IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYREE JEFFERSON

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY NO. 76011-4-I

The Honorable Frank Cuthbertson, Judge

PETITION FOR REVIEW - CORRECTED

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STATUTES, RULES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Tyree Jefferson, appellant in the Court of Appeals, requests this Court accept review of the July 17, 2017 decision referred to in Section B.

B. COURT OF APPEALS DECISION

Mr. Jefferson seeks review of the Court of Appeals decision in *State v. Jefferson*, ___P.3d.___(2017 WL No. 3016047). The decision is attached in Appendix A.

C. Issues Presented on Appeal

1. This criminal case involves the prosecution's use of a peremptory challenge to strike the only African American juror from the venire. Does the need to protect due process and trust in the justice system require this Court to examine more closely the use of pre-textual reasons to challenge race-based peremptory challenges?

2. Does the need to protect due process and trust in the justice system require this Court to increase judicial scrutiny of the state's use of peremptory challenges based on the Washington state constitution's enhanced protection of the right to trial by jury?

3. To protect the due process right to a fair and impartial jury, does this Court need to re-examine the use of an objective versus subjective inquiry into jurors' ability to disregard the taint from highly prejudicial extrinsic evidence, regardless of whether the trial court makes the inquiry during jury deliberations or after a verdict is rendered?

D. STATEMENT OF THE CASE

a. Summary

Jefferson, an African American, was charged and convicted of attempted murder in the first degree and unlawful possession of a firearm in the first degree. CP 40-42, 181-84.

Someone shot Rosendo Robinson after he stole a pair of Versace glasses from Lashonda Goodman at a bar called the Latitude 84. Wortham was quite intoxicated when the shooting occurred. RP 616-18. Wortham and Goodman saw Dimitri Powell at the Latitude who came with his nephew/cousin, who was not introduced by name but was later identified as Tyree Jefferson. RP 418-19, 838. Neither of the women knew Jefferson or remembered talking to him, but after Wortham viewed surveillance video from Latitude 84, she realized that she must have talked to Jefferson. RP 496, 901, 979.

After Wortham told Powell that Robinson refused to return Goodman's glasses, Powell and his cousin unsuccessfully tried to convince Robinson to return the glasses to Goodman. RP 421-25. To settle the matter, Goodman and the woman with Robinson agreed to fight across the street at the 76 Station. RP 432, 886-87.

Wortham and Goodman knew that Powell drove over to the gas station in a **black Nissan Altima**, but did not know if Jefferson was with him. RP 434, 862, 934. Robinson described another dark car arriving at the gas station. RP 689.

Goodman saw Jefferson at the 76 Station but did not see him while she was fighting with the other woman. RP 850, 866. Robinson and Powell were fighting when Robinson was shot.

Robinson's testimony was inconsistent. Robinson testified that he did not see the person who shot him, that he was not shot by the person he was fighting with, that he was shot by the person he was fighting with, and that he did not know where the shots came from. RP 548-549, 694-95, 700-01. Robinson also positively identified Powell as the shooter and had a photograph of him on his phone. RP 575, 703-04.There was no forensic evidence linking Jefferson to the shooting. RP 747-827.

b. *Batson* Challenge

Juror No. 10 was the only African American jury pool member. RP 238-39. The relevant voir dire related to the *Batson* challenge is as follows:

> MS. COREY: Without telling us the verdict, during deliberations, did you have a situation where anybody
> referred to matters that were not germane to what you were considering?
>
> JUROR NO. 2: Sure.
> MS. COREY: And what happened when that happened?
> JUROR NO. 2: We all discussed it, and the person
> agreed that it didn't really pertain to what was going on.
>
> MS. COREY: Okay. Was a person called on that,
> essentially, and saying, this doesn't have anything to do with it?

RP 228.

> JUROR NO. 2: Exactly.
> MS. COREY: Juror No. 10.
>
> JUROR NO. 10: Yes.
>
> MS. COREY: And that worked?
>
> JUROR NO. 10: I agree with No. 2. I did have

that same situation because I was one of them.

MS. COREY: You were one of them that brought up stuff?

JUROR NO. 10: Yeah. I was too open-minded, I guess.

RP 229.

Juror No. 10, could you please stand? So you've
already taken your oath.

JUROR NO. 10: Yeah.

MR. CURTIS: Why am I still here with 20 minutes
to question you? Why does the Court allow that?

JUROR NO. 10: Maybe you're trying to still figure out can we, or me, be influenced still by something from the outside.

MR. CURTIS: You think I should continue to ask questions and take advantage of the time, or do you think it's enough that everybody stood up and took the oath?

JUROR NO. 10: No, I don't think you should waste
time. Honestly –

> MR. CURTIS: You think I should take everybody at their word and just keep it moving, right?
>
> JUROR NO. 10: Well, I mean that's up to you, but for me, personally, it's a waste of time, so, okay –
>
> MR. CURTIS: What if I was representing you in a case? Would you want me to ask the jurors questions and figure out if -- if you were my client, would you want me -- or just take everyone at their word -- jurors?
>
> JUROR NO. 10: Just like you said, if everyone took the oath and you're expecting them to be partial to the evidence and everything that's presented, so -- and the questions that have been asked about, you know, being influenced by anything from the outside, still need to separate those two from the facts and then -- and whatever they hear on the outside.

RP 175-76.

> They're still -- they're doing their best, but they're still dealing with humans, and people have biases, and people have their own thoughts and decisions. And they, you know, just -- people in general, people aren't all the same. They may all say one thing, but they may not mean the same thing, if that
> makes any sense.

RP 178.

> JUROR NO. 23: Many, many years ago, yes.
> MS. COREY: Can you give us a synopsis of the plot, please?
>
> JUROR NO. 23: Oh, boy. That's putting me to the test. As far as I can remember, it's a jury comes together, and you have very differing opinions, and they can't come to a conclusion, if I remember correctly. It's very difficult to come to a conclusion that they can all agree on the same verdict.

RP 194.

> JUROR NO. 1: There was a group -- the whole movie takes place in a jury room. And they're debating the case, and there's a lot of personalities involved and so forth. And I think, as it turns out in the end, there's the recognition that this witness, who seems so credible, could not possibly have seen what they claimed they saw.
>
> MS. COREY: Okay.
>
> JUROR NO. 1: And that was a shock to everybody.

RP 210.

> JUROR NO. 10: I know it's a long time ago. I think Jack-somebody played in the movie "12 Angry Men." The way it started out, a lot of jurors were ready to give a verdict right off the bat because a lot of them had things to do, places to go, other things going on in their life.
> And like the young man, No. 9, said, 11 of them wanted to go ahead and give a verdict, but that 12th man held out because he knew that the evidence, what he was listening to didn't add up. And like he said, it took days in a jury room, and it took some time to get those jurors to understand the facts that were given in court. And I say one by one, the jurors began to change they mind and see the evidence a little bit different than what they had started out to. In the end, if I can remember right, the person that was on trial didn't do it. It was someone else.

RP 196.

> JUROR NO. 9: I watched it. I think -- the main point I took out of it was that 11 people were against – or were for the guilty verdict. Only one person was for not guilty. And slowly, throughout the movie, he kind of convinces them, gives that reasonable doubt in their head, and so it just kind of showed the power of the system at work. It's not because -- people had all these assumptions, and it slowly starts to reveal the biases in their heads that they didn't realize. So at the end, they all kind of change their mind

> and realize how even themselves, they couldn't trust their own opinion.

RP 19

> JUROR NO. 22: When you're on a committee, or something, and you're laying out all the project information and you look at the facts and data to prove your points, and some people -- I was on task one time. There was a bias because of the type of product. We were trying to choose two products, and the company -- this group was looking at one product, and part of the team was looking at the other. And instead of looking at the facts of the costs and long-range plan of it and how it was going to work in the company for everybody, they were just looking at "because
> this was their favorite." So you have to kind of help people see the light and what you're really there for, and to look at the facts and data that are going to support a decision that you're going to make.

RP 197-99.

When asked about deadlock-----

> JUROR NO. 1: So when we have -- I'm a physician, and we have team meetings, monthly, and we're making decisions as to problem solving, things that go wrong, how we can make our systems better, and there's lots of

> different opinions. We oftentimes don't come to a conclusion. RP 198-99.

RP 210.

The prosecutor removed Juror No. 10 from the jury pool in Jefferson's case. RP 238-39. The prosecutor claimed that he did not like juror No. 10 because juror No. 10 believed that the extended voir dire was a waste of time after the jurors had sworn to abide by the law in upholding their responsibilities as jurors. RP 242-45. White juror No. 1 also revealed that the voir dire process seemed like a waste of time but was not removed from the jury venire. RP 245-46. Juror No. 10 indicated that in a prior case he had discussed a matter in the jury room from outside the case and had learned that this was not appropriate. Id.

The prosecutor also explained that he struck juror No. 0 in part because he enthusiastically discussed *Ten Angry Men.* RP 242-47. However, white juror No. 1 discussed the movie enthusiastically as did white jurors number No. 9 and No. 23, but none of these white jurors were removed. RP 194-95.

The court denied the *Batson* challenge ruling that striking the only African American juror in a case where the defendant was

African American was not a race based strike. RP 246-47. Jefferson informed the court that "this is not a jury of my peers." RP 249.

The Court of Appeals agreed and ruled that there was no *Batson* violation because:

> At least two of juror 10's responses support the trial court's decision to deny Jefferson's Batson challenge. First, juror 10 stated voir dire was a "waste of time." Striking a juror who indicates that the voir dire and pretrial proceedings are a "waste of time" is a reasonable, race-neutral reason to strike a juror. Second, juror 10 admitted that while serving as a juror in a criminal trial he brought extraneous evidence into the deliberations. This is also a reasonable race-neutral reason to strike a juror.

Jefferson at page 3. The Court of Appeals also determined that striking Juror No. 10 was race-neutral because of Juror No. 10's discussion of *12 Angry Men*. Again the Court of Appeals ignored the disparate treatment of Juror No. 10 compared to two other white jurors (1 and 22) and who were permitted to serve even though they described their personal involvement in scenarios similar to *12 Angry Men*. *Jefferson*, ___P.3d____.

c. Jury Misconduct.

After the prosecution began its closing argument, the trial court *sua sponte* called for a sidebar after juror No.8 informed the judge that she felt intimidated by members of the galley who had been identified as Jefferson's family. RP 1185-86, 1188-89. The judge referred the juror to the bailiff to continue communicating her concerns. Id.

Juror No.8, a female, informed the bailiff that she felt threatened, scared, and intimidated by galley members who followed her and juror No. 9 to the parking garage and watched as they got into their cars. RP 1191-92. According to juror No. 8, juror No. 9 said if the members of the galley came up to the garage she was going to stay with security and not go to her car. RP 1191-92. Juror No. 8 described the experience as "unnerving". RP 1191-92.

The next morning juror No. 8 discussed her concerns with most of the other jurors in the jury room. RP 1193. The other jurors told juror No. 8 that she needed to bring her concerns to the court's attention. When asked about her ability to proceed, juror No. 8 indicated that she was uncomfortable in part because the members

of the galley were people of color. RP 1169. Juror No. 8 was removed for cause. RP 1258.

During questioning of juror No. 9, she conceded that she became concerned with being watched after juror No. 8 brought it to her attention. RP 1200. Juror No. 9 informed the court that juror No. 8 discussed with other jurors, her fears about being followed and watched. RP 1203-04. The defense moved for a mistrial which the court deferred, choosing instead to voir dire each juror individually. RP 1206-1207-14. Juror No.8 thought it was “creepy” to be watched. RP 1129.

Juror’s No. 5 and No. 11 both heard juror No. 8 discuss being watched by galley members in a black Nissan Altima, the alleged shooter car. RP 1219, 1232, 1239-40, 1252, 1256-57. The court recalled jurors' No. 5 and No. 11 to ask if they were mistaken and perhaps heard “black male” rather than “black Nissan Altima”. Both jurors insisted that juror No. 8 said she was watched by people in a black Nissan Altima. Id. When asked, juror No. 8 denied mentioning the black Nissan Altima. RP 1262. Jefferson offered that the person in the car was his brother. RP 1242-1245.

The defense moved for a mistrial based on juror misconduct and because the trial court intimidated jurors' No. 5 and No. 11 by challenging their memories about the black Nissan Altima. RP 1219, 1232, 1239-41, 1247, 1252, 1256-58, 1266. Even though the court was concerned about the vehicle, it denied the motion for a mistrial because the other jurors indicated that they could be fair and unbiased. RP 1247, 1258, 1264.

The defense made a record that there was no curative instruction that could have removed the taint from this incident and that Jefferson's right to a fair trial had been denied. RP 1265-66.

E. REASONS TO ACCEPT REVIEW AND ARGUMENTS

1. THE COURT OF APPEALS DECISION PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE UNITED STATES CONSTITUTION AND IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT REGARDING *BATSON* AND DISCRIMINATION IN THE JURY SELECTION PROCESS.

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During jury selection, the deputy prosecutor exercised peremptory challenges excusing the only African American juror. RP 219-20; 238-39. Mr. Jefferson who is African- American

challenged this dismissal under *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). CP 403-16.

A prosecutor's use of a peremptory challenge solely on the basis of race violates a defendant's right to equal protection. *Batson*, 476 U.S. at 89.

a. Standard of Review

Batson challenges are reviewed for clear error. *State v. Saintcalle*, 178 Wn.2d 34, 41, 309 P.3d 326 (2013). "Clear error exists when the court is left with a definite and firm conviction that a mistake has been committed." Id.

b. This Court Should Grant Review and Remand for a New Trial.

This Court should accept review because the Court of Appeals mis-applied the *Batson* standard for establishing race-based discrimination during jury selection by deciding that any facially, race-neutral reasons trumped race-based reasons in the jury selection process. This is a significant question of law under the equal protection clause of the Fourteenth Amendment.

The record from Mr. Jefferson's trial provides an ideal opportunity for this Court to consider if our reviewing courts' interpret and apply the Batson test for determining pre-textual, race-based discrimination in a manner that makes a finding of

discrimination in the jury selection process impossible in violation of the due process clause and equal protection. Accordingly, this Court should accept review. RAP 13.4(b)(3)-(4).

c. *Batson* Test.

The Equal Protection Clause prohibits the use of peremptory challenges to exclude otherwise qualified and unbiased jurors based upon their race. U.S. Const. amend. 14; *Batson,* 76 U.S. at 98; *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995). *Batson* and subsequent cases set out a three-part test for whether the Equal Protection Clause has been violated by a peremptory challenge.

First, the person challenging the peremptory must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson,* 476 U.S. at 93-94. Second, "the burden shifts to the State to come forward with a [race-]neutral explanation" for the challenge. *Batson,* 476 U.S. at 97. Third, "the trial court then [has] the duty to determine if the defendant has established purposeful discrimination." *Batson,* 476 U.S. at 98.

In making these determinations, the trial court must

consider the defense argument of discrimination along with the State's explanation to decide if all the circumstances show the challenge was purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). If the trial court finds purposeful discrimination, the trial court must prohibit the peremptory strike. *Saintcalle*, 178 Wn.2d at 42. The trial court is given deference in determining purposeful discrimination. *Saintcalle*, 178 Wn.2d at 55-56.

To determine an inference of race based discrimination, our federal courts consider the "combination of circumstances taken as a whole" during voir dire. *U.S*. *v*. *Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989).

d. The Prosecutor's Reasons were Pre-textual.

(i) Comparative Juror Analysis

This Court should accept review because the Court of Appeals upheld the trial court's affirmance of the use of a race-based peremptory challenge because the prosecutor also offered race-neutral reasons. This ignored the fact that under a comparative juror analysis, the prosecutors reasons were race-based. The analysis examines "whether the proffered race-neutral

explanation could apply just as well to a nonminority juror who was allowed to serve." *Miler-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

"*Batson* requires the judge to determine whether a race-neutral reason offered for a challenge is honest". *United States v. Roberts*, 163 F.3d 998, 1000 (7th Cir. 1998). See also, *Snyder v. Louisiana*, 552 U.S. 472, 485, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (court examines reasons to make sure they are not pretextual). *See also, Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) (stating that courts are not bound to accept neutral reasons that are either unsupported by the record or refuted by it).

The fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason. *Chinchilla,* 874 F.2d at 699.

Although the reasons given by prosecutor "would normally be adequately 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency".

In *Chinchilla*, the prosecutor provided two race-neutral reasons (poor appearance and choice of employment) for

challenging Hispanic jurors and one suspect reason (location of residence). The Court held that although the poor employment and choice of employment "would normally be adequately 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency." *Chinchilla*, 874 F.2d at 699. This means that if any of the state's reasons are not race-neutral, under the combination of circumstances taken as a whole, the remaining race – neutral reasons are inadequate to overcome the race-based reasoning. *Chinchilla*, 874 F.2d at 699.

Here, the Court of Appeals treated juror No. 10 differently than three other white jurors. First, the Court of Appeals mistakenly determined that Juror No. 10 "brought extrinsic evidence" into the jury, when in fact, Juror number 10 merely discussed a matter not relevant to the trial in question. RP 228-29; *Jefferson* at page 3. This is not the same as introducing extrinsic evidence and is not a valid race-neutral reason to strike the only African American juror.

The Court of Appeals also mistakenly believed that Juror No. 10's response to questions about the benefits of voir dire were adequate race-neutral reasons to strike No. 10. *Jefferson* at page

3. Again the Court of Appeals mischaracterized Juror No. 10's responses and took them out of context in much the same manner held impermissible in *Chinchilla*. *Chinchilla*, 874 F.2d at 699; RP 175-76.

Juror No. 10 revealed was that he personally believed the court dire a waste of time because he took an oath. RP 175-76. Juror No. 10 also respected the prosecutor's decision to ask questions: "that's up to you". RP 175-76. Finally, Juror No 10 explained in detail that even after the jurors' took an oath, if the prosecutor represented him, he agreed that the prosecutor would need to vet the jurors with voir dire questions to determine their bias. RP 175-76. Without explicitly stating as much, white Juror No. 5 also informed the prosecutor that voir dire was a waste of time because people do not say what they mean. RP 178. This view was similar to Juror No. 10, but juror No. 5 was not struck. RP 228-29; 174-76, 194-96; 210.

The Court of Appeals also ruled that regarding the discussion of *12 Angry Men,* the prosecutor's reason were race-neutral for striking Juror No. 10, but not white jurors nos. 1, 22, and

23, who were as familiar with of *12 Angry Me*n, as juror no. 10. RP 228-29; 174-76, 194-96; 210.

Here, under the comparative juror analysis used in *Chinchilla*, the prosecutor committed purposeful discrimination by challenging the only African American juror on the same grounds exhibited by four other white jurors who held beliefs similar to juror No. 10 but were not challenged for cause. RP 228-29; 174-76, 194-96; 210. This disparate treatment of white jurors and the only African American juror violated *Batson* and established purposeful discrimination. *Batson*, *supra; Chinchilla.*

These cases demonstrate, the reviewing Court must look beyond an explanation that in a vacuum seems race-neutral, but that is in fact race-based, even where the prosecutor may not even be aware of his own race-based discrimination. *Saintcalle*, 178 Wn.2d at 53.

This Court should grant review to clarify the interpretation and application of the *Batson* test to afford real protection against pre-textual, race-based discrimination in the jury selection.

2. THE COURT OF APPEALS DECISION PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER

WASHINGTON STATE CONSTITUTION ARTICLE 1 SECTION 23 AND IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT REGARDING THE ADEQUACY OF THE *BATSON* TEST TO PREVENT RACIAL DISCRIMINATION IN THE JURY SELECTION PROCESS UNDER THE STATE CONSTITUTION.

a. This Court Should Grant Review under RAP 13.4(b)(3)-(4).

The standard for establishing race-based discrimination during jury selection is a significant question of law under the equal protection clause of the Fourteenth Amendment and under article 1, section 21 of our state constitution. It is also an issue of substantial public interest that should be decided by this Court. Article I, section 21 provides greater protection of the right to trial by jury.

This greater protection commands a better standard to begin addressing the reality of racial bias in jury selection. Mr. Jefferson asks this Court to grant review under RAP13.4(b)(3)-(4) and adopt such a standard because *Batson* as currently interpreted is inadequate to protect against the type of race-based discrimination that occurred in this case.

b. *Batson* Creates A "Crippling Burden" Making It Impossible to

Establish Race-Based Discrimination in The Jury Selection Process.

Our State Supreme Court agreed with the United States Supreme Court in *Miller-El* that "peremptory challenges have become a cloak for race discrimination." *Saintcalle*, 178 Wn.2d at 44. "This fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable." *Saintcalle*, 178 Wn.2d at 44.

In "over 40 cases since *Batson,* Washington appellate courts have *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge. *Saintcalle*, 178 Wn.2d at 45-46. *Batson* "appears to have created a '"crippling burden' making it very difficult for defendants to prove discrimination even where it almost certainly exists." Saintcalle, 178 Wn.2d at 45-46.

"The United States Supreme Court has left it to the states to provide *Batson* procedures." *City of Seattle* v. *Erickson,* ___P.3d___; *Ford v. Georgia,* 498 U.S. 411, 423, 111 S.Ct. 850 112 L.Ed.2d 935 (1991). This Court has "the power to determine, under appropriate circumstances, whether the traditional *Batson* analysis should be amended or replaced to ensure the promise of

equal protection." *Erickson,* ___P.3d___; (citing *Saintcalle*, 178 Wn.2d at 51).

c. The Washington State Constitution's Greater Protections for a Jury Section Process Free of Racial Discrimination Require a Different Approach to *Batson*.

A majority of the Washington Supreme Court has acknowledged that, in spite of *Batson,* racial discrimination remains a serious problem with respect to jury selection and something must change to meaningfully address and improve this serious problem. *. Saintcalle*, 178 Wn.2d at 44-50.

In light of the failure of *Batson*, "now is the time to begin the task of formulating a new, functional method to prevent racial bias in jury selection." *Saintcalle*, 178 Wn.2d at 52. Article I, section 21 of the state constitution provides the underpinnings of a more functional method to ameliorate the pernicious effects of discrimination. It provides, "The right of trial by jury shall remain inviolate . . . ." An analysis of this provision under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), supports the adoption of enhanced judicial scrutiny of peremptory challenges

exercised against jurors in protected classes.

Because the current standard is inadequate to stem the tide of race-based peremptory challenges, Jefferson requests that Washington courts deny the exercise of any peremptory strike "if there is a reasonable probability that race was a factor in the exercise of the peremptory . . . ." *Saintcalle*, 178 Wn.2d at 54.

d. *Gunwall* Requires an Independent Analysis of the Jury Trial Right Under the State Constitution and Also Requires Greater Rrotection of This Right

In assessing whether the state constitution provides greater protection of a right than the federal constitution, *Gunwall* requires consideration of six factors: "(1) textual language, (2) differences between the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern." *Smith*, 150 Wn.2d at 149.1

The Washington Supreme Court has already recognized that a " *Gunwall* analysis indicates that the right to a jury trial may be broader under article I, section 21 than under the federal

1 Due to the page limit constraints in this petition, counsel has significantly abbreviated the *Gunwall* analysis.

constitution." *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003); *State v. Hobble*, 126 Wn.2d283, 298, 892 P.2d 85 (1995).

The first *Gunwall* factor supports a more protective right. Article I, section 21 provides that the right to jury trial "shall remain inviolate." The Washington Supreme Court has already interpreted the word "inviolate" as connoting the highest protection." *Sofie v. Fibreboard Corp*., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989); see also, *Smith*, 150 Wn.2d at 150 ("free from change or blemish" (citations omitted)).

The second factor also compels a more protective interpretation. Although the Sixth Amendment and article I, section 22 are comparable, " this court has previously found that article I, section 21 has no federal equivalent", because the state constitution unlike the federal constitution (6th Amend.) acknowledges the right to a jury trial in two provisions instead of one. *Smith*, 150 Wn.2d at 151.

The third and fourth *Gunwall* factors, state constitutional and common law history and preexisting state law, also support greater protection. Prior to the ratification of the state constitution, territorial statutes gave criminal defendants twice as

many peremptory challenges than the State.. CODE OF 1881, ch. 87, § 1079, at 202; CODE OF 1897, ch. 11, §§ 6931-32.

The court practice limited the State's use of peremptory challenges in favor of the accused. Article I, section 21 should be interpreted as providing the utmost protection to keep the jury-trial right inviolate.

The fifth factor, differences in structure, always supports an independent and more protective interpretation of the state constitution because "[t]he federal constitution is a grant of limited powers whereas state constitutions limit the otherwise plenary power of the states." *Smith*, 150 Wn.2d at 151. "This difference favors an independent state interpretation in every Gunwall analysis." *State v. Russell*, 125 Wn.2d 24,61, 882 P.2d 747 (1994).

The sixth *Gunwall* factor, the state interest and local concern, additionally favors an independent and more protective analysis. *Smith*, 150 Wn.2d at 152 "[I]t would seem that providing jury trials for adult defendants is a matter of particular local concern." *Smith*, 150 Wn.2d at 152. This is particularly true in light of the *Saintcalle* decision, which called on counsel and courts

to address this serious problem. *Saintcalle,*178 Wn.2d at 52-53.

All six *Gunwall* factors favor an independent and more protective treatment of the jury-trial right under the Washington Constitution.

e. The State Constitution's Greater Protection of the Jury- Trial Right Supports the Adoption of a More Workable 'Reasonable Probability' Standard to Confront the Issue of Racial Discrimination in Jury Selection.

The *Saintcalle* decision provides a direction forward to ensure the right to jury remains inviolate from the racial prejudice of prosecutors.

"As a first step, we should abandon and replace *Batson's* 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion." *Saintcalle*, 178 Wn.2d at 53-54. The lead opinion then proposed a rule "to require a Batson challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory . . . ." *Saintcalle*, 178 Wn.2d at 54.

Such a standard "would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge. This in turn would simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." *Saintcalle*, 178 Wn.2d at 54.

Based on the greater protection of the right to jury trial article I, section 21 provides—protection that requires this right to remain inviolate—this Court should grant review and instruct trial courts to sustain *Batson* challenges when there is a reasonable probability that race was a factor in the exercise of a peremptory challenge.

3. THE COURT OF APPEALS DECISION PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE UNITED STATES CONSTITUTION AND IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT REGARDING JEFFERSON'S DENIAL OF HIS CONSTITUTIONAL RIGHT TO A FAIR AN IMPARTIAL JURY UNDER ARTICLE 1, SECTION 22 AND THE SIXTH AMENDMENT.

The Court of Appeals in this case relied on the wrongly

decided decision in *State v. Gaines*, 194 Wn.App. 892, 896, 380 P.3d 540 (2016), which permits the trial court to rely on a subjective inquiry into the impact of extrinsic evidence on a jury, rather than compelling an objective analysis in all cases. The Court of Appeals reliance on *Gaines*, adversely impacts the constitutional right to a fair and impartial jury free from extrinsic evidence. This is a significant question of law under the U.S. Const. amends. VI, XIV § 1; and Wash. Const. art. I, §§ 3, 22. It is also an issue of substantial public interest that should be decided by this Court.

Mr. Jefferson asks this Court to grant review under RAP13.4(b)(3)-(4) and clearly articulate that regardless of the timing of a challenge to a jury's consideration of extrinsic evidence, and regardless of juror's stated ability to disregard that evidence, under an objective analysis some evidence is too damaging and prejudicial, and the only remedy to protect the right to a fair and impartial jury, is to make an objective inquiry.

a. A Defendant is Constitutionally Entitled To An Unbiased Jury.

The accused in a criminal trial has a constitutional right to have a fair and impartial jury. U.S. Const. amends. VI, XIV § 1;

Wash. Const. art. I, §§ 3, 22; *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). Due process requires that a person accused of a crime be tried only by a jury willing to decide the case solely on the evidence presented. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1981). "[I]t is error to submit evidence to the jury that has not been admitted at trial." *In re Pers. Restraint of Glassman*, 175 Wn.2d 695, 705, 286 P.3d 673 (2012); *State v. Pete*, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004).

b. Standard of Review

This Court reviews a court's investigation of juror misconduct and a motion for a new trial for abuse of discretion. *Gaines*, 194 Wn.App. at 896; *State v. Balisok*, 123 Wn.2d 114, 117, 666 P.2d 631 (1994).

c. Jury Misconduct Occurs When The Jury Considers Facts Not In Evidence.

Consideration of extrinsic evidence constitutes juror misconduct that may require a new trial. *Pete*, 152 Wn.2d at 552; *Balisok*, 123 Wn.2d at 118. This Court "may presume prejudice on a showing of misconduct." *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009). "[A]' new trial must be granted unless 'it can

be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.' " *State v. Briggs*, 55 Wn.App. 44, 55, 776 P.2d 1347 (1989) (*citations omitted).*

According to the Court in *Gaines*, courts may use a subjective inquiry into a juror's ability to disregard extrinsic evidence when the matter is raised pre-verdict, but need not make an objective determination regarding the jury's ability to be fair and impartial if the inquiry is made during deliberations but pre-verdict because there is no verdict to impeach. *Gaines*, 194 Wn.App. at 898.

The Court's logic is not correct because the real issue is whether the verdict will ultimately be tainted not the timing of the inquiry into the taint. *Bagley*, 641 F.2d at 1242; *Llewelly*n, 609 F.2d 195; *Briggs,* 55 Wn.App. at 60. The Court in *Gaines*, use of the subjective inquiry also ignored the reality that the defendant cannot cross-examine any extrinsic evidence introduced to the jury regardless of whether it was introduced during closing arguments or post-verdict. *Pete*, 152 Wn.2d at 552-53.

d. <u>This Court Should Accept Review Because The Court of Appeals Failed to Apply A Constitutionally</u>

Meaningful Test for Determining Whether a Jury is Tainted Beyond Repair.

The use of an objective test post-verdict and a subjective test pre-verdict ignores the actual impact of the extrinsic evidence on the jury deliberation process because: (1) jurors' generally desire to deliberate and decide the cases in which they have heard evidence; and (2) some extrinsic evidence is impossible to disregard. *Pete*, 152 Wn.2d at 555; *State v. Powell*, 62 Wn.App. 914, 919, 816 P.2d 86 (1991) (In context of prosecutorial misconduct -"The bell once rung cannot be unrung.").

See, also United States v. Heller, 785 F.2d 1524, 1526-28 (11th Cir. 1986) (court became aware of jurors prejudicial comments and ordered a new trial even though a hearing was conducted and jurors individually assured the court they could set aside consideration of the prejudicial remarks); *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979);

This Court in *Pete* agreed with this line of cases. In *Pete*, the Court informed the jury after they reached a verdict but before it was rendered that inadmissible evidence had been sent to the jury

including the police report and a statement made by Pete. *Pete*, 152 Wn.2d at 550. This Court held the impact of the extrinsic evidence could not be mitigated with a curative instruction. *Pete*, 152 Wn.2d at 554-55.

The prejudice to Pete existed because of the introduction of the extrinsic evidence, not because of the timing of the inquiry. As in *Pete*, here, the jury's inevitable associating Jefferson with the jury intimidation, whether intended or not, prejudiced Jefferson because there is at least a "reasonable ground to believe that the defendant may have been prejudiced." *Pete*, 152 Wn.2d at 554 n. 4.

To protect every defendant's right to a fair and impartial jury free from the taint of damaging extrinsic evidence, Mr. Jefferson respectfully request this Court grant review and follow its own precedent in *Pete* and disregard *Gaines*' reliance on a subjective inquiry into the likely impact of the extrinsic evidence on the verdict, because the subjective test is inadequate.

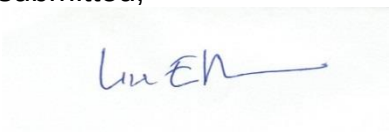
F. CONCLUSION

Tyree Jefferson respectfully requests this Court grant review to express a better standard for protecting against racial

discrimination in the jury selection process; determine that even under *Batson* as currently interpreted, the prosecutor struck Juror No. 10 based on his race; that no reasonable juror could disregard the extrinsic evidence introduced to the jury regarding the alleged shooter car; and establish that an objective test is needed to protect against the introduction of extrinsic evidence into the deliberation process.

DATED this 16th day of August 2017

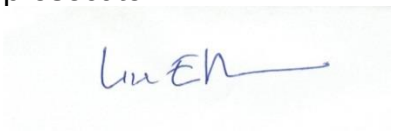
Respectfully submitted,



_____

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor – pcpatcecf@co.pierce.wa.us and the Tyree Jefferson DOC# 305122 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362, on August 16, 2017 a true copy of the document to which this is attached. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Jefferson and electronically to the prosecutor.



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Signature

APPENDIX A

2017 WL 3016047
Court of Appeals of Washington,
Division 1.

STATE OF WASHINGTON, Respondent,
v.
TYREE WILLIAM JEFFERSON, Appellant.

No. 76011-4-I
|
FILED: July 17, 2017

Opinion

MANN, J.

***1** Tyree Jefferson appeals his conviction for attempted first degree murder, first degree assault, and unlawful possession of a firearm. Jefferson raises ten issues on appeal, including: (1) the trial court erred in denying his Batson[1] challenge after the State used a peremptory challenge to strike the only African American venireperson, (2) the trial court violated the appearance of fairness doctrine, (3) the trial court erred in denying a mistrial for jury misconduct, (4) the trial court erred in admitting gang evidence, (5) the trial court erred in excluding evidence and testimony from one of Jefferson's witnesses, (6) prosecutorial misconduct, (7) that insufficient evidence supported the convictions, (8) the "to convict" instruction was inadequate, (9) ineffective counsel, and (10) cumulative error. Finding no error, we affirm.

[1] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

FACTS

On February 14, 2013, Harmony Wortham and Lashonda

Goodman went to Latitude 84, a Tacoma nightclub. At Latitude 84, Wortham and Goodman met an acquaintance Dimitri Powell and Powell's younger relative, Tyree Jefferson.

Over the course of the evening, a dispute arose between Goodman and Rosendo Robinson, another bar patron, over Goodman's sunglasses. Eventually, Goodman and Wortham were kicked out of Latitude 84, and the police arrived. The police interviewed Goodman and Wortham, but did not resolve the dispute over Goodman's sunglasses.

After the police left, Goodman and one of Robinson's female friends, Jessica Hunter, agreed to settle the dispute with a fight. Goodman, Wortham, and Robinson met at the Union 76 gas station across the street from Latitude 84 to fight. Powell and Jefferson also arrived at the gas station. The Union 76 surveillance cameras captured many of the events. The cameras showed Goodman and Wortham confronting and punching Robinson through his car's driver's side window. Robinson stepped out of his car to confront Goodman. And as he did so, Powell and Jefferson got out of a black Nissan Altima and approached. While Powell got into a physical altercation with Robinson, Jefferson walked back to the black car, opened the trunk, pulled out an object, and then ran toward Robinson with his arm outstretched holding a dark item. Surveillance camera 10 showed Jefferson chasing Robinson and Robinson fleeing from Jefferson into the street. After Robinson fled, Jefferson ran back to Powell's car. Moments later, the cars at the Union 76 station sped off.

Robinson was struck by bullets at the gas station and as he fled on foot across the street. He sustained five gunshot wounds to the torso. Robinson initially identified Powell as the shooter, but after watching the videos, he changed his mind and believed that Jefferson shot him. Wortham, Goodman, and Hunter identified Jefferson as the shooter.

On July 12, 2013, Jefferson was charged with one count of first degree assault by alternative means and one count of unlawful first degree possession of a firearm. The charges were subsequently

amended to add one count of attempted first degree murder.

***2** The trial began with jury selection on May 4, 2014. Jury deliberations began on May 20, 2015. The jury convicted Jefferson of (1) attempted first degree murder, (2) first degree assault, and (3) unlawful possession of a firearm in the first degree. Jefferson was sentenced to a low-end standard range sentence of 277.5 months in prison plus 60 months additional for the firearm sentence enhancement.

Jefferson appeals his conviction.

ANALYSIS

I

Jefferson argues first that the trial court erred in denying his Batson challenge after the State used a peremptory challenge to strike the only African American venireperson in his jury pool. Jefferson claims the peremptory strike was clearly racially motivated in violation of the equal protection guaranty described in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We disagree.

We review a Batson challenge for clear error, deferring to the trial court to the extent its rulings are factual. State v. Saintcalle, 178 Wn.2d 34, 41, 309 P.3d 326 (2013). "Clear error exists when the court is left with a definite and firm conviction that a mistake has been committed." Saintcalle, 178 Wn.2d at 41. "Deference to trial court findings is critically important in Batson cases because the trial court is much better positioned than an appellate court to examine the circumstances surrounding the challenge." Saintcalle, 178 Wn.2d at 56.

The equal protection clause of the Fourteenth Amendment prohibits racial discrimination during the jury selection process. "Those on the venire must be 'indifferently chosen,' to secure the defendant's

right under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.' " Batson, 476 U.S. at 86-87 (quoting Strauder v. West Virginia, 100 U.S. 303, 309, 25 L. Ed 664 (1879)).

Batson established a three-step analysis to determine whether a prosecutor's peremptory strike unconstitutionally discriminates on the basis of race. First, the person challenging the peremptory must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 93-94. Second, the " 'burden shifts to the State to come forward with a [race-] neutral explanation' for the challenge." Saintcalle, 178 Wn.2d at 42 (quoting Batson, 476 U.S. at 97) (alterations in original). Finally, " 'the trial court then [has] the duty to determine if the defendant has established purposeful discrimination.' " Saintcalle, 178 Wn.2d at 42 (quoting Batson. 476 U.S. at 98). Under this "purposeful discrimination" part of the Batson analysis, courts must examine whether the race-neutral explanation could apply just as well to a nonminority juror who was allowed to serve. Saintcalle, 178 Wn.2d at 43.

During voir dire, the State exercised a peremptorily challenge against juror 10—the last African American person from the venire. Jefferson, an African American, challenged this strike with a Batson motion. The trial court, walking through the three-step Batson analysis, concluded first that Jefferson had established a prima facie showing of racial discrimination. The trial court then shifted the burden to the State by asking the State to explain the reason why it struck juror 10. The State explained that three of juror 10's responses were concerning. First, juror 10 stated that he thought the voir dire questioning was a "waste of time." Second, juror 10 admitted that he previously brought extraneous evidence into the deliberations while serving as a juror in a criminal trial. And third, juror 10 enthusiastically described, in detail, the movie 12 Angry Men.

***3** The trial court considered the State's explanation and concluded that the State had met its burden of producing a nondiscriminatory

explanation for its challenge. The court then turned to the third step of the Batson analysis and concluded that that Jefferson had not established purposeful discrimination. Giving due deference to the trial court, its decision was not clearly erroneous.

At least two of juror 10's responses support the trial court's decision to deny Jefferson's Batson challenge. First, juror 10 stated voir dire was a "waste of time." Striking a juror who indicates that the voir dire and pretrial proceedings are a "waste of time" is a reasonable, race-neutral reason to strike a juror. Second, juror 10 admitted that while serving as a juror in a criminal trial he brought extraneous evidence into the deliberations. This is also a reasonable race-neutral reason to strike a juror.

Jefferson argues that the State's reasons for striking juror 10 were pretexts for a race based strike. First, he claims that juror 1 also believed that voir dire was a waste of time. To support his claim, Jefferson cites to his defense counsel's argument, not juror 1's alleged statement. Juror 1 never said that voir dire was a waste of time. Second, Jefferson claims that although other jurors discussed 12 Angry Men, the State only struck juror 10. This claim also fails, however, because juror 9 was also enthusiastic about the move and was challenged. Jefferson cannot establish that the trial court's decision to deny his Batson motion was clear error.

While we find no error, we are concerned with what appears to be the State's primary argument on appeal. The State repeatedly, in both its briefing before this court, and during oral argument, argued that we should affirm the trial court's denial of Jefferson's Batson motion because of "the circumstances evident to the trial court." Specifically, that "(1) the case was being tried before an African American judge, (2) the prosecutor was African American .... (3) the defendant was African American, and (4) the defense attorney was a Caucasian woman." The State argues:

> [I]n essence, the defense attorney's objection amounted to this: the African American prosecutor chose this particular case to attempt to engage in purposeful race discrimination against an African American venire member. Even more implausibly he did so allegedly against a venire member who shared both his and

the judge's racial background.[2]

2 Br. of Resp't. at 14.

In essence, the State invites us to accept the proposition that where the prosecutor is an African American or other minority, we should presume that there was no purposeful discrimination in the peremptory challenge. The State's argument lacks merit, is inappropriate, and has no bearing on a Batson analysis. Neither the race or gender of the judge hearing the case, nor the race or gender of the lawyers trying the case, are relevant inquiries under Batson. Once a prima facie showing of discrimination is made, the State must provide a race-neutral explanation for the peremptory challenge and the trial court must then conduct a comparative juror analysis to determine if there was purposeful discrimination. Saintcalle, 178 Wn.2d at 42-43. The court's focus is on the jurors, not the race or gender of the judge or lawyers.

II

Jefferson next contends that a series of actions, statements, and rulings made by the trial court demonstrate a violation of the appearance of fairness doctrine. After reviewing the record, we disagree.

***4** "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.' " Gamble, 168 Wn.2d at 186 (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). "Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will succeed." State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007).

Under the Code of Judicial Conduct (CJC), designed to provide guidance for judges, "[a] judge should disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." CJC 2.11(A); Gamble, 168 Wn.2d at 188.

Jefferson raises several examples of the trial court's bias against him. We address each in turn.

A. Jury Appreciation Day

First, at the end of the first day of trial, the court informed the jurors that the county council was making a proclamation for Juror Appreciation Month and "you are certainly welcome to join me on the 10th floor, in council chambers, at 3:15 if you'd like to do that. It might be nice for them to see some real folks, but I'll leave that to your discretion." Jefferson did not object. When the jury appeared the next morning, the court stated that "after court, I ran into one of your colleagues on the tenth floor, and the person got to meet the county council and—for our Juror Appreciation day, and it was really interesting. I don't think some of the council, some of the members, had seen a real juror before. It's like he became a celebrity."

Jefferson argues that the court's comments demonstrate bias. We disagree. A reasonably prudent, disinterested observer would not conclude that the court was biased or appeared biased by extending an invitation for the jurors to attend a juror appreciation event.

B. Admonition of Defense Counsel

Second, Jefferson cites two instances where the trial court admonished defense counsel's conduct. The first instance concerned the State's witness, Wortham. Wortham had been flown up from California under subpoena. Wortham's testimony, which turned out to be hostile to the State, was started late on a Thursday, but was not completed before the end of the trial day. The State asked the court to instruct the witness to return Monday

morning. Defense counsel interrupted and inserted that Wortham had not legally been subpoenaed. This apparently surprised Wortham. The court instructed Wortham to return on Monday and not to talk to anyone about the case or her testimony.

On Monday morning, the State requested a bench warrant after learning that Wortham had changed her flight and was on her way to the airport. The court issued the bench warrant and then asked both trial counsel if they had been in contact with Wortham over the weekend. Defense counsel stated that Wortham called her to ask about the subpoena. Counsel stated that she informed Wortham that she could not give legal advice and that Wortham should talk to a lawyer. Counsel did, however, provide Wortham with a citation to RCW 10.55.060, the statute controlling out of state subpoenas. The trial court expressed its concern:

> I'm going to tell you, I'm concerned about that the statue even came up... Nobody has brought anything to my attention that is improper about the way she was summosed ... But at this point, I have to tell you candidly, I don't think it excuses any discussion about 10.55.060 and anything that suggests to her that she maybe didn't have to show today, or there was some technicality for her to get out of it following this court's order, is a serious problem, in my view, and I'm going to research it further.[3]

***5** The jury was not present during this discussion. It does not appear the trial court took further action.

3 Report of Proceedings (RP) (May 11, 2015) at 534.

In the second instance, prior to the testimony of Jefferson's forensics expert, the State objected that it had no information about what the expert was going to testify to as it had not received an expert report. The trial court asked if the witness was going to mirror the cross-examination of the State's forensic expert. Defense counsel then stated that the expert "didn't examine evidence. That's why there is no expert report." During the expert's testimony, it was disclosed that he had examined photographs of the victim's clothing

before trial and was prepared to testify to his opinions. The trial court dismissed the jury and again admonished defense counsel:

> Ms. Corey, I'm going to raise an issue. And, you know, I got to tell you candidly, at this point, I feel like the Rules of Professional Conduct mean nothing. I'm really concerned about the lack of candor to the Tribunal. I'm concerned about fairness to opposing Counsel. I know this has been contentious. Okay? But I got to tell you, candidly, you led me to believe that Mr. Sweeney's coming here to talk about one thing. Mr. Sweeney has had these photos. I asked you about a report from Mr. Sweeney. Mr. Sweeney did not write a report because he hasn't reviewed any evidence - and I'm paraphrasing. Okay?
>
> Mr. Sweeney reviewed evidence in April. Mr. Sweeney could have written a report, and now you're asking him to testify about the photos that he looked at back in April, and there has been nothing. There has been nothing.
>
> [The prosecutor] has been complaining all day about sandbagging. I say, no, this isn't sandbagging. I'm letting him talk about a very limited subject matter. And, no, he didn't write a report because I asked for—I ordered you to provide a report to him. There was no report because he didn't look at anything. Because he didn't consider the evidence. Okay?
>
> I don't want to hear it, okay? But you can explain it to the WSBA when we're done.[4]

[4] RP (May 18, 2015) at 1116-17.

Again, Jefferson cannot demonstrate evidence of the court's actual or potential bias. A reasonably prudent, disinterested observer would not conclude that the trial court's action admonishing defense counsel for unprofessional behavior showed actual or apparent bias. The admonitions occurred twice over a three-week trial. Both instances were outside the presence of the jury. And in both instances, the record reflects defense counsel's conduct was unprofessional. The court's admonition of defense counsel was

appropriate and does not demonstrate bias.

C. Sua Sponte Objections

Third, Jefferson contends that the trial court made several sua sponte objections during the trial that demonstrate bias against Jefferson or his counsel. In addition to the admonition of counsel discussed above, Jefferson cites to three incidents over the course of the trial. First, during cross-examination of one of the investigating officers, Jefferson asked whether the officer had visited the victim in the hospital. When he replied "no" Jefferson asked if this was because Robinson was uncooperative. The court interjected and, after a sidebar where the court explained that he was concerned the question would confuse the jury because there was no evidence on direct examination that Robinson had been cooperative, the question was withdrawn. Later, during direct examination of Jefferson's forensic expert, the trial court interjected after Jefferson asked the expert to draw a hypothetical sketch of a bullet with landings and grooves, and a shell casing with hit fire pin indentation. During sidebars, the court explained that both drawings would confuse the jury because the expert had not reviewed any of the recovered bullets or casings. After hearing from counsel, the court allowed the expert to draw the sketch of a bullet but not the casing.

***6** The trial court is generally in the best position to perceive and structure its proceedings. Accordingly, the trial court has broad discretion to make trial management decisions, ranging from "the mode and order of interrogating witnesses and presenting evidence," to the admissibility of evidence, to provisions for the order and security of the courtroom. State v. Dye, 178 Wn.2d 541-47, 48, 309 P.3d 1192 (2013). In each instance cited by Jefferson, the trial court interjected and called a sidebar. Then later, with the jury out, the court summarized the sidebar, explained its ruling, and allowed counsel to supplement the record. A reasonably prudent, disinterested observer would not conclude that the trial court's action attempting to avoid confusing the jury showed actual or apparent bias.

D. Courtroom Hostility

Fourth, Jefferson contends that the trial court's admonition of members of the gallery, including Jefferson's father, during the trial demonstrate bias. Jefferson cites several events. For example, after the court concluded its ruling on the Batson challenge, the prosecutor asked the court to "admonish individuals in the courtroom not to make comments directed at the prosecutor, in a way to question or harass the prosecutor." The court warned the gallery that it would hold people in contempt if Jefferson's case was threatened. During the admonition, Jefferson and the trial court exchanged heated remarks. One morning during the second week of trial, prior to the jury entering the courtroom, the prosecutor asked the trial court to admonish Jefferson's father for calling him names. The court asked the sheriff deputy and defense counsel about what had happened. After hearing the exchange, the trial court gave Jefferson's father a second warning. When Jefferson's father continued to argue with the court, the court held him in contempt and had him removed from the courtroom.

That same day, after the mid-day recess and before the jury was brought in, the trial court addressed the parties and the gallery:

> The other thing I want to mention, and with some degree of trepidation, when I am not out here—you know, we had a discussion this morning, and it got into who said what, and people were saying things. And I just want to remind everyone that civility and professionalism is of paramount importance in this trial, and anything short of that, I just have to be candid, is unacceptable. And, candidly, I'm concerned that whatever is going on, if anything, between counsel, is spilling out onto people in the gallery, and I don't want that to happen. So that's what I want to say.
>
> The other thing is, I don't know if there's been one person here—I don't know if it's Mr. Jefferson's mother, or what, or relative who has been here, I think at all the hearings, and I think she knows how important it is that everybody be civil, that we try to do everything we can to make sure that this is a fair trial and that

> nobody does anything to interfere with Mr. Jefferson's right to a fair trial. And to the extent that she's—some of the folks in the gallery—been the one with the level head, I appreciate that. And so this is really important to me, and I just wanted to be clear about it.[5]

5 RP (May 12, 2015) at 736-37.

There is certainly evidence in the record that the atmosphere in the courtroom was heated at times. Outbursts from disgruntled members of the gallery and Jefferson punctuated the proceedings. But far from showing bias, after reviewing the record, it is clear that the trial court's demeanor and restrained, understated approach over the course of the three-week trial was exemplary. A reasonably prudent, disinterested observer would not conclude that the trial court's action managing the trial and courtroom showed actual or apparent bias.

***7** In sum, Jefferson's arguments that the court was biased against him fail. A disinterested observer viewing the entire record would conclude that Jefferson's trial was fair and conducted without apparent or actual bias.

III

Jefferson next contends that the trial court abused its discretion.by removing and replacing a juror that had witnessed extrinsic evidence rather than declaring a mistrial. We disagree.

A. Juror Observations and Voir Dire

During the lunch break after the State's closing argument, juror 8 approached the trial court with a question. The court referred the juror to his judicial assistant. After the lunch recess, the trial court moved, sua sponte, to close the courtroom. The court explained

that he believed there were compelling reasons under Bone-Club[6] to close the court for a limited time. The court explained that his concern was "based on concern about Mr. Jefferson's right to a fair trial, and I'm concerned that if we aren't able to flesh this out candidly, there is a serious and imminent threat to [Jefferson's] right to a fair trial." There were no objections from the parties or members of the gallery.

[6] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

With the courtroom closed, the court heard first from the judicial assistant, juror 8, and juror 9. The judicial assistant recounted that juror 8 told him that "she felt threatened, scared, intimidated, something to that effect, yesterday afternoon when court had recessed." The court and parties then questioned juror 8. Juror 8 explained that as she and juror 9 walked to their cars at the end of the day, she observed one of the men from the gallery observing jurors as they were getting in their cars. No contact, words, or gestures were exchanged between the jurors and the gallery members, but juror 8 found it "a little nerve wracking." Juror 8 believed she could continue and evaluate the evidence in a fair and unbiased manner. The court and parties then questioned juror 9. Juror 9 also observed members from the gallery as they left the courthouse but did not observe anyone watching them. She was not bothered until juror 8 brought it to her attention. Juror 9 did not believe the events would impact her ability to be fair or impartial. After the voir dire of jurors 8 and 9, the trial court explained that it was not declaring a mistrial.

Defense counsel asked the court to question the remaining jurors. The State objected and expressed concern that if they cross-examine each of the jurors it might result in getting them to "adopt something that's not there" and provide the defense a reason to challenge the juror. The court, initially siding with the State, was afraid to question more jurors for fear of "poison[ing] the water." The court explained that it viewed juror 8 very different than juror 9. It believed juror 8 had an issue, but that juror 9 was not intimidated, frightened, or concerned. Defense counsel agreed and expressed

belief that juror 8 should be removed, but that juror 9 was "probably okay." But at defense counsel's suggestion, the court questioned each juror individually.

Although each juror knew something about juror 8's observation, each juror recounted a slightly different version of what juror 8 reported. Every juror confirmed that the incident did not affect his or her ability to be fair and impartial going forward.

***8** Jurors 5 and 11 mentioned that they heard discussion of a "black Nissan" or "black Altima" and that someone might have been watching them. This was concerning because the shooter's car was black. But none of the other jurors mentioned a black Nissan or black Altima. After questioning the entire jury, the court questioned jurors 5 and 11 again. After further argument, the court indicated that it planned to excuse juror 8 and deny the motion for a mistrial. Before denying the motion for a mistrial, the court asked juror 8 if she mentioned anything about a vehicle to the other jurors. She denied doing so.

After hearing argument, the court excused juror 8 and denied the motion for mistrial. The court "believe[d] that Juror 11 and Juror 5 [could] be fair and impartial. ... [and that] they [could] follow the Court's instructions."

B. Impartial Jury

Jefferson argues first that he was denied his right to an impartial jury.

The accused in a criminal trial has a constitutional right to a fair and impartial jury. U.S. Const. amends. VI, XIV § 1; Wash. Const. art I, §§ 3, 22; State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). Where trial irregularities concerning the jury arise, a new trial is warranted only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). The decision is a matter left to the discretion of the trial

court. State v. Bartholemew, 98 Wn.2d 173, 211, 654 P.2d 110 (1982).

Similarly, we review a ruling on a motion for mistrial for abuse of discretion. See, e.g., State v. Tigano, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991) (reviewing mistrial motion based on jury misconduct for abuse of discretion). "A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable." State v. Gaines, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). An abuse of discretion occurs "only if no reasonable person would adopt the view espoused by the trial court." State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). "The trial court's ruling, therefore, will not be disturbed unless this court believes that no reasonable judge would have made the same ruling." State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004).

Misconduct occurs when a jury considers extrinsic evidence. Gaines, 194 Wn. App. at 897. Extrinsic evidence is information outside what is admitted at trial. "This type of evidence is improper because it is not subject to objection, cross-examination, explanation or rebuttal." State v. Pete, 152 Wn.2d 546, 553, 98 P.3d 803 (2004) (internal quotations omitted).

If a potentially prejudicial contact is alleged, the court should " 'determine the circumstances, the impact thereof upon the jury, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.' " Tarango v. McDaniel, 837 F.3d 936, 948-49 (9th Cir. 2016) (quoting Remmer v. United States, 347 U.S. 227, 230, 74 S. Ct. 450, 98 L. Ed. 654 (1954)), cert. denied, 137 S. Ct. 1816 (2017).

If the allegations are found to be true, then the "court must determine if the bias or prejudice amounted to a deprivation of Fifth Amendment (due process) or Sixth Amendment (impartial jury) guarantees." United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir. 1977). A trial court can inquire into the jurors' "subjective ability to disregard extrinsic information before there is a verdict to potentially impeach." Gaines, 194 Wn. App. at 898.

***9** Jefferson argues that juror 8's comment about being intimidated tainted the jury. He relies on three cases: State v. Rinkes, State v. Pete, and Mach v. Stewart. Rinkes held that mistakenly sending a newspaper editorial and cartoon into the jury room constituted prejudicial error. 70 Wn.2d 854, 862-63, 425 P.2d 658 (1967). Pete held that a new trial was required where the court inadvertently sent the jury two unadmitted but admissible written statements: a police officer's report and a defendant's written and signed statement. Pete, 152 Wn.2d at 554-55. And Mach v. Stewart held that Mach's right to an impartial jury was violated when the venire was exposed to a veniremember's expert-like statements about the veracity of children's claims of sexual abuse. 137 F.3d 630, 634 (9th Cir. 1997).

Unlike in Rinkes, Pete, and Mach, the trial court here opened an investigation into the issue by conducting a voir dire of each juror individually. Because the misconduct came to light before the verdict was rendered, the court and parties had the opportunity to inquire into the jurors' "subjective ability to disregard extrinsic information." Gaines, 194 Wn. App. at 898. The court conducted a full hearing into the matter, confirmed that each juror, except for juror 8, could remain impartial, and satisfied itself that the "black Altima" and "black Nissan" comments were heard out of context.

Part way through the court's voir dire, it considered giving a curative instruction. Jefferson rejected this suggestion:

> I don't think there's a curative instruction that the Court can propose, and I've spent time since the Court went back to do that researching online, whether or not you can give curative instruction in this situation, and I don't know how you can do that. Can you tell the jurors to pay no attention to the statements of your fellow jurors? Put no credence in what your fellow jurors say? Of course you can't do that.
>
> I don't think it's something you can—I don't think the Court can invade that. The—I mean, I think we can hear what went on, but in terms of telling them to—[7]

[7] RP (May 19, 2015) at 1265.

Given this record, the court's denial of Jefferson's mistrial motion is not manifestly unreasonable. There is no basis to conclude that "no reasonable judge would have made the same ruling." Thomas, 150 Wn.2d at 854.

C. Presumption of Innocence

Jefferson also argues that the jury misconduct destroyed his presumption of innocence. The presumption of innocence "is a basic component of a fair trial under our system of criminal justice." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (quoting Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)). To implement the presumption, courts must be alert to factors that may "undermine the fairness of the fact-finding process." Williams, 425 U.S. at 503. "Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." Williams, 425 U.S. at 504.

Here, Jefferson's presumption of innocence was not destroyed. The court investigated the jury misconduct thoroughly and determined that each juror (besides juror 8) could remain impartial and that the "black Nissan" and "black Altima" statements were heard out of context. Jefferson's argument that the presumption was lost when the jurors "obtain[ed] information that the shooter car followed jurors" overstates the record. After reviewing the entire record, we are satisfied that the comments about a black car were minor comments that only two jurors thought that they heard. The comments were not, as Jefferson argues, so prejudicial to him that they destroyed his presumption of innocence.

***10** Jefferson argues that the trial court abused its discretion by improperly admitting prejudicial gang evidence under ER 404(b). We disagree.

ER 404(b) prohibits a court from admitting ' "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." "This prohibition encompasses not only prior bad acts and unpopular behavior but also any evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting State v. Everbodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)). We review evidentiary rulings for abuse of discretion. State v. Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." State v. Embry, 171 Wn. App. 714, 731-32, 287 P.3d 648 (2012).

Evidence of gang affiliation is considered prejudicial. Embry, 171 Wn. App at 732 (citing State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009) (noting "the inflammatory nature of gang evidence generally")). Gang evidence may not be admitted to prove that the defendant was prone to commit the crimes with which he was charged, but may be admitted for other purposes. Yarbrough, 151 Wn. App. at 81. There must, however, be a "nexus between the crime and the gang before the trial court may find the evidence relevant." Embry, 171 Wn. App. at 732.

Here, in response to a defense motion in limine, and without objection, the trial court confirmed that this was "not a gang case" and was prepared to exclude all gang evidence. The State confirmed that it was not a gang case, but asked to allow witnesses that knew Jefferson by only his moniker—"Little Shake" or "Baby Shake"—be allowed to use the nickname.

After confirming that the State did not plan to put on expert testimony about gang activity, the trial court excluded gang evidence with two caveats: (1) the State must admonish its

witnesses to refer to Jefferson as “Mr. Jefferson,” and that (2) Jefferson would not prejudiced by witnesses testifying that they only knew Powell as “Shake” or Jefferson as “Baby Shake.” Jefferson did not object.

At trial, references to “Shake Man,” “Little Shake,” and “Baby Shake” were sparse. Wortham referred to Powell as “Shake Man” once during direct examination. Jefferson did not object. The State admonished Wortham not to refer to Powell as “Shake Man,” but as “Dimitri Powell.” On the seventh day of trial, the State asked Sesilia Thomas, the manager of Latitude 84, if she knew “Shake Man.” Thomas replied that she knew that person. When the State asked Thomas to identify “Powell” in a photo, Jefferson objected “to the form of the question.” The court sustained the objection on the ground that Thomas laid a foundation that she knew Shake Man, not that she knew Powell. On the eighth day of trial, Goodman referred to Powell as “Shake Man.” After the State referred to “Shake Man” in three other questions, Jefferson objected to the reference. The court sustained the objection. When the State resumed its direct examination of Thomas, the State did not use the nickname again. Later that day, Hunter testified that she knew Powell as “Shake Man,” but that she did not know Jefferson by any other name.

***11** The sparse references to “Shake Man” and “Baby Shake” did not violate Jefferson’s right to a fair trial. There was no testimony about a street gang, what a street gang was, how a person joins, what membership entails, Jefferson’s affiliation to a gang, or how gang membership motivated the crime. The nicknames, to the extent that they were used at trial, did not affiliate Jefferson with any gang or gang activity.

Jefferson argues that the nicknames have unsavory meanings that may demonstrate gang membership, but Jefferson cannot link the nicknames to a specific gang or gang activity. That the nicknames suggest that Jefferson was Powell’s disciple or protege is not evidence of Jefferson’s gang affiliation. As the trial court explained in its pretrial ruling on this matter, “nicknames or street names ... don’t implicate or make this a gang case.” Jefferson’s claim—that

he was denied his right to a fair trial because of improperly admitted gang references—fails.

V

Jefferson argues next that the court violated his constitutional right to present a defense when the court excluded Jefferson's investigator, Patrick Pitt, from testifying at trial and authenticating freeze frame images extracted from the Union 76 station surveillance cameras. We disagree.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). However, a court ' "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." " State v. Iniquez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)). "We review an alleged denial of the constitutional right to present a defense de novo." State v. Lizarraga, 191 Wn. App. 530, 551, 364 P.3d 810 (2015); State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The Sixth Amendment to the United States Constitution and article 1, section 22 amendment 10 of the Washington State Constitution guarantee criminal defendants the right to present testimony in one's defense. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Wade, 186 Wn. App. 749, 763-64, 346 P.3d 838 (2015). However, the right to present a defense is not absolute—the right does not extend to irrelevant or inadmissible evidence. Wade, 186 Wn. App. at 763-64. The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The defendant's right to present a defense is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Cayetano-Jaimes, 190 Wn.

App. 286, 296, 359 P.3d 919 (2015).

After the State rested, the court asked for a witness lineup for the defense. Defense counsel indicated that Jefferson planned to call an investigator, Patrick Pitt. When asked to summarize Pitt's anticipated testimony, defense counsel explained that Pitt had looked at the Union 76 surveillance videos and extracted approximately 8 freeze frame images showing Powell. Because the court previously required the State to lay a foundation for personal knowledge before allowing the introduction of the surveillance videos, the State asked that foundation be laid for Pitt's personal knowledge. The court, concerned that Pitt lacked foundation, and that the images were from videos that the court had "seen ad nauseum," requested an offer of proof. The court explained:

***12** Ms. Corey, here's the issue. Okay? And you probably know this better than anyone in this room because you probably are—have the most experience. Whenever we go to trial like this and the question is not just, is evidence relevant, and balancing the relevance verses the potential prejudice, you know, the issue is how we get it in.

We're at the third week of trial. The videos have not been a surprise to anybody. We all knew that they were there. We all knew what cameras were there, and I believe in almost every other occasion, either a person who actually observed, or operated the camera, or owned the camera, or took the picture, or could provide some basis for what we're seeing, is the one that we introduced the evidence through. And you know better that better than I do. And, in fact, that's why we don't just say, okay, Jury, here's some pictures. Go for it. Figure it out. That's always one of the issues.[8]

8 RP (May 18, 2015) at 1048-49.

The offer of proof revealed that Pitt was not at the Union 76 station on the night of the shooting, did not know how many images he had extracted, and did not know where or which cameras the photos were taken from.

The court excluded Pitt's testimony explaining:

No. 1, the first set is cumulative.

No. 2, Mr. Pitt can't say for sure what camera is what, or what's being depicted.

No. 3, Mr. Pitt can't lay a foundation. He's not a witness with knowledge that the matter is what it claims to be. ... And, finally, it's confusing to the jury. What is the jury supposed to do? Look at those pictures and try to ascertain what they mean, what they depict, who is who? And nobody can tell them because Mr. Pitt can't testify to it.

So, finally Mr. Pitt has obviously taken snippets of photos from a video, but he can't tell us whether they're in any sequence; whether we took the first two minutes; or we took this from Minute No. 4, or 5, or 3, or 1; or I got the ones that I thought would look good from the first couple of minutes and then the last minute. We don't know any of that, and nobody can explain that to the jury.

Ms. Corey, you can't because then you'd be a necessary witness. He can't; he doesn't have first-hand knowledge.

So I'm not going to have Mr. Pitt testify, and I'm going to exclude his lately—this evidence that is not timely, it is confusing, it's cumulative, and there's no foundation for [it]. I'll note your objection for the record.[[9]]

9 RP (May 18, 2015) at 1053-54.

We agree that the trial court's decision did not deny Jefferson his Sixth Amendment right to present a defense. The court properly excluded Pitt from testifying for several reasons. First, ER 602 prohibits a witness from testifying about a matter if the witness lacks personal knowledge of the matter. The rule has a low threshold for what constitutes personal knowledge and only requires that evidence "sufficient to support a finding" of personal

knowledge be introduced. State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). “Testimony should be excluded only if, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge.” Vaughn, 101 Wn.2d at 611-12.

Under ER 602, Pitt was not competent to testify because he did not have personal knowledge of the scene or location of the cameras. Pitt admitted that he was not at the scene on the night of the shooting, did not know how many images were at issue, or which camera each image was taken from. As the trial court explained, “there’s nothing that precluded the defense from showing the freeze frames to Ms. Wortham,... any of the witnesses and saying: What is this? And were you here? And you were here. And what is this?” Pitt, however, was not the right witness. “[N]o trier of fact could reasonably find that the witness had firsthand knowledge.” Vaughn, 101 Wn.2d at 611-12.

***13** Second, ER 403 allows a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. It is not error to exclude cumulative evidence. Saldivar v. Momah, 145 Wn. App. 365, 396, 186 P.3d 1117 (2008). The trial court reviewed Jefferson’s proposed images and determined that they were cumulative to the videos and freeze frame images already introduced by the State. The images were extracted from videos that had been repeatedly shown during the course of trial. Moreover, Pitt was not prepared to testify which camera the images were extracted from nor the relative timing. As a result, the trial court found Jefferson’s proposed images were both cumulative and potentially confusing.

Jefferson’s constitutional right to present a defense was not violated.

VI

Jefferson claims that the court abused its discretion when it denied

his motion for a mistrial based on prosecutorial misconduct. We disagree.

We review rulings on allegations of prosecutorial misconduct for an abuse of discretion. State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). "The defendant bears the burden of showing that the comments were improper and prejudicial." Lindsay, 180 Wn.2d at 431. The prosecutorial misconduct inquiry consists of two prongs: (1) whether the prosecutor's comments were improper and (2) if so, whether the improper comments prejudiced the defendant. Lindsay, 180 Wn.2d at 431. To show prejudice, the petitioner must show a substantial likelihood that the prosecutor's statements affected the jury's verdict. Lindsay, 180 Wn.2d at 440. A prosecutor can "argue that the evidence does not support the defense theory." Russell, 125 Wn.2d at 87. But a prosecutor "must not impugn the role or integrity of defense counsel." Lindsay, 180 Wn.2d at 431-32.

Jefferson identifies several events that he argues constitute prosecutorial misconduct.

First, during a relatively heated redirect examination of the State's hostile witness, Wortham, the prosecutor referred to defense counsel by her first name, "Barbara." The trial court immediately called a sidebar. After the sidebar, the prosecutor apologized for "getting a little too comfortable in here. Apologize for using first names." While we agree with Jefferson (and apparently the trial court) that referring to defense counsel by her first name was improper, Jefferson did not show that there was a substantial likelihood that this statement affected the jury's verdict.

Second, Jefferson asserts that the State made several speaking objections during the trial. For example, during Jefferson's recross-examination of Officer Roberts, the prosecutor objected that defense counsel was testifying. With the jury absent, Jefferson argued that this objection was a personal attack on his defense counsel and a comment on Jefferson's right to counsel. Jefferson moved for a mistrial and requested a curative instruction. The court denied the mistrial motion and the request for a curative instruction because "[defense] counsel[ ] read[ ] way more into the statement

than is warranted."

The Rules of Evidence neither authorize nor prohibit speaking objections. 5 WASH. PRAC., EVIDENCE LAW AND PRACTICE § 103.8 (6th ed.). Instead, the trial court decides the propriety of a speaking objections. This trial court ruled that the State's objection was not improper. Jefferson has not demonstrated that any speaking objections were improper or prejudicial.

Third, Jefferson asserts that it was misconduct for the prosecutor to ask the trial court to admonish one of the members of the gallery. As previously discussed, the record reflects that the proceedings at times were contentious. On three occasions, during the three-week trial, outside the presence of the jury, the prosecutor reported that he felt he was being questioned about his race, called names, and harassed by Jefferson's father—a member of the gallery. Jefferson has not demonstrated that the prosecutor's requests for an admonition were either misconduct nor prejudicial.[10]

[10] In his brief, Jefferson asserts that the most contentious of the events—the or resulted in Jefferson's father being temporarily removed from the courtroo contempt—occurred in front of the jury. This is incorrect. See RP (5/12/15) at 6 (colloquy); at 673 (jury present).

***14** Finally, Jefferson asserts that the State impugned defense counsel when, during the State's closing argument rebuttal, the prosecutor argued that Jefferson's counsel agreed that Jefferson was running with his hand outstretched. Again, Jefferson has not demonstrated that the State's argument impugned defense counsel, Lindsay, 180 Wn.2d at 431-32, or that the argument was prejudicial.

The trial court did not abuse its discretion when it denied Jefferson's motion for a mistrial based on alleged prosecutorial misconduct.

VII

Jefferson next contends that there was insufficient evidence from which a rational juror could find Jefferson guilty of attempted first degree murder and unlawful possession of a firearm. We disagree.

"When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Further, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8. Circumstantial evidence is not to be considered any less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A. Attempted First Degree Murder

A person commits the crime of first degree murder when, with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). Premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Condon, 182 Wn.2d 307, 315, 343 P.3d 357 (2015) (internal quotations omitted). Premeditation must involve "more than a moment of time." Condon, 182 Wn.2d at 315.

To convict of an attempted crime, the State must prove both intent to commit the crime and a substantial step toward its commission. RCW 9A.32.020(1). "In order for conduct to comprise a substantial step, it must be strongly corroborative of a defendant's criminal purpose." State v. Price, 103 Wn. App. 845, 852, 14 P.3d 841 (2000).

A person commits first degree attempted murder when, with premeditated intent to cause the death of another, he takes a substantial step toward commission of the act. State v. Smith, 115

Wn.2d 775, 782, 801 P.2d 975 (1990). The act of deliberately firing a gun toward an intended victim is strongly corroborative of an attempt to commit first degree murder. Price, 103 Wn. App. at 852-53.

Here, there was sufficient evidence from which a rational jury could find Jefferson guilty of attempted first degree murder beyond a reasonable doubt. Viewed in the light most favorable to the State, the Union 76 station's surveillance footage shows the confrontation at the station, a man witnesses previously identified as Jefferson walk to the car that he arrived in, open the trunk from the driver's side, walk to the trunk, search through the trunk, pull out a small dark object, handle it, and run toward Robinson with his arm outstretched ahead of him. While the weapon was never recovered, the surveillance footage was played for the jury. The jury also had a series of time stamped freeze frame images showing the events.

***15** State v. Price is instructive. In Price, the court upheld a conviction for attempted first degree murder based on evidence that the defendant deliberately fired a gun at the victim's car. Price, 103 Wn. App. at 853. The Price court explained that "the act of deliberately firing a gun toward an intended victim clearly is 'strongly corroborative' of an attempt to commit first degree murder." Price, 103 Wn. App. at 853 (quoting State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995)).

B. Unlawful Possession of a Firearm

To support a charge of first degree unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the defendant was previously convicted in Washington of a serious offense and had a firearm in his possession or control. See RCW 9.41.040(1)(a). Possession of a firearm can mean actual possession or constructive possession. State v. Manion, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). Actual possession means that the person charged with possession had "personal custody" or "actual physical possession" of the firearm. Manion, 173 Wn. App. at 634 (internal quotations omitted). Actual possession may be proved by circumstantial evidence. Manion, 173 Wn. App. at 634.

Jefferson argues that the evidence to support this charge was insufficient because "[n]o witness saw Jefferson in possessi[on] of a gun." This argument fails.

Here, there was sufficient evidence from which a rational jury could find Jefferson guilty of unlawful possession of a firearm in the first degree. First, Jefferson stipulated to a previous "serious offense as that term is defined in RCW 9.41." Second, although a weapon was not recovered, there are (at least) three pieces of circumstantial evidence that support a conclusion that Jefferson actually possessed a firearm: (1) Wortham identified Jefferson as the shooter, (2) Exhibit 105 shows Jefferson pointing a handgun-shaped object at Robinson, and (3) Robinson sustained gunshot wounds. Sufficient circumstantial evidence supports the jury's finding that Jefferson was armed with a firearm at the time of the crime.

VIII

Jefferson argues next that the "to convict" jury instruction for attempted first degree murder omitted an essential element of the crime by failing to include a premeditation element. We disagree.

Whether a jury instruction correctly states the applicable law is a legal question subject to de novo review. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). A "to convict" jury instruction "must contain all the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. Smith, 131 Wn.2d 258, 263, 930 P.3d 917 (1997); State v. DeRyke, 149 Wn.2d 906, 910, 73 P.2d 1000 (2003).

"An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime." DeRyke, 149 Wn.2d at 910. Here, the "to convict" instruction informed the jury that in order to convict Jefferson of

attempted first degree murder, the State had to prove that he committed an act that "was a substantial step toward the commission of Murder in the First Degree," and that the act was done "with the intent to commit Murder in the First Degree." Additional jury instructions accurately set forth the elements of murder in the first degree, including premeditation, and defined "premeditation," "intent," and "substantial step."

***16** The court's instructions follow WPIC 100.02 and its "note on use" which recommends a "to convict" instruction setting forth the essential elements of the attempted crime and a separate instruction delineating the elements of the substantive crime.[11] This approach was approved by our Supreme Court in DeRyke, where it rejected the defendant's claim that the "to convict" instruction for attempted first degree rape was deficient because it failed to include all of the elements of first degree rape. DeRyke, 149 Wn.2d at 911. Subsequently, in State v. Reed, 150 Wn. App. 761, 772, 208 P.3d 1274 (2009), this court rejected the argument Jefferson makes here. Reed held that the "to convict" instruction, identical to the instruction given here, correctly set forth the elements of attempted first degree murder and did not relieve the State of its burden to prove all elements of the charged crime. 150 Wn. App. at 772-73. See also State v. Embry, 171 Wn. App. 714, 757-58, 287 P.3d 648 (2012).

[11] 11A WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC 100.02 (4th Ed. 2016).

The "to convict" instruction provided to the jury correctly set forth all essential elements of the crime of attempted first degree murder.

Jefferson next contends that his trial counsel was ineffective because she displayed unprofessional behavior. We disagree.

To prevail on an ineffective assistance of counsel claim, a criminal defendant must demonstrate (1) deficient performance by counsel and (2) resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish deficient performance, the defendant must show that trial counsel's

performance fell "below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Courts presume counsel's representation was effective. Strickland, 466 U.S. at 689. This presumption is rebutted if there is no possible tactical explanation for counsel's action. In re Pers. Restraint of Cross, 180 Wn.2d 664, 694, 327 P.3d 660 (2014). Whether an attorney renders ineffective assistance of counsel when he or she violates the Rules of Professional Conduct is a question of law. State v. Garrett, 124 Wn.2d 504, 517, 881 P.2d 185 (1994).

In Garrett, the defendant claimed he was deprived of effective assistance of counsel due to his attorney's unprofessional conduct throughout the trial. Garrett, 124 Wn.2d at 517-518. Our Supreme Court agreed that defense counsel's conduct, throughout the trial, was "boorish, contemptuous, discourteous, disrespectful, insolent, obdurate, obnoxious, offensive, rude and uncouth." Garrett 124 Wn.2d at 522. Indeed, the Court referred the matter to the Washington State Bar Association for appropriate disciplinary investigation and proceedings. Garrett 124 Wn.2d at 522. However, despite defense counsel's unprofessional conduct toward the trial court, our Supreme Court denied defendant's claim for ineffective assistance. The court explained:

However, with a few minor exceptions, the verbal exchanges between defense counsel and the court occurred out of the presence of the jury. It cannot be said that Respondent was prejudiced in his right to a fair trial based on matters that were not brought to the attention of the jury.

Garrett 124 Wn.2d at 523.

The trial court here admonished Jefferson's counsel numerous times throughout the trial. For example, the trial judge informed defense counsel that he was considering reporting her to the WSBA over her communications with the State's hostile witness Wortham. The court also admonished Jefferson's counsel for her lack of candor to the court and opposing counsel regarding the evidence reviewed by the defense forensic expert Sweeney. Although we agree with the trial court that Jefferson's counsel behaved unprofessionally, Jefferson's claim of ineffective

assistance of counsel fails. Defense counsel's conduct in no way rose to the level of misconduct described in Garrett. Moreover, like in Garrett, the trial court's admonishment of defense counsel took place outside the presence of the jury.

***17** Accordingly, Jefferson cannot establish a claim for ineffective assistance of counsel. Defense counsel zealously and aggressively represented Jefferson throughout the trial. The entire record demonstrates that Jefferson did have effective assistance of counsel and was not prejudiced in his right to a fair and impartial trial.

X

Finally, Jefferson claims that cumulative errors at trial denied him his right to a fair trial. We disagree.

Under the cumulative error doctrine a court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant a right to a fair trial, even if each error standing alone would be harmless. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). "But the doctrine does not apply where the errors are few and have little or no effect on the trial's outcome." Venegas, 155 Wn. App. at 520.

Here, Jefferson cannot establish a claim for cumulative error because there were not multiple and separate errors that denied him a right to a fair trial.

Jefferson's conviction is affirmed.

WE CONCUR:

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Corrected (reduced). Please disregard previously filed petition.

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Note: The Filing Id is 20170816130945D1388610