015). Several of those attributes were not apparent in the photographic record, which further warranted the testimony.[63]

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[63] RP (11/4) 16-17:
Q: "Detective, I'm handing you Plaintiff's Exhibits 248 and 249; do you recognize those? ... Do those fairly and accurately depict the shoe impressions that you observed on March 8, 2009?
A: They do, with the exception that photographs don't give quite as much detail as you can see in person. And so we could tell a little bit more observing the footprints in person than you can from these photographs. ...

State moves to admit 248 and 249.

[Defendant] No objection.

c. It was reasonable to admit evidence of fresh boot tracks found at the crime scene.

"Whether evidence actually plays a part in a crime is not the definition of relevan[ce]...." ***State v. Burkins***, 94 Wn. App. 677, 693, 973 P.2d 15, 25 (1999)(quoting ***State v. Quigg***, 72 Wn. App. 828, 838, 866 P.2d 655 (1994)). To be "relevant," evidence must have some tendency to make the existence of a material fact more or less probable. ER 401. Even minimal logical relevancy will do. ***State v. Bebb***, 44 Wn. App. at 814.

Defendant argued the tracks were irrelevant because they appeared ½ inch shorter than his shoe size. Yet he apparently understood the tracks were made in unstable bark, which accounted for them appearing slightly smaller than the boots that made them. His claim nonetheless confused weight with admissibility. *See* ***State v. Cole***, 67 Wn.2d 522, 534, 408 P.2d 387, 394 (1965). Juries are entitled to a description of the crime scene. *See* ***Cole***, 67 Wn.2d at 534; ***Burkins***, 94 Wn. App. at 693; ***State v. Lantzer***, 55 Wyo. 230, 99 P.2d 73, 78 (1940). Descriptions may include inferences drawn from perception. *Id.*; ***Ortiz***, 119 Wn.2d at 308; ER 701. It is for the jury to decide if connections to the charged offense exist. *Id.*; ***Flythe v. D.C.***, 4 F. Supp. 3d 222, 233 (D.D.C. 2014).

Defendant is not the first murderer to challenge circumstantial evidence recovered from a crime scene. In ***Burkins***, the Court of Appeals

affirmed the admission of rope discovered at a murder scene as evidence of premeditation despite the State's inability to prove it was used. ***Burkins***, 94 Wn. App. at 693. A similar result was reached in at least two other cases. ***Cole***, 67 Wn.2d at 534 (objection to lunch box containing cartridges found in area occupied by murderer went to weight); ***Flythe***, 4 F.Supp.3d at 233 (debatable connection to the incident did not justify excluding knife found at the scene).

It was likewise for defendant's jury to determine if boot tracks observed at the scene were connected to the murder. They certainly had some tendency to identify him as the killer. They were fresh, consistent with his boots and found twenty feet from where the victim's blood was recovered with his DNA along a natural escape route to his apartment. Absent those links, they were still a relevant characteristic of the scene that explained a pertinent sequence of events. If nothing else, they showed somebody seemingly fled from the area around the time of the murder. They consequently contributed to a rational understanding of the incident.

For the first time on appeal, defendant claims the evidence was too prejudicial, if probative. This unpreserved invocation of ER 403 should not be considered. It is also meritless. "In almost any instance, a defendant can complain ... potentially incriminating evidence is prejudicial in that it may contribute to proving ... [he] committed the crime." ***State v.***

Stackhouse, 90 Wn. App. 344, 356-57, 957 P.2d 218 (1998). "As such, the focus must be on whether it was unfairly prejudicial." *Id.* Prejudice is "unfair" when it arouses an emotional response. *Id*

The jury either embraced the tracks as a fact connecting defendant to the murder or convicted him despite them. There was nothing unfair about alerting the jury to their existence, describing their appearance or orientating the jury to their placement between the murder and defendant's nearby apartment. It was reasonable to admit the evidence, so the ruling should be affirmed. The evidence was harmless, if error, for it was not outcome determinative given the DNA that linked him to the scene. ***State v. Doerflinger***, 170 Wn. App. 650, 665, 285 P.3d 217, 224 (2012).

3. THIS COURT SHOULD REJECT DEFENDANT'S UNPRESERVED CLAIM ERROR ADHERED TO THE NOTICE OF HIS TRIAL ON SOCIAL MEDIA THAT THE JURY WAS REPEATEDLY INSTRUCTED TO AVOID AND PRESUMABLY NEVER VIEWED.

Prosecutors are accountable to the public they serve. ***Spokane Cty. v. State***, 136 Wn.2d 644, 655-56, 966 P.2d 305 (1998). Accountability is achieved by alerting the public to prosecutions undertaken in its name. *See* ***State v. Wise***, 176 Wn.2d 1, 17, 288 P.3d 1113, 1121 (2012). Once informed, community members can better exercise their right to observe the proceedings, and through observation assess whether justice was done.

A trial court's ruling on the impact of trial publicity will not be reversed unless clearly erroneous. *See* ***State v. Noltie***, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1990); ***Michielli,*** 132 Wn.2d at 240; ***State v. Wixon***, 30 Wn. App. 63, 71-76, 631 P.2d 1033 (1981) (citing ***State v. Crudup***, 11 Wn. App. 583, 587, 524 P.2d 809 (1979)).

Defendant moved to disqualify the Prosecutor because of his popularity, conduct in the first trial and comments attributed to him by the press. RP (2/13/14) 49-53, 55-56. The trial court denied the motion, in part because there was no reason to believe the Prosecutor committed the misconduct alleged. *Id.* at 57-61. The issue came up again when defendant sought an unconstitutional "gag order" to prevent anyone from discussing the case. RP (3/27/14) 152-53; (5/1/14) 184-89.

Defendant's retrial had not been actively covered by the press. RP (10/27/14) 43. Preliminary instructions issued to prospective jurors provided: the evidence was limited to testimony and admitted exhibits; the State charged defendant with first degree murder, but he is presumed innocent; the case involved the death of a cab driver in Tacoma; the case must not be decided on something heard outside the courtroom; and the jury was "not to look up anything ... [on] anybody's web page ..." or discuss the case on social media. *Id.* at 75-77, 79-80, 106-08. Similar

instructions were given to the empaneled jury before and after opening statement.[64]

Defendant informed the court of a November 2, 2014, "Tweet" on the sixth day of trial. RP (11/12/14) 5-12, 43-44, 55-57. It stated:

> "Prosecutor Mark Lindquist to deliver opening statement tomorrow on Jaycee Fuller murder trial. Fuller Killed taxi driver on Tacoma's Sixth Avenue."

Id. 6-7. The message was placed on the Prosecutor's Twitter account by a staff member tasked with alerting the public to the office's community service. It was sent following the jury's instruction to avoid social media about the case. *Id.* at 6, 10. There was reason to believe a person would have to make a conscious effort to find the message. *Id.* at 9-10. When the Prosecutor inquired into the motion being made, defendant responded:

> **It's not a motion**. It's informing the Court a more proper Tweet would have been "Fuller allegedly killed cab driver from fare off Sixth Avenue." That's the difference.

Id. at 8 (emphasis added). The court correctly observed:

> [I]f the State didn't have a good-faith belief ... you did this ... and there wasn't probable cause ... already found, that you did it, we wouldn't even be here, so saying "allegedly" might be better, but I don't see that it's a great problem....

Id. at 8. Defendant disagreed, conceded he had no reason to think jurors knew about the "Tweet" and reiterated his limited goal of bringing the

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[64] RP (10/28/72) 74-76 (10/30/14) 14-15, 17, 20-22; (11/3/14) 176; (11/4/14) 119.

matter to the court's attention. *Id.* at 9. He did not want the matter brought to the jury's attention. *Id.* at 9-10. That position never changed. *Id.* at 43-44, 55-57; RP (11/19/14) 13-15. Concluding instructions reiterated the impropriety of deciding the case from extrinsic evidence. CP 503-07.

a. Defendant improperly urges reversal for an issue he did not want addressed below.

No procedural principle is more familiar than a right of any sort may be forfeited in criminal cases by a failure to timely assert it. ***State v. Lazcano***, 188 Wn. App. 338, 355-57, 354 P.3d 233 (2015), *as amended* (Aug. 20, 2015); ***United States v. Olano***, 507 U.S. 725, 731, 113 S.Ct. 1770 (1993); ***Yakus v. United States***, 321 U.S. 414, 444, 64 S.Ct. 660 (1944)). Defendants are often precluded from advancing new arguments on appeal because they did not afford the trial court an opportunity to correctly rule on the law they want applied. *Id.* at 355; ***McFarland,*** 127 Wn.2d at 333; ***State v. O'Hara,*** 167 Wn.2d 91, 97–98, 217 P.3d 756 (2009); ***Smith v. Shannon,*** 100 Wn.2d 26, 37, 666 P.2d 351 (1983); ***State v. Strine***, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013)).

Defendants hoping to raise an unpreserved issue on appeal must prove the relief requested is required to correct a manifest error affecting a constitutional right. ***Lazcano***, 188 Wn. App. at 355-57; RAP 2.5. This requires the defendant to show how the alleged error actually affected his

rights. The facts necessary to evaluate the error must be in the record on appeal. *Id.* "[P]ermitting every ... constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals ... and is wasteful of ... limited resources ...." *Id.* at 357.

By asking the trial court to refrain from taking any action to address the "Tweet," defendant ensured the record required to evaluate its impact on the jury was never made. ***Wixon***, 30 Wn. App. at 68; ***Estrada v. Scribner***, 512 F.3d 1227, 1238-39 (9th Cir. 2008). Without that record, there is no way for him to prove the "Tweet" was manifest constitutional error. There is consequently no basis for granting review of this claim.

b. The "Tweet" properly alerted interested members of the public to the trial on social media the jury was instructed not to view.

Prosecutors are public servants. They have an obligation to keep the public informed about how the resources entrusted to them are being managed. *See* ***Spokane Cty.***, 136 Wn.2d at 655-56. This includes alerting the public to judicial proceedings initiated to keep the community safe. *Id.*; ***Wise***, 176 Wn.2d at 17.[65] "Twitter" enables prosecutors to share such

[65] Prof. Kathryn Van Namen, Face Book Facts and Twitter Tips—Prosecutors and Social Media: An Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function, 81 Miss. L.J. 549, 551-56 (2012); https:// twitter.com /KC Prosecutor....

information with people who have taken proactive steps to receive it. This distinguishes Twitter from remarks reported by the press.

Prosecutors may use Twitter to notify interested members of the public when a charge will be tested in trial provided the message consists of non-inflammatory statements about admissible facts available in the public record. *See* ***Wixon***, 30 Wn. App. at 68-70; *see* ***Nebraska Press Ass'n v. Stuart***, 427 U.S. 539, 551, 96 S. Ct. 2791 (1976); ***State v. Polk***, 415 S.W.3d 692, 695-96 (2013); ***State v. Usee***, 800 N.W.2d 192, 200-01 (2011); ***Hall v. State***, 979 So.2d 125, 170-71 (2007). Charges embody a prosecutor's constitutional power of criminal accusation. ***State v. Rice***, 174 Wn.2d 884, 904, 279 P.3d 849, 859 (2012) (citing Wash.Const. Art. XI, Sec.5). They express the prosecutor's decision that sufficient evidence exists to support conviction. *See* RCW 13.40.077(1).

The assignment of error is predicated on defendant's interpretation of the "Tweet" as "an unqualified statement of guilt...." He perceives it to be at odds with the Rules of Professional Conduct. App.Br. at 34(citing RPC 3.6, 3.8). But those rules "do not establish the parameters of the constitutional right to a fair trial." ***Wixon***, 30 Wn. App. at 69. Defendant has not identified a *law* requiring a reference about charges to be prefaced or closed with a reminder of how they differ from convictions.

Public appreciation of the distinction can be presumed in a society that has embraced it for almost a millennium. *See* ***Duncan v. State of La.***, 391 U.S. 145, 151-52, 88 S. Ct. 1444 (1968). By the time the Constitution was written, jury trials to determine guilt in criminal cases had existed for several centuries. In the 18th century Blackstone could write: "Our law ... wisely placed this ... two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and ... prerogative of the crown." English colonists brought the division with them and it remains the corner stone of our justice system. ***Duncan***, 391 U.S. at 151-52. One could hardly open a paper, turn on a television or peruse the internet without being reminded of it, if it were the sort of thing one could forget.

It is unsound, or at least too antidemocratic to contend the public is so ignorant of its justice system's basic structure that prosecutors must preface any reference to a charge with the word "alleged," or conclude by disclaiming it as such. This is especially true when the citizens tasked with deciding its truth will be reminded of as much through instructions they are presumed to follow. CP 503-07; ***State v. Kirkman***, 159 Wn.2d 918, 928, 155 P.3d 125, 131 (2007). Appreciation for this concept resonates in the unwillingness to interpret a prosecutor's factual statement about a crime as an improper opinion about guilt. ***State v. McKenzie***, 157 Wn.2d 44, 57-58, 134 P.3d 221 (2006)("[I]f ... evidence indicates ...

defendant is a ... killer, it is not prejudicial to so designate him."); ***State v. Buttry***, 199 Wash. 228, 250, 90 P.2d 1026 (1939)).

The challenged "Tweet" reported: "Prosecutor Lindquist to deliver opening statements tomorrow in Jaycee Fuller murder trial. Fuller killed taxi driver on Tacoma's Sixth Avenue." The first sentence innocuously alerts viewing members of the public to work the Prosecutor was about to do in a pending murder trial. It was a matter of legitimate interest to people who sought information about the Prosecutor's activities in the community. The second sentence enabled viewers to differentiate the case from others in the county by straightforwardly identifying defendant as the killer in an unadorned summary of admissible evidence already available in the public record of the case. CP 1; 665-66; ***McKenzie***, 157 Wn.2d at 57-58. Aside from the generally understood difference between a prosecutor's statement of fact and a court's pronouncement of guilt, identifying defendant as a person who "killed" is different from labeling him a "murderer" since it is equally understood that not every killer is a murderer, particularly in Washington where citizens free to carry firearms have no duty to retreat from hostile encounters. RCW 9A.16.030 (excusable homicide); .050 (justified homicide); ***State v. Allery***, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); RCW 9.41.050. Defendant failed to prove the "Tweet" was improper.

c. There is no evidence of resulting prejudice.

To win reversal for governmental conduct outside the presence of the jury, a defendant must prove arbitrary action or misconduct that actually prejudiced his right to a fair trial. ***State v. Blackwell***, 120 Wn.2d 822, 830, 845 P.2d 1017, 1022 (1993); CrR 8.3; ***Wixon***, 30 Wn. App. at 68; ***State v. Jamison***, 25 Wn. App. 68, 71, 604 P.2d 1017, 1020 (1979) *aff'd,* 94 Wn.2d 663, 619 P.2d 352 (1980). The "mere possibility of prejudice" is insufficient. ***Rohrich***, 149 Wn.2d at 657.

Defendant irrationally claims he was prejudiced by a "Tweet" from the Prosecutor's office that identified him as the person who "killed" the victim. The State charged defendant with murdering Ahmed. CP 1. The Information accused him of "cut[ting] [Ahmed's] throat, ... thereby causing [his] death." *Id.* Defendant's jury was instructed that the charge was an allegation and repeatedly directed to refrain from viewing social media about the case. Admissible evidence proved defendant killed Ahmed by cutting his throat. The jury was instructed to base its verdict on that admitted evidence. It was further instructed lawyers' statements are not evidence. It is presumed those instructions were followed. Defendant ensured there would be no way of knowing whether the jury was exposed to the "Tweet" when he asked the court not to inquire about it. Even if exposure was assumed, defendant cannot rationally contend the jury was

unduly influenced by a "Tweet" reporting information it legitimately encountered at trial. This is not a case where an extra-judicial statement exposed the public to inadmissible evidence or inflammatory rhetoric inciting condemnation for the accused, which still would not warrant the reversal requested absent proven prejudice.

4. DEFENDANT'S CONVICTIONS ARE WELL SUPPORTED BY PROOF HE SLIT A SOMALI TAXI DRIVER'S THROAT DURING AN ATTEMPTED ROBBERY AIMED AT TAKING SOMETHING BACK FROM IMMIGRANTS HE BLAMED FOR SELF-INFLICTED HARDSHIPS.

Evidence is sufficient to support a murder conviction if it would permit any jury to find the elements of the crime beyond a reasonable doubt. Circumstantial evidence is as reliable as direct evidence. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); ***State v. Notaro***, 161 Wn. App. 654, 670-71, 255 P.3d 774, 782 (2011). A claim of insufficiency admits the truth of the State's evidence with all reasonable inferences capable of being drawn from it. *Id.* Reviewing courts will not reweigh it or substitute their judgment for that of the jury. ***State v. Bencivenga***, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). They defer to the jury's resolution of conflicting testimony, witness credibility and the persuasiveness of evidence. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); ***State v. Walton***, 64

Wn. App. 410, 415–16, 824 P.2d 533 (1992). A person is guilty of first degree murder when: he kills a person with premeditated intent to cause death or causes death in the course, furtherance or flight from an attempted robbery. RCW 9A.32.030(1)(a), (c).

a. Defendant killed Ahmed.

Identity can be proved by circumstantial evidence. ***State v. Hill***, 83 Wn.2d 558, 560, 520 P.2d 618, 619 (1974). It is often inferred from motive, opportunity, ability, connection to the crime scene, or conduct consistent with guilt. ***State v. Lord***, 117 Wn.2d 829, 881-82, 822 P.2d 177 (1991); ***State v. Kirkby***, 20 Wn.2d. 2d 455, 457-58, 147 P.2d 947 (1944); ***State v. Price***, 126 Wn. App. 617, 651-52, 109 P.3d 27, 44 (2005); ***State v. Nicholas***, 34 Wn. App. 775, 779, 663 P.2d 1356, 1359 (1983); *see also* ***State v. Franklin***, 180 Wn.2d 371, 383, 325 P.3d 159 (2014).

Each of those factors are present here. Motive is plain. Ahmed represented people defendant blamed for his troubles—Somalis employed by King Cab. Opportunity was apparent. The fatal fare began at a place where a man resembling defendant was seen. The taxi traveled past his apartment to a neighboring parking lot. He claimed to be on a computer in his apartment at the time, but his alibi was impeached by the device. Ability was manifest in the superior size he could bring to bear with one of

the knives he owned, knew how to use, and habitually carried. Experience as a cabby equipped him to preempt the taxi's panic button as well as select the crime scene, which was otherwise tied to him through the beanie, DNA, hair, facial injuries, boot tracks toward his apartment, and similarly sized boots in his bedroom.

After the murder, defendant betrayed his guilty conscience in conventional ways. He drastically altered his appearance. He deactivated his phone to avoid detection. He impulsively mentioned the murder in conversation. He created opportunities to account for the beanie and facial injuries connecting him to the scene. He gave discrepant versions of events. He even collected newspapers about the crime. At trial he had a histrionic reaction to the victim's picture and admitted committing perjury. The jury had ample evidence from which to reasonably infer his guilt.

b. Defendant committed premeditated murder when he directed Ahmed to an isolated parking lot, slit his throat and stabbed him in the liver.

Premeditation is a decision to kill following reflection, however short. ***State v. Monaghan***, 166 Wn. App. 521, 535-36, 270 P.3d 616 (2012); RCW 9A.32.020(a), .030(1). It is inferable from a variety of facts, including planned presence of a knife, multiple knife wounds, signs of struggle, blind-side attacks, or motive to rob. ***State v. Ollens***, 107 Wn.2d

848, 849-51, 853-54, 733 P.2d 984, 985 (1987); ***State v. Thompson***, 169 Wn. App. 436, 490-91, 290 P.3d 996, 1025-26 (2012); ***Notaro***, 161 Wn. App. at 672 (victim lured into basement, shot twice in the head from behind); ***State v. Ra***, 144 Wn. App. 688, 703, 175 P.3d 609 (2008) (defendant brought gun, provoked confrontation, fired multiple shots).

The premeditated cabby murder in ***Ollens*** is analogous to this case in every material respect. *Id.* at 849-51. Premeditation was found in the defendant's procurement of a knife, attack from behind and motive to rob. *Id.* Ollens' act of slashing the victim's throat after stabbing him further demonstrated predetermined intent to kill. *Id.* Such factors ensured the jury was not left to speculate about premeditation. *Id.* Analogous facts proved defendant's premeditated intent to kill. Premeditation is inferable from his act of luring Ahmed to the scene under the pretext of purchasing a ride, in addition to defendant's decision to bring a knife into the encounter. Commensurate proof of motive to rob as well as retaliate against immigrants Ahmed represented, was manifest in defendant's perception of taxis as "cash boxes" while experiencing financial hardships he attributed to Somali drivers employed by King Cab. Wound patterns on Ahmed's throat taken together with the bloodstain patterns established Ahmed was attacked from behind.

Multiple wounds separated by time also attested to several misused moments of reflection. A sharp-edge injury typical of prolonged pressure was found under Ahmed's chin. Intervening reactive struggle is evident in defensive wounds on his hand, which correspond with scratches on defendant's face to put the bloodstain patterns in context. A moment for reflection passed when defendant repositioned the knife to Ahmed's throat. Another passed when he pushed the blade into Ahmed's flesh. Another passed when he slit Ahmed's throat by pulling the blade across to Ahmed's ear. Yet another passed when defendant stabled Ahmed in the liver after enough time elapsed for Ahmed to lose blood pressure through the severed blood vessels in his neck. The jury was empowered to find premeditation in any part of this coordinated multi-stage attack.

c. Attempted robbery was inferable from defendant's circumstances and the crime he chose to commit.

The felony murder conviction must be supported by evidence defendant killed Ahmed in the course, furtherance or flight from an attempted or completed robbery. ***State v. Maupin***, 63 Wn. App. 887, 892, 822 P.2d 355, 358 (1992); RCW 9A.32.030(c). A person attempts first degree robbery when he intentionally takes a substantial step toward the competed crime. CP 513, 518-19; RCW 9A.28.010(1); RCW 9A.56.200.

Robbery is the unlawful taking of property from another through use or threatened use of force. CP 514; RCW 9A.56.190.

Felony murder based on attempted robbery has been affirmed where victims in possession of valuable properly are killed while resisting attack. *See* ***State v. Cureton***, 38 S.W.3d 64, 73 (2000)(victim with bag of cash killed defending himself while closing his store); ***People v. Rivera***, 159 A.D.2d 255, 256, 552 N.Y.S.2d 249 (1990). An assailant's intent to commit robbery can be inferred from circumstances commonly understood to motivate the crime as well as the absence of those that are not. *Id.*; ***State v. Powell***, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Lack of missing property does not negate the inference, for resistance can explain why the crime was aborted. *Id.*

The record is replete with proof of defendant's intent to rob a King Cab driver like Ahmed. Defendant was destitute. He perceived taxis to be "cash boxes." King Cab would not hire him, but would hire Somalis; "foreigners" defendant hated for stealing jobs from English-speaking drivers like him. Intent to commit robbery is equally evident in the setup. Defendant hailed Ahmed late at night when he predictably had money from earlier fares. Defendant directed Ahmed to an isolated parking lot where a robbery could be accomplished without interruption. Defendant sat behind Ahmed, making it more difficult for him to anticipate the

attack. This element of surprise enabled defendant to preempt the taxi's panic button. If defendant only planned to murder Ahmed there would have been no need to hold him at knife point for a period of time before repositioning the blade to slit his throat.

It appears Ahmed interrupted the robbery through resistance. To that end, the dollar bill and business card on the rear floorboard could have been offered as proof he had nothing to steal, which would have been consistent with the loss-prevention tactic described by his cousin. RP (11/4/14) 86-88. Ahmed's wallet was empty, so they conceivably came from there; however, the dollar was comparable to the haphazardly arranged $49 in Ahmed's coat pocket and would made an even $50. It is also plausible Ahmed threw the dollar and business card backward as a diversion to initiate the struggle apparent in the defensive wounds on his hands, the bloodstains in the taxi and scratches on defendant's face.

There was other evidence from which to infer an intent to steal. Ahmed's manager estimated the fourteen fares Ahmed ran in the ten hour shift preceding his death could have paid $140 to more than $300. RP (11/5/14) 250-52. The jury was able to consider the presence of $210 in Ahmed's pockets with the evidence of his diligence to infer he earned an amount closer to the top of the range. Cabbies carry money in multiple places. Defendant would have known this. The dollar bill on the rear

floorboard showed there was money elsewhere in the cab. In this context, the torn center console was cable of being interpreted as defendant's hurried effort to find cash after the $160 in Ahmed's pocket became too soaked in blood to rationally steal. Whatever the jurors thought, it is appropriate to draw such inferences here; moreover, the running meter established defendant at least stole the value of Ahmed's last fare[66].

Defendant's challenge to the evidence's sufficiency is based on three conceptual errors. He demands direct evidence when circumstantial will do. He attacks each item of evidence in isolation instead of accepting it as a whole. And he challenges inferences supporting the verdict with inferences favorable to the defense. Both convictions should be affirmed.

d. His proposed remedy is similarly flawed.

Sentence was imposed on a merged count of first degree murder. Assuming *arguendo* one of the independently decided first degree murder convictions was overturned, the remedy would be remand for correction of judgment as the remaining first degree murder count would support the sentence. ***State v. Turner***, 169 Wn.2d 448, 466, 238 P.3d 461 (2010). If the felony murder count was overturned *and* only intentional murder was found, the remedy would be remand for resentencing on deadly weapon

[66] Theft includes an unauthorized taking of services by force or deception. RCW 9A.56.020(1).

enhanced second degree murder. *Id.* Yet neither remedy is appropriate since the jury had a factual basis from which to infer defendant committed first degree murder by the means found in each of its two verdicts.

D. CONCLUSION.

Defendant's unpreserved claims of evidentiary error and misconduct should not be reviewed, or, if reviewed, rejected as meritless and his well supported first degree murder convictions should be affirmed.

RESPECTFULLY SUBMITTED: March 11, 2016

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/18/16
Date Signature

PIERCE COUNTY PROSECUTOR

March 18, 2016 - 3:13 PM

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