SUPREME COURT NO. 95008-3

NO. 72734-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YUSUF SHIRE,

Petitioner.

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

The Honorable Jeffery Ramsdell, Judge
The Honorable William Downing, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

1. Trial Proceedings. 2

2. Mistrial 5

3. Material Witness Warrant. 9

4. Court of Appeals Opinion. 10

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 11

1. REVIEW OF WHETHER DOUBLE JEOPARDY PRECLUDED RETRYING SHIRE BEFORE A DIFFERENT JURY BECAUSE SHIRE DID NOT CONSENT TO A MISTRIAL IS APPROPRIATE UNDER RAP 13.4(b)(2), (3), AND (4). 11

2. REVIEW OF WHETHER SHIRE WAS DENIED HIS RIGHT TO A COMPEL WITNESSES AND TO PRESENT A DEFENSE IS APPROPRIATE UNDER RAP 13.4(b)(1), (3), AND (4). 14

3. REVIEW SHOULD BE GRANTED BECAUSE WHETHER SHIRE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IS A SIGNIFICANT QUESTION OF LAW UNDER THE WASHINGTON AND UNITED STATES CONSTITUTIONS. 18

E. CONCLUSION 20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Aho
137 Wn.2d 736, 975 P.2d 512 (1999) 18

State v. Burri
87 Wn.2d 175, 550 P.2d 507 (1976) 15

State v. Edwards
68 Wn.2d 246, 412 P.2d 747 (1966) 16, 17

State v. Jones
97 Wn.2d 159, 641 P.2d 708 (1982) 12

State v. Juarez
115 Wn. App. 881, 64 P.3d 83 (2003) 12

State v. Maupin
128 Wn.2d 918, 913 P.2d 808 (1996) 15

State v. Robinson
146 Wn. App. 471, 191 P.3d 906 (2008) 10, 13

State v. Smith
101 Wn.2d 36, 677 P.2d 100 (1984) 15, 16

State v. Thomas
109 Wn.2d 222, 743 P. 2d 816 (1987) 18

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 18

Ashley v. Wainwright
639 F.2d 258 (5th Cir. 1981) 16

Chambers v. Mississippi
410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 15

United States v. Dinitz
424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976) 12

Washington v. Texas
388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) 15

RULES, STATUTES AND OTHER AUTHORITIES

CrR 4.10 19

RAP 13.4 ..... 1, 11, 14, 17, 20

U.S. Const. amend. V 11, 12

U.S. Const. amend. VI 14, 15, 18

U.S. Const. amend. XIV 14, 15

Const. Art. I, § 9 12

Const. Art. I, § 21 ..... 14, 15

Const. Art. I, § 22 ..... 15, 18

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Yusuf Shire, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Shire, 2017 WL 398691 (No. 72734-6-I, filed August 21, 2017).[1]

B. ISSUES PRESENTED FOR REVIEW[2]

1. Where the trial court failed to consider several reasonable alternative options to declaring a mistrial over Shire's objections, the State's actions contributed to the trial time constraints, and retrial prejudiced Shire, should review should be granted under RAP 13.4(b)(2), (3) and (4) because whether double jeopardy barred retrial on the charges against Shire is a significant question of Constitutional law and involves an issue of substantial public interest?

2. The trial court denied defense counsel's request for a material witness warrant to secure the presence of a witness who was prepared to testify that Shire was not involved in the alleged shooting. Where denial of the material witness warrant violated Shire's right to a compulsory

[1] Shire's motion for reconsideration was denied on August 21, 2017, and the January 30, 2017 opinion was withdrawn and a substituted opinion filed. A copy of the substituted opinion is attached as Appendix A.

[2] Shire's case was linked for appeal with his co-defendant, Mohamed Ibrahim's case. Because the opinion in Ibrahim's appeal discusses facts and issues relevant to Shire's case, a copy of the Ibrahim opinion is attached as Appendix B.

process and to present a defense, should review be granted under RAP 13.4(b)(1), (3), and (4) because the Court of Appeals decision conflicts with precedent from this Court, involves a significant question of Constitutional law, and involves an issue of substantial public interest?

3. The trial court denied counsel's request for a material witness warrant on the last day of trial as untimely, but noted it likely would have granted a material witness warrant had counsel requested one sooner. Should review be granted under RAP 13.4(b)(3), because whether Shire received ineffective assistance of counsel is a significant question of law under the Washington State and the United States Constitutions?

C. STATEMENT OF THE CASE[3]

1. Trial Proceedings.

Yusuf Shire was found guilty by a King County jury of three counts of second degree assault with a firearm, and one count of first degree unlawful possession of a firearm, for his alleged involvement in a shooting incident on May 18, 2013. CP 1-8, 10-15, 90-92.

Evidence at trial revealed the following. Police stopped a car about ten blocks away from an early morning shooting. RP 1831, 1850, 2078, 2533, 2615-17, 2631-32. Five men were in the car. RP 1834, 2537, 2540.

[3] Shire presented a more detailed statement of facts in his Brief of Appellant (BOA), at pages 3-17, and Supplemental Brief of Appellant (SBOA) at pages 1-6, which he incorporates herein by reference.

Mohamed Ibrahim was seated in the rear passenger seat behind the driver. RP 2252-54, 2547, 2552-53, 2558. Shire was seated in the right rear passenger seat. RP 1766, 1768, 1770, 1772, 2557-58, 2591, 2613.

Police found a left handed glove and 9mm semi-automatic handgun underneath the driver's seat of the car. RP 1907, 1913-14, 2078-79, 2089-91, 2105, 2136, 2255, 2547, 2558, 2591, 2613. Police also found a .38 caliber revolver under the front passenger seat. RP 2092-95, 2101, 2116, 2255, 2558, 2591, 2613. The revolver contained three live rounds and one spent round. RP 2096-99, 2118, 2614. No additional revolver rounds were found in the car. RP 2116, 2614.

No fingerprints were found on the revolver or 9mm bullets. RP 2270-71, 2284. No fingerprints were found on the 9mm pistol. RP 2271, 2591-92, 2594-95. Shire's thumbprint and left middle fingerprint were found on the cylinder of the revolver. RP 2273-74, 2276-79, 2280-81, 2547-48. Three unidentified fingerprints were also found on the revolver. RP 2276, 2281-82.

Police also found several 9mm bullet casings at the scene of the shooting. RP 2140, 2146-47, 2154-55, 2166, 2169, 2179. Police found no .38 revolver bullet casings. RP 2150, 2166, 2614.

Vincent Williams identified Ibrahim and Shire in a police photo montage as the shooters. RP 2313, 2349-51, 2569-74. Williams explained that he, Mardillo Barnes, and Berket Kebede hung out earlier during the day

of the shooting. RP 2296-97. The three of them drank and smoked marijuana before going back to Williams' house. RP 2298-99, 2387. Williams was intoxicated. RP 2298.

While standing around the men were approached by someone named "New York." Kebede was friends with "New York" and talked with him. RP 2304-05, 2321, 2376-78. A short time later, Shire and Ibrahim walked towards the group from the north. RP 2304-14, 2320-2323, 2378.

Williams had previously seen Shire once or twice. RP 2318, 2369, 2379. He did not know Ibrahim. RP 2313-15. Shire spoke with Kebede. RP 2315-16, 2319. Shire also asked Barnes where he was from. Barnes "brushed off" Shire's questions. RP 2316-17. Williams did not feel threatened or intimidated by Shire or Ibrahim. RP 2318, 2383, 2386.

Shire backpedaled several steps while still talking with Barnes and Kebede. RP 2324-25, 2328, 2383-84, 2388. Shire put a gun in the air and fired it. Two or three seconds later Shire lowered the gun and pointed it at Williams, Kebede, and Barnes who were all standing together. RP 2326-27, 2384, 2391. Shire fired five shots and then turned and ran. Williams did not see the gun. RP 2328-29, 2391. After a brief pause, Ibrahim pulled a gun from his waistband and also fired several shots. RP 2329, 2331-32, 2410. Williams saw Shire and Ibrahim run into an apartment complex after the shooting. RP 2334-35, 2392.

Williams went to Barnes' parents' house after the shooting. RP 2344-45. Williams told Barnes' mother that Shire had shot at them. RP 2020-21, 2033, 2346, 2370. Williams spoke with several other people before telling police that Shire and Ibrahim were the shooters. RP 2410-11. Williams also looked online to get more information about Shire and Ibrahim's identities. RP 2314, 2347-48, 2351, 2371-72. Williams acknowledged there was "no way" he could have identified Ibrahim without first seeing his pictures online. RP 2394-95.

Barnes description of the events before the shooting was consistent with Williams'. RP 1950-59, 1965, 1971-73. A bullet entered Barnes' left hand and exited his wrist. RP 1973-74, 2064, 2067. Barnes explained that he did not see anyone or hear anything before the shooting. RP 1969-72. Barnes denied that anyone threatened them before the shooting. RP 1965, 1969. Barnes did not know Ibrahim. RP 1988. Barnes did not see or talk with Shire before the shooting. RP 1987, 1992-93. Barnes did not know who shot him. RP 1972, 1993.

2. Mistrial.

Shortly before the State intended to rest its case, defense counsel informed the trial court they had located Kebede. RP 1286, 1448, 1453. Neither party knew Kebede's true identity until he identified himself to defense counsel during trial on December 10. RP 1474-75, 1509-13, 1516,

1524; CP 43-50. Defense counsel's investigator then interviewed Kebede on December 14. RP 1448, 1508-13; CP 43-50.

Defense counsel explained that he wanted Kebede to testify but did not have him under subpoena. RP 1448. Defense counsel anticipated that Kebede would testify that he was acquainted with Barnes and Williams and was present at the shooting. Kebede denied that Shire was involved in the shooting. RP 1449, 1478-81, 1551-52; CP 175-256.

The State moved to exclude Kebede's anticipated testimony. RP 1454-56, 1460-61, 1469. A recess was taken so the prosecutor could interview Kebede. RP 1458-59, 1466-67. After the recess, the trial court explained it would not exclude Kebede's anticipated testimony because it was potentially exculpatory and not duplicative of any other witnesses. RP 1471-72, 1485, 1490-91. In response, the State requested a recess of 28 days, until January 14. RP 1486. Prosecutor, Julie Kline, explained she was leaving for a scheduled vacation the following day and would not return until January 13. RP 1483, 1489-90. Kline noted however, that she was "not going anywhere – tomorrow." RP 1490. The State's co-prosecutor, Paul Sewell, did not indicate he would be unavailable to continue the trial in Kline's absence.

Kline further stated that she believed the State's investigation into Kebede would take longer than 24 hours. RP 1490. Kline explained the

State needed to investigate whether to bring an additional charge against Shire with Kebede as a complaining witness. Kline also noted the State would need to call rebuttal witnesses. Finally, Kline noted impeachment evidence might exist since Kebede had sat through Williams' trial testimony and contacted Shire while Shire was in jail. RP 1467-69, 1482.

Defense counsel objected to the prosecutor's month length recess proposal, noting he believed Kebede's testimony could be completed that afternoon. RP 1476, 1487. The State proposed the trial court question the jury as to whether they could return after a month long recess. RP 1486, 1495-96. Defense counsel again objected, noting the jury could infer the reason for the delay was caused by the defense which would prejudice Shire. RP 1499.

The trial court noted the State had reason to want to conduct further investigation. RP 1499. The trial court explained it was not going to poll the jury because it did not feel it was fair to require them to return after a month long recess. RP 1499-1500. The trial court sua sponte granted a mistrial. RP 1493-94, 1500; CP 40. In granting a mistrial, the trial court noted the weaknesses in the testimony of the State's witnesses. RP 1500.

Shire's trial began anew on September 3, 2014. RP 1504. Defense counsel moved to dismiss Shire's retrial on the basis of double jeopardy.

RP 1508-13; CP 43-50. Counsel for Shire and Ibrahim noted that the trial court had several options other than declaring a mistrial. RP 1513-19, 1528-34. First, the court could have ordered a short recess to allow the State to interview Kebede. RP 1511-13, 1518, 1534. Counsel also noted that prosecutor Kline remained in the Seattle area for two weeks after the declared mistrial despite her scheduled vacation. Accordingly, counsel argued the case could have continued after a short recess without interrupting Kline's scheduled vacation. RP 1518, 1528-32. Second, counsel noted that prosecutor Sewell could have continued the trial in Kline's absence. RP 1512, 1518-19.

The State maintained they were unaware of Kebede's true identity until he approached defense counsel during the first trial. RP 1524; CP 135-50, 296-98. The State argued the mistrial was not an "unreasonable remedy" under the circumstances. RP 1527.

The trial court noted the apparent lack of diligence undertaken by police to find Kabede during the first trial. RP 1523, 1536. The trial court also believed the defense could have identified Kebede sooner since Shire was in contact with him. RP 1536-37. The trial court concluded the first trial court properly exercised it discretion in granting a mistrial for "manifest necessity." RP 1536-39.

3. Material Witness Warrant.

Shortly after identifying himself to counsel, Kebede gave a sworn interview to police. RP 1467, 1844-46. Kebede explained that he was acquainted with Barnes, Williams, and Shire. Kebede said he was present at the shooting and denied that Shire was involved in the shooting. CP 135-256; RP 1449, 1479-81. Kebede did not know who did the shooting. RP 1478-80, 1551-52. Defense counsel wanted Kebede to testify but did not have him under subpoena. RP 1448.

When Shire's trial began anew, the State personally served Kebede with a subpoena on September 4, 2014. CP 257-59; RP 2497-98. On September 11, the State explained that it did not intend to call Kebede as a witness because it had not been able to locate him. RP 2477. The State did not request a material witness warrant for Kebede. RP 2497-98, 2716. The court noted that the State may not want to call Kebede as a witness given his anticipated testimony. RP 2496-97.

That same day, defense counsel noted he had not been able to reach Kebede by telephone. RP 2495. Defense counsel explained he was preparing a subpoena and would serve it on Kebede. RP 2495-98. Defense counsel's investigator had an address and telephone number for Kebede. RP 2714.

On September 16, defense counsel noted he still not been able to reach Kebede. RP 2628-29, 2690, 2713. Defense counsel explained he had

not had any contact with Kebede since December 2013. RP 2690, 2713-15. Defense counsel believed Kebede was unlikely to appear and testify. RP 2690. Later that afternoon, Ibrahim's attorney notified the court Kebede had contacted her over the lunch hour and confirmed he would appear the following morning to testify. RP 2690-91, 2700.

The next day, defense counsel informed the court he had spoken with Kebede by telephone that morning. RP 2708-09, 2713. Kebede confirmed he received the defense subpoena left for him at his mother's residence. RP 2709, 2713-15. Kebede told counsel he would appear and testify that morning. RP 2708.

Defense counsel requested a material witness warrant when Kebede failed to appear on September 17, as scheduled. RP 2715-16. The trial court denied the material witness warrant as untimely. RP 2715-16. The trial court explained, "you know, I might have [granted a material witness warrant] a week ago[.]" RP 2715.

4. Court of Appeals Opinion.

On appeal, Shire challenged the trial court's declaration of a mistrial over Shire's objection. Relying in part on State v. Robinson, 146 Wn. App. 471, 191 P.3d 906 (2008), Shire argued the trial court failed to consider reasonable alternatives to declaring a mistrial, such as taking a short recess, having a different prosecutor complete the case, or

admonishing the jury or providing curative instructions following a lengthy recess. SBOA at 6-13. Shire further argued the retrial was prejudicial because it allowed the prosecutor to bring an additional charge of assault against Shire and allowed the State to introduce the testimony of an emergency room physician excluded at the first trial. Id. The Court of Appeals concluded the trial court did not err in declaring a mistrial for "manifest necessity" because it properly gave counsel an opportunity to explain their positions. Appendix B at 21-24.

Shire also argued the trial court denied Shire his right to present a defense when it denied his request for a material witness warrant for Kebede. Alternatively, Shire argued defense counsel was ineffective in failing to request the material witness warrant until the last day of trial. BOA at 18-38; The Court rejected each of these arguments. Appendix A at 13-15; Appendix B at 25-30. Shire now asks this Court to accept review and reverse the Court of Appeals.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW OF WHETHER DOUBLE JEOPARDY PRECLUDED RETRYING SHIRE BEFORE A DIFFERENT JURY BECAUSE SHIRE DID NOT CONSENT TO A MISTRIAL IS APPROPRIATE UNDER RAP 13.4(b)(2), (3), AND (4).

The Double Jeopardy Clause of Fifth Amendment provides that no person shall be "twice put in jeopardy of life or limb" for the same

offense. U.S. Const. amend. V. Similarly, article 1, section 9 of the Washington Constitution provides: "No person shall be twice put in jeopardy for the same offense."

If a jury is discharged after jeopardy attaches but before the jury reaches a verdict, a defendant may be tried again for the same crime only if: (1) he freely consents to the mistrial, or (2) the mistrial was required by a "manifest necessity." State v. Juarez, 115 Wn. App. 881, 836-87, 889, 64 P.3d 83 (2003); United States v. Dinitz, 424 U.S. 600, 606-07, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976). To discharge the jury without the defendant's consent is tantamount to an acquittal "unless such discharge was necessary in the interest of the proper administration of public justice." State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982). This means that "extraordinary and striking" circumstances must be present which clearly indicate that substantial justice cannot be obtained without discontinuing the trial. Id. at 163.

Here, there is no dispute that a mistrial was declared without Shire's consent. To declare a mistrial on the basis of "manifest necessity" the trial court was therefore required to consider three factors: (1) whether both defense counsel and the prosecutor had a full opportunity to explain their positions; (2) whether careful consideration was afforded to the defendant's interest in having the trial concluded in a single proceeding;

and (3) whether alternatives to declaring a mistrial were considered. State v. Robinson, 146 Wn. App. 471, 479-80, 191 P.3d 906 (2008).

Division One's conclusion that the trial court properly considered each of these factors, conflicts with Division Two's decision in Robinson. Appendix B at 21-24. In Robinson, the trial court declared a mistrial over Robinson's objection after finding that the bailiff committed misconduct by having communication with the jury. 146 Wn. App. at 476-77.

Division Two concluded the record did not support a mistrial for "manifest necessity." Robinson, 146 Wn. App. at 484. The Court noted the trial court failed to consider alternatives to mistrial such as admonishing the jury or providing curative instructions. Id. at 483. Division Two also concluded that the trial court failed to properly consider Robinson's right to single proceeding because the court failed to discuss whether the improper communication might prejudice Robinson or specify how a mistrial would protect Robinson's interest. Robinson, 146 Wn. App. at 482-83.

As in Robinson, here the trial court's consideration of Shire's interests falls short. First, here the trial court failed to consider several reasonable alternatives to declaring a mistrial such as taking a short recess, having a different prosecutor complete the case, or admonishing the jury or providing curative instructions following a lengthy recess. The trial

court's noting of weaknesses in the testimony of State witnesses, allowance for the State to conduct additional investigation into Kebede, and suggestions that the State would benefit from a mistrial because it would allow an additional charge of assault to be brought against Shire, also demonstrates the trial court's analysis was driven more from the standpoint of protecting the State's interests then Shire's interest in a single proceeding. Supplemental Reply Brief of Appellant (SRBOA) at 3-4. Despite the factual similarity between Shire's case and what was deemed insufficient in Robinson, here Division One gave only passing consideration to that case. Appendix B at 22-24.

Because the Court of Appeals opinion is not supported by the record and conflicts with Division Two's decision in Robinson, review is appropriate under RAP 13.4(b)(2), (3), and (4).

2. REVIEW OF WHETHER SHIRE WAS DENIED HIS RIGHT TO A COMPEL WITNESSES AND TO PRESENT A DEFENSE IS APPROPRIATE UNDER RAP 13.4(b)(1), (3), AND (4).

The Sixth[4] and Fourteenth[5] Amendments, as well as article 1, § 21[6] of the Washington Constitution, guarantee the right to trial by jury and to

[4] The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

defend against the state's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

The Sixth Amendment and Article I, § 22 of the Washington Constitution also guarantee the accused the right to compel the attendance of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right to the compulsory attendance of material witnesses is also a fundamental element of due process, and goes directly to the right to present a defense. Texas, 388 U.S. at 19; Burri, 87 Wn.2d at 180-81. Because the right to compulsory process is a fundamental right, trial courts should safeguard it with meticulous care. Burri, 87 Wn.2d at 181.

The right to compulsory process is violated when the defendant is deprived of a material witness. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The burden of showing materiality is met where the defendant "establish[es] a colorable need for the person to be summoned." Smith,

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[5] The Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[6] Article I, § 21 provides, "The right of trial by jury shall remain inviolate[.]"

101 Wn.2d at 41-42 (quoting Ashley v. Wainwright, 639 F.2d 258 (5th Cir. 1981)).

There can be no dispute here that Kebede's anticipated testimony was material to Shire's defense or that Kebede was subject to a material witness warrant. Instead, the Court of Appeals concluded the material witness warrant was properly denied because issuance of a warrant would have unnecessarily delayed trial. Appendix B at 27, 29. Contrary to the Court of Appeals conclusion however, Shire did not actually request a contemporaneous continuance at the time of the material witness warrant request. Moreover, the trial court did not find that granting a material witness warrant would have unnecessarily delayed trial. Rather, the trial court denied Shire's request for a material witness as untimely. RP 2715-16.

In State v. Edwards,[7] this Court found that the trial court abused its discretion in denying a continuance so three exculpatory witnesses could be compelled to appear in court. This Court noted Edwards took specific steps to assure the witnesses attendance, made a timely application to enforce their attendance, and that there was no evidence trial would have been unnecessarily delayed, or the State's case prejudiced, because of a continuance. 68 Wn.2d at 257.

[7] 68 Wn.2d 246, 412 P.2d 747 (1966).

Despite counsel's late request for subpoenas, this Court explained, "no rule of criminal procedure ought to be construed or applied so as to abridge a fundamental constitutional right." Edwards, 68 Wn.2d at 258. The Court concluded the trial court's refusal to compel the attendance of the witnesses denied Edwards his constitutional right to the compulsory process. Edwards, 68 Wn.2d at 258-59.

The Court of Appeals attempt to distinguish Edwards on the basis that here, Shire's request for a material witness warrant would have necessarily delayed trial, is unsupported by the record. Appendix B at 28-39. Moreover, the Court of Appeals conclusion ignores this Court's recognition in Edwards that "no rule of criminal procedure ought to be construed or applied so as to abridge a fundamental constitutional right." 68 Wn.2d at 258. Kebede's testimony could easily have been the difference between a verdict of guilty or an acquittal. Given the importance of Kebede's anticipated testimony, denial of a material witness warrant was error.

Because the Court of Appeals decision is not supported by the record and conflicts with this Court's prior precedent, review is appropriate under RAP 13.4(b)(1), (3), and (4).

3. REVIEW SHOULD BE GRANTED BECAUSE WHETHER SHIRE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IS A SIGNIFICANT QUESTION OF LAW UNDER THE WASHINGTON AND UNITED STATES CONSTITUTIONS.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) his performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d at 226.

Defense counsel's failure to timely request a material witness warrant for Kebede was unreasonably deficient. Legitimate trial strategy or

tactics may constitute reasonable performance. Aho, 137 Wn.2d at 745. But there was no possible strategic reason for waiting to request a material witness warrant until it was too late. Defense counsel expressed his intent to call Kebede as a witness even before the first trial ended in mistrial. RP 1448, 1467-69. Defense counsel further reiterated his intent to call Kebede as a witness on September 11, even after detailing the "pros and cons" of doing so. RP 2495-98. Moreover, by the start of the second trial on September 3, the State had already added an additional count of assault with Kebede named as the complaining witness. RP 1544-45; CP 56-66. Thus, even if defense counsel's strategy was to prevent an additional count of assault by not calling Kebede as a witness, this strategy was objectively unreasonable.

The State served Kebede with a subpoena on September 4. CP 257-59. Kebede failed to comply with that subpoena and thus, the State indicated on September 11 that it did not intend to call him as a witness. RP 2477. Because the requirements of CrR 4.10(a)(2) and (3) had been satisfied as early as September 11, defense counsel could therefore have requested a material witness at least as early as that date. Instead, defense counsel waited until September 17 to request a warrant, despite recognizing Kebede was difficult to locate, and had already failed to comply with the State's subpoena. RP 2477, 2690, 2713-15.

Shire was also prejudiced from defense counsel's delay in requesting the warrant. First, Kebede's anticipated testimony was undeniably material to the defense theory that Shire was not involved in the shooting incident. BOA at 27-31, 37. Second, the trial denied Shire's motion for a material witness warrant as untimely because Shire did not request a warrant until the final day of trial. BOA at 27-28 (citing RP 2715-16). As the trial court explained, "you know, I might have [granted a material witness warrant] a week ago[.]" BOA at 15. Moreover, defense counsel clearly recognized he had waited too long to request the warrant as evidenced by his comments "that's not a surprise" when told his request would be denied given the late hour at which it was being requested for the first time. RP 2715.

The Court of Appeals erred in concluding that Shire's trial counsel was not ineffective. Appendix A at 14-15. There is a reasonable probability the outcome would be different but for defense counsel's conduct. This Court should grant review under RAP 13.4(b)(3).

E. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to grant review and reverse the Court of Appeals.

DATED this 19th day of September, 2017.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. YUSUF HAISE SHIRE, Appellant.	No. 72734-6-I ORDER DENYING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

Appellant Yusuf Haise Shire filed a motion to reconsider the opinion filed on January 30, 2017. Respondent State of Washington filed an answer to the motion. The panel has determined that the motion should be denied, but the opinion filed on January 30, 2017 shall be withdrawn and a substitute opinion filed. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied and the opinion filed on January 30, 2017 shall be withdrawn and a substitute opinion shall be filed.

DATED this 21st day of August, 2017.

Schindler, J.

Verellen, J.

Cox, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,	)	No. 72734-6-I
v.	)	UNPUBLISHED OPINION
YUSUF HAISE SHIRE, Appellant.	)	FILED: August 21, 2017

SCHINDLER, J. — The State charged Yusuf Haise Shire and Mohamed Ibrahim with assault of Mardillo Barnes, Vincent Williams Jr., and Berket Kebede in the first degree while armed with a firearm and unlawful possession of a firearm in the first degree. The jury convicted Shire of three counts of the lesser included offense of assault in the second degree while armed with a firearm and unlawful possession of a firearm in the first degree. Shire contends he is entitled to dismissal of the convictions because double jeopardy barred the second trial. In the alternative, Shire seeks reversal on the grounds that the court erred in denying his motion to suppress custodial statements and his request for a material witness warrant. Shire also claims his attorney provided ineffective assistance of counsel by failing to timely request a material witness warrant. In the linked case, State v. Ibrahim, No. 72753-2-I (Wash. Ct. App. Aug. 21, 2017), we considered and rejected the argument that double jeopardy barred

retrial and that the court erred in denying the request to issue a material witness warrant. We also reject Shire's argument that the court erred in denying the motion to suppress and conclude Shire does not meet his burden of showing ineffective assistance of counsel.[1] We affirm the jury convictions but remand to correct a scrivener's error in the judgment and sentence.

Motion to Suppress Custodial Statements

Shire contends the court erred by admitting custodial statements he made to police. Shire asserts the statements were made in response to custodial interrogation. The State asserts the statements were not the result of an interrogation.

Under the Fifth Amendment, "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court adopted "[p]rocedural safeguards" to protect the privilege and require warnings before questioning an individual in custody.[2] If an individual invokes his right to remain silent, the police must cease questioning. Miranda, 384 U.S. at 473-74; State v. Cross, 156 Wn.2d 580, 619, 132 P.3d 80 (2006). However, statements made "freely and voluntarily" are not barred by the Fifth Amendment. Miranda, 384 U.S. at 478.

> Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police

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[1] The facts are more fully set forth in the linked case, Ibrahim, No. 72753-2-I, and will be repeated only as necessary.

[2] The police must clearly inform the suspect

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 478-79.

> without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Miranda, 384 U.S. at 478.

In Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the Supreme Court addressed the meaning of "interrogation" under Miranda. The Court concluded "interrogation" under Miranda "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301.[3]

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 300-01;[4] see also In re Pers. Restraint of Cross, 180 Wn.2d 664, 685, 327 P.3d 660 (2014). In determining whether any words or actions of the police are reasonably likely to elicit an incriminating response, we focus "primarily upon the perceptions of the suspect, rather than the intent of the police." Innis, 446 U.S. at 301; see also Cross, 180 Wn.2d at 685; State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988).

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[3] Footnote omitted.

[4] Footnote omitted.

We review a trial court's findings of fact following a CrR 3.5 hearing for substantial evidence and review de novo whether the findings support the conclusions of law. State v. Radcliffe, 164 Wn.2d 900, 907, 194 P.3d 250 (2008); State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997); State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). In determining if police engaged in "interrogation" for Miranda purposes, "we defer to the trial court's findings of fact but review its legal conclusions from those findings de novo." Cross, 180 Wn.2d at 681. Unchallenged findings of fact are verities on appeal. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

There is no dispute Shire was in custody. The unchallenged findings of fact state:

> 1. THE UNDISPUTED FACTS: The defendants were stopped in a white 1996 Toyota Camry at approximately 1:40 AM on May 18, 2013 after . . . Seattle Police Department officers learned that the Toyota Camry that was suspected to be involved in a shooting that had just occurred. After a felony stop was conducted by several Seattle Police Department officers, all of the occupants were ordered out of the Camry.

There is no dispute Officer Shelley San Miguel read Shire his Miranda rights. Shire stated he understood his rights and "he did not want to speak about the shooting." The unchallenged findings establish Officer San Miguel did not ask Shire any questions. The unchallenged findings of fact state:

> Officer Shelley San Miguel arrived at the location of the stop just as defendant Shire was being removed from the vehicle. The officer contacted defendant Shire, placed him into handcuffs, and walked him back to Officer Elias's patrol vehicle. There, the [officer] apprised defendant Shire of his Miranda warnings. Defendant Shire indicated that he understood, and advised the officers that he did not want to speak about the shooting. He was not asked any further questions about the incident.

But the unchallenged findings of fact establish that "Officer San Miguel did, however, inform defendant Shire of the reason for his arrest." Officer San Miguel told Shire that "the vehicle was a possible suspect vehicle in an incident a few blocks away" and that "we had stopped the vehicle and were detaining all the occupants inside while we conduct an investigation." Shire "then stated that he was not involved in anything and had just been picked up by his friends."

Officer San Miguel was the only witness to testify at the hearing on the admissibility of the custodial statements made by Shire. Officer San Miguel testified that the statement she made to Shire about "why he was being stopped" was not "framed . . . as a question."

The State argued the statements were admissible. The State asserted the testimony established Officer San Miguel read Shire his Miranda rights and Shire exercised his right not "to answer any of the questions." And "after that point," all Officer San Miguel did was inform Shire of "the reason for his arrest."

> All the Officer did after that point was inform Mr. Shire the reason for his arrest; that being that they were investigating some suspicious circumstances involving a shooting. And as the Officer noted, that statement[ ] wasn't intended to — intended to elicit a response, it wasn't a question. It certainly wasn't coerced in any manner. And — and really, the Officer didn't believe that there was going to be any response made by Mr. Shire to that statement.

Shire's attorney argued the question of whether the statement of Officer San Miguel was interrogation is an objective not a subjective determination.

> Innis clearly defines interrogation under Miranda as not only express questioning, but also words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily on the perceptions of the suspect rather than the intent of the police. . . .

> [T]he standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts. The subjective intentions of the officer are not at issue.

The court ruled Shire was not subject to interrogation and the statements he made were admissible.

> When it comes to the statements of Mr. Shire to Officer San Miguel, the issue here is whether Officer San Miguel's statement basically articulating for Mr. Shire the reason for his detention, whether or not that is objectively designed to elicit statements in violation of Miranda. In this particular case I think the statements were innocuous, they were informative only, they weren't intended or designed, or objectively requiring a response on behalf of Mr. Shire.

The written conclusions of law state, in pertinent part:

> Statements by Defendant Yusuf Shire: When defendant Shire was taken into custody, he was appropriately apprised of his Miranda warnings and exercised his right to remain silent. Defendant Shire was not questioned thereafter. Officer San Miguel, however, did make an innocuous statement about the reason for the arrest. This statement was not a question, nor was it intended to elicit a response from defendant Shire. As a result, defendant Shire's statement made in response does not implicate the protections afforded by Miranda. Defendant Shire's response was spontaneously and voluntarily made and is admissible for CrR 3.5 purposes.

Shire challenges the conclusion of law on the grounds that the court erred in focusing on Officer San Miguel's subjective intent rather than on the objective determination of whether Officer San Miguel should have known that telling Shire why he was under arrest was likely to elicit an incriminating response. The record does not support Shire's argument.

The written conclusions of law specifically incorporate by reference the "oral findings and conclusions." The court's oral ruling clearly shows the court applied the correct standard in determining whether Officer San Miguel's statement was objectively likely to elicit an incriminating response. The court expressly states that it considered

"whether Officer San Miguel's statement basically articulating for Mr. Shire the reason for his detention, whether or not that is objectively designed to elicit statements in violation of Miranda."[5] The court ruled the officer's statements "were informative only, they weren't intended or designed" to "objectively" require a response from Shire. The record also does not support the argument that telling Shire why he was under arrest was reasonably likely to elicit an incriminating response.

Because the court used an objective standard in concluding Shire's statement to Officer San Miguel was not the product of interrogation, the court did not err in admitting the statement Shire made to police. See United States v. Crisco, 725 F.2d 1228, 1232 (9th Cir. 1984).

Ineffective Assistance of Counsel

Shire contends his attorney provided ineffective assistance of counsel by failing to timely request a material witness warrant for Kebede.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). "Ineffective assistance of counsel is a fact-based determination, and we review the entire record in determining whether a defendant received effective representation at trial." State v. Carson, 184 Wn.2d 207, 215-16, 357 P.3d 1064 (2015); Grier, 171 Wn.2d at 34.

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[5] Emphasis added.

To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. Grier, 171 Wn.2d at 32-33. If a defendant fails to establish either prong, we need not inquire further. Strickland, 466 U.S. at 697; State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish deficient performance, Shire has the heavy burden of showing that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. "Deficient performance is performance falling 'below an objective standard of reasonableness based on consideration of all the circumstances.' " State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

An appellate court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and the presumption of a legitimate trial strategy. Strickland, 466 U.S. at 689. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 335-36.

As the Supreme Court explained in Strickland:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

> circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)].

Strickland, 466 U.S. at 689.

To rebut the presumption that counsel's performance was reasonable, Shire "bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.' " Grier, 171 Wn.2d at 42[6] (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); State v. Humphries, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014); McFarland, 127 Wn.2d at 335-36.

Shire cannot show the decision not to request a material witness warrant before the last day of trial fell below the objective standard of reasonableness. The second trial began on September 3, 2014. The court granted the State's motion to amend the information to add the charge of assault in the first degree of Berket Kebede while armed with a firearm. The State endorsed Kebede as a witness and on September 4, issued a subpoena to appear and testify at trial.

During pretrial motions, Shire's attorney addressed the "pros and cons" of calling Kebede as a defense witness in the first trial. "Certainly the concerns that I had were there were a number of jail calls, as the State has pointed out, between my client and Mr. Kebede" and allegations of witness tampering.

> [T]here have been allegations of — of witness tampering. I know there's a letter in evidence that the prior trial court permitted, that I anticipate will be permitted to be used at this trial, regarding that alleged witness tampering.

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[6] Emphasis in original.

On September 11, the prosecutor told the court that because "we're not able to locate [Kebede]," the State did not intend "at this point to introduce any of the jail calls" Shire "made to Mr. Kebede."

> [W]e're not able to locate him, so it doesn't — we don't anticipate him being called as a witness — calling him as a witness. They — some of these calls could potentially be used as impeachment evidence against him.

Shire's attorney questioned the State's efforts to present Kebede as a witness at trial and stated Shire planned to subpoena Kebede to testify.

> I'm going to prepare a subpoena and direct my investigator to try to serve [Kebede]. However the resources that we have obviously pale in comparison to those at the State's disposal. I — I am making, and will make efforts to get a subpoena for Mr. Kebede. My understanding is the State hasn't subpoenaed him, and . . . I will let the State say what efforts. But they've obviously added him as a victim; believe that they endorsed him as a witness. So we certainly have the expectation that Mr. Kebede would be present at trial.

The prosecutor told the court the State served a subpoena but was uncertain "whether there was any return of service" and, therefore, could not in "good faith" request a material witness warrant.

> I can tell that I've asked Detective Janes and they're — part of the issue with regards to why the State hasn't asked for a material witness warrant is usually the detectives need somewhere to start, and we don't have that. So that would be the reason why we haven't asked for one. I mean — and I don't even know if he's properly served to even in good faith ask for one. So that would be the only State's issue at this point.

The State planned to conclude its case in chief on September 16. On September 16, Detective Thomas Janes testified about the attempts he made during the trial to locate Kebede, including speaking to Kebede's mother. Detective Janes said Kebede's mother talked to Kebede "earlier in the week" but she did not provide "any information of his location." During his testimony, Detective Janes read a letter Shire wrote while in

jail. The letter states the case against him turns on the testimony of the victims and if "the victims don't come," he will be convicted of only unlawful possession of a firearm.[7]

During the recess, the court asked the defense for an update—"where we'll go next." Shire's attorney told the court he planned to call the defense investigator to rebut the implication that Shire had paid Kebede to leave town and not testify. The court ruled:

> Well he can certainly testify to having contact with Mr. Kebede in December of 2013. He'd not relocated to California where he was receiving a thousand dollars a month or anything like that. He was here in King County, Washington in December of 2013.

Shire's attorney asked the court to "give the defense until tomorrow morning" to locate Kebede. The attorney told the court that he had made "efforts to find him." The attorney said he left Kebede "a message saying that if — if he was going to testify on behalf of the defense . . . that we would need him here tomorrow morning." The prosecutor said in that event, the State planned to call Kebede as a witness. The court ruled the State could "either rest and let the defense call [Kebede], or you can call him and see where that takes us."

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[7] The letter states, in pertinent part:

> What's up, Samira? . . . [M]y case is looking kind of bad right now that they pushed it back 'til October. And they got my prints on the gun. But really, my case relies on the victims. If the victims don't come, I will get charged with the gun. That's why I'm stressing really. So far they can't get a hold of none of the victims or the witness.
>
> But yeah, I need you . . . to take Oh Boy out of town to Cali and give him like one thousand a month to live until my shit is over with 'cause if they find him and he comes, I'm cooked. Bad. That's why I need you to do that, because with him I . . . should be good. 'Cause they are — are looking for him.

The court asked Shire's attorney what were "the chances of [Kebede] coming in tomorrow morning." Shire's attorney responded that "from my perspective, . . . they're slim."

> I've left messages, [the defense investigator] went out and talked to his mom that — basically what we conveyed to him was the case will be over tomorrow. I — I have no idea if he's going to show up.

At that point, Ibrahim's attorney interjected and for the first time disclosed that she received a call from Kebede during the noon recess that day, and Kebede told her he "would be here at 8:30" on September 17.

> [IBRAHIM'S ATTORNEY]: And your Honor, this is perhaps why I need to then disclose this. And that is just at the lunch hour, I did get a call from Mr. Kebede —
> THE COURT: Okay.
> [IBRAHIM'S ATTORNEY]: — in response to my telephone calls.
> THE COURT: Uh huh.
> [IBRAHIM'S ATTORNEY]: Mr. Kebede — I told him he would need to be here at 8:30 tomorrow morning.
> THE COURT: Yeah.
> [IBRAHIM'S ATTORNEY]: He indicated he would be here at 8:30.

The next morning, Shire's attorney told the court that Kebede called him at approximately 7:45 a.m., Kebede acknowledged receiving the subpoena from the defense, and Kebede said he "would be here at 9:00" a.m. The court ruled in the meantime, Shire could present the testimony of the defense investigator.

> Well we can bring in the jury, the State can rest. We can hear from [the defense investigator], and that will give us until 9:30 or 9:40 to see if Mr. Kebede should appear. If he has not appeared, then would you be resting?

Shire's attorney told the court that if Kebede did not appear, he would ask the court to issue a material witness warrant.

> [SHIRE'S ATTORNEY]: I — I think the only other thing that I would have would be a motion for material witness warrant. Unfortunately the

> service information is, as I've described to the Court, and — and that's all that I can offer the Court in terms of a basis for that.
>
> THE COURT: Okay.
>
> [SHIRE'S ATTORNEY]: But — but I — I think I would be obliged to ask.
>
> THE COURT: Okay. And I think I would probably, in light of the timing, be obliged to decline that —
>
> [SHIRE'S ATTORNEY]: That's not a surprise.
>
> THE COURT: — invitation. You know, I might have a week ago, which is, I think, what Detective Janes might have had the impression had occurred. There was not a warrant for Mr. Kebede?

The prosecutor told the court there "actually is a warrant for Mr. Kebede's arrest" in municipal court.

When Kebede did not appear by 9:40 a.m., Shire's attorney asked the court to issue a material witness warrant for Kebede. The court denied the request to issue a material witness warrant as untimely.

Shire cannot show deficient performance in failing to request a material witness warrant before September 17. The record does not support the argument that Shire should have requested a material witness warrant for Kebede on September 11.

At the beginning of the second trial, the State filed an amended information adding a charge of assault in the first degree of Kebede. The State endorsed Kebede as a witness and issued a subpoena on September 4. On September 11, the prosecutor told the court the State did not plan to call Kebede and could not in "good faith" request a material witness warrant because the requirements of CrR 4.10 were not met. CrR 4.10(a) states, in pertinent part:

> The [material witness] warrant shall issue only on a showing . . . that
>
> (1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or
>
> (2) The witness has refused to obey a lawfully issued subpoena; or
>
> (3) It may become impracticable to secure the presence of the witness by subpoena.

The record does not show that on September 11, Kebede "refused to obey a lawfully issued subpoena" or that the defense could not "secure [his] presence" by issuing a subpoena.[8] The record shows that on September 11, Shire's attorney planned to subpoena Kebede and call him to testify. The record shows Kebede was in contact with the defense attorneys and received the defense subpoena to testify. Kebede assured defense counsel on September 16 and on September 17 that he would comply with the defense subpoena and come to court to testify the morning of September 17. Kebede told Ibrahim's attorney on September 16 that he planned to come to court at 8:30 a.m. on September 17. Shire's attorney talked to Kebede the morning of September 17 and confirmed he planned to come to court and testify. There was no justification to request a material witness warrant under CrR 4.10 until September 17.

The record also shows legitimate strategic reasons not to request a delay or continuance of the trial.[9] Barnes testified that he knew Shire and that Shire was not involved in the shooting. During cross-examination, Barnes admitted he previously testified that he did not "see who did the shooting." Barnes testified that he knew Shire but said he did not remember seeing or talking to Shire that evening.

Further, there is no dispute the State would have impeached Kebede's credibility. The State would have introduced evidence that the jail calls showed Kebede was in

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[8] CrR 4.10(a)(2), (3).

[9] Washington v. Smith, 219 F.3d 620 (7th Cir. 2000), and Young v. Washington, 747 F. Supp. 2d 1213 (W.D. Wash. 2010), are distinguishable. In Smith, the court held defense counsel "had no semblance of a tactical reason for the delay, nor can we think of one for him." Smith, 219 F.3d at 630. In Young, the attorney " 'stated on the record that his failure to serve a subpoena was not a strategy or tactic.' " Young, 747 F. Supp. 2d at 1219 (quoting State v. Young, 132 Wn. App. 1037, 2006 WL 1064122, at *4).

regular contact with Shire while he was in jail; that unbeknownst to the State, Kebede was in court during the first trial; and that Kebede did not come forward until after Williams testified. In addition, the State would have questioned Kebede about the letter Shire wrote to him.

Because Shire cannot establish deficient performance, his claim of ineffective assistance of counsel fails. Strickland, 466 U.S. at 697; Hendrickson, 129 Wn.2d at 78; Carson, 184 Wn.2d at 229.

Statement of Additional Grounds

In his pro se statement of additional grounds, Shire claims his attorney provided ineffective assistance of counsel by not asking Williams about being "pressured into testifying against me" and about the information Williams obtained after the shooting "from friends and family." Shire cannot show ineffective assistance of counsel. Shire's attorney engaged in a lengthy cross-examination of Williams, and we presume decisions regarding the extent of cross-examination are strategic. See In re Pers. Restraint of Brown, 143 Wn.2d 431, 451, 21 P.3d 687 (2001); State v. Stockman, 70 Wn.2d 941, 945, 425 P.2d 898 (1967).[10]

Scrivener's Error in Judgment and Sentence

Shire contends the judgment and sentence incorrectly lists assault in the first degree instead of assault in the second degree. The State concedes the judgment and sentence mistakenly lists assault in the first degree. We accept the State's concession

[10] Shire also contends that because Kebede did not testify, he was deprived of his constitutional right to confront Kebede and present a defense. Because appellate counsel "addressed" this argument, we need not address Shire's argument. RAP 10.10(a); State v. Thompson, 169 Wn. App. 436, 493, 290 P.3d 996 (2012) (alleged error thoroughly addressed by counsel not proper matter for statement of additional grounds).

as well taken and remand to correct the judgment and sentence. In re Pers. Restraint Petition of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

We affirm the jury convictions but remand to correct the scrivener's error in the judgment and sentence.

WE CONCUR:

LAW OFFICES OF

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September 18, 2017

Richard D. Johnson, Court Administrator/Clerk
ATTN LORI MOORE
Court of Appeals, Division I
One Union Square
600 University Avenue
Seattle, WA 98101

RE: State v. Akiel Taylor, 75764-4-I

Dear Mr. Johnson,

It is my understanding the Court would like the original copies of Mr. Taylor's two-part Statement of Additional Grounds (SAG). Enclosed is part two, a copy of which we filed recently. Unfortunately, I cannot provide the first installment at this time, as I sent it back to Mr. Taylor for him to go over in pen. I will let him know the Court would like the original copy if he has not yet copied it in pen.

Sincerely,

Dana M. Nelson
Attorney

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MOHAMED IBRAHIM, Appellant.	)	No. 72753-2-I ORDER DENYING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

Appellant Mohamed Ibrahim filed a motion to reconsider the opinion filed on January 30, 2017. Respondent State of Washington filed an answer to the motion. The panel has determined that the motion should be denied, but the opinion filed on January 30, 2017 shall be withdrawn and a substitute opinion filed. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied and the opinion filed on January 30, 2017 shall be withdrawn and a substitute opinion shall be filed.

DATED this 21st day of August, 2017.

Schindler, J.

Verellen, J.

Cox, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MOHAMED IBRAHIM, Appellant.	)	No. 72753-2-I UNPUBLISHED OPINION FILED: August 21, 2017

SCHINDLER, J. — A jury convicted Mohamed Ibrahim of three counts of assault in the first degree while armed with a firearm and unlawful possession of a firearm in the first degree. Ibrahim contends he is entitled to dismissal with prejudice because the court erred in declaring a mistrial and the retrial violated double jeopardy. In the alternative, Ibrahim seeks reversal on the grounds that (1) the court abused its discretion by allowing the State to amend the information to add a third count of assault in the first degree, (2) the amended information did not inform him of the essential elements of the crime, (3) the court erred in denying the defense request for a material witness warrant, and (4) insufficient evidence supports one of the convictions for assault in the first degree. Ibrahim also claims the court erred by sentencing him to serve the sentence for the three assault convictions consecutively under RCW 9.94A.589(1)(b). We affirm the convictions and the judgment and sentence.

May 2013 Shooting

Vincent Williams Jr., his good friend Mardillo "Mardy" Barnes, and Barnes' friend "Ket" spent the evening of May 17, 2013 together. Williams, Barnes, and Ket went to a bar to drink and shoot pool. Afterward, they smoked marijuana and stopped to get food. At approximately 1:00 a.m., they parked on Fremont Avenue North near North 85th Street. Williams and Barnes lived next to each other about a block away from where they parked the car. Before walking home, Williams, Barnes, and Ket stood next to each other "shoulder to shoulder" on the sidewalk talking.

Williams testified that while they were talking, two "light skinned . . . African American . . . guys" walked toward them. The man walking in front, later identified as Yusuf Haise Shire, was short and wearing "dark clothing." The taller man, later identified as Mohamed Ibrahim, was wearing a blue and white striped zip-up sweatshirt, a baseball cap, and dark gloves. Williams recognized the shorter man as someone he had seen one or two times before and knew as "Louie." Williams did not recognize the taller man.

Shire approached Ket and engaged in a brief and friendly conversation. But when Shire and Ibrahim talked to Barnes, Williams said it was "kind of weird." Barnes acted like he "didn't want to have this conversation" and "just wanted to go home." Williams said the two men were "pretty intoxicated," it seemed "like they were going to go home too," and there were "no threats or . . . intimidation."

But after Shire and Ibrahim started walking away, Shire said, " 'I do this.' " Shire pulled out a revolver, "pointed it in the air," fired a shot, and then pointed the gun at Barnes, Williams, and Ket and fired four more shots. Ibrahim then turned around facing

Barnes, Williams, and Ket. Ibrahim pulled out a 9mm semiautomatic pistol from his waistband; pointed the gun at Barnes, Williams, and Ket; and fired at least six shots.

Williams, Barnes, and Ket were standing "right next to" each another within an "arm's length" and were "in the line of fire." Williams saw Ket "run across the street and dive behind a car. So he was kind of like out of the way when Mr. Ibrahim began to fire." After "[b]ullets . . . passed [his] head," Williams hid behind a car. As Barnes "began to run across the street," Ibrahim continued shooting and Williams "saw blood." Williams testified:

> I don't know what their intentions were, but I just know that I think that — like from the gist I got from it and from my own mind is that they were aiming for [Barnes]. . . . Like I said, like it's like a trail of bullets following him like where he ran.

Shire and Ibrahim turned and ran away toward a housing complex.

Williams tried to find Barnes. Williams screamed his name while he followed the direction of the blood on the street. Williams heard Barnes groaning "in agony" and found him in a backyard in a "puddle of blood." Barnes was "holding his hand," blood "dripping out his sleeve."

The Barnes family lived in a housing complex located at 8521 Fremont Avenue North. Barnes' father Mardillo Arnold was awakened by a "loud bang" followed by a pause and several more shots. Arnold ran outside and saw Williams down the street. Arnold ran down the street and asked Williams what happened. Williams looked scared and said, " 'They just shot Mardy.' " Arnold "was really scared" and "ran into the middle of the street . . . screaming, 'Mardy, Mardy, Mardy.' " Barnes "came running from behind a house." Arnold, Barnes, Williams, and someone Arnold "vaguely" knew as "Kip" headed back to their house.

Meanwhile, Barnes' mother Carolyn Barnes-Arnold looked out the window and saw someone run by wearing a black shirt or "hoodie." The man ran along a walkway that leads into the courtyard of the housing complex. When Barnes-Arnold ran outside, she saw Williams and Barnes' friend, who she knew as "Ket," standing on the front porch looking scared. Williams was screaming that Barnes had been shot. Barnes was bleeding heavily from his hand. Arnold used his belt to make a tourniquet around Barnes' arm and called 911. Williams told Barnes-Arnold that "Louie" was one of the two shooters.

Thomas English lived in the same housing complex at 8549 Fremont Avenue North. English was smoking a cigarette on his patio around 1:00 a.m. when he saw two black men run through the well-lit courtyard toward Fremont Avenue North. One of the men was "pretty short" and the other was taller. Within minutes, English heard 9 or 10 gunshots. The gunshots were "[v]ery quick" and separated by a "real brief hesitation." The gunshots were "very close[,] . . . [n]ot even a block away."

After hearing the gunshots, English saw two black men, "[o]ne was short and one was tall," run through the courtyard. The shorter man ran by first and was wearing a dark hoodie and dark pants. He was "crouching down" and holding a gun in his hand. The taller man was 10 to 15 seconds behind "running clumsily with [his] hands down in his pants." He was wearing a blue and white striped hoodie and baggie pants. English "couldn't tell" if they were the same two men he saw run by earlier. English went to see if anyone needed "assistance" and saw an "African American" man in shock with a hand injury.

David Bentler lived near the intersection of North 85th Street and Fremont Avenue North. Bentler heard two series of gunshots that were very close. When Bentler looked out the widow, he saw a white late-1990s-model Toyota Camry parked in a driveway. Less than a minute later, Bentler saw two men get into the car. A "very tall African American male" wearing "dark colored clothing" got into the back seat behind the driver. As soon as the two men got in the Camry, the car "sped off" heading west on North 85th Street. Bentler called 911 at 1:18 a.m. and provided a description of the vehicle.

At 1:24 a.m., Seattle Police Department Officer Collin Carpenter stopped a white 1996 Toyota Camry in the 7700 block of 3rd Avenue Northwest. There were five people in the car—two in the front and three in the back. Officer Carpenter called for backup. The passenger in the back seat behind the driver, later identified as Ibrahim, did not put his hands up as directed and kept "moving around" and "bending down." The passenger in the back seat of the car on the passenger side, later identified as Shire, was also reaching down.

The police removed the five individuals from the car and conducted a showup identification. Ibrahim is over six feet tall. He was wearing a blue and white striped zip-up sweatshirt and a blue baseball hat. Shire is five feet three inches tall. He was wearing a black T-shirt and jeans. English identified Ibrahim and Shire with "100 percent" certainty as the two men he saw run through the courtyard of the housing complex. Bentler identified the white 1996 Toyota Camry as the car he saw parked in a driveway near the intersection of North 85th Street and Fremont Avenue North.

The police found a 9mm semiautomatic pistol under the driver's seat directly in front of where Ibrahim was sitting. The gun has a 16-cartridge capacity. Only 1 bullet remained in the gun. The police found a black and white glove on the floorboard near where Ibrahim was sitting. The police found a .38 caliber revolver under the front passenger seat directly in front of where Shire was sitting. The .38 caliber revolver has a 5-round capacity. The revolver contained 3 unfired rounds and 1 spent shell casing.

Detective Robert Sevaaetasi searched the area where the shooting occurred. Detective Sevaaetasi recovered six 9mm shell casings and a "deformed bullet fragment." Detective Sevaaetasi found bullet "strike marks in the planting strip" near the street.

Detective Thomas Janes interviewed Williams the next day. Detective Janes prepared two six-person photomontages, one with a photo of Shire and the other with a photo of Ibrahim. Williams identified Ibrahim and Shire as the shooters with "100 percent" certainty.

Williams told the police he knew the third victim only as "Barkett" and did not know where to find him. Barnes refused to provide any information to the police. Barnes' father told the police he did not know "Barkett." The police believed the man identified as "Barkett" was associated with the "Barquet" family. The police were unable to identify or locate the person identified as "Ket," "Kip," or "Barkett."

Testing performed by the Washington State Patrol Crime Laboratory (WSPCL) showed the six 9mm shell casings found at the location of the shooting were fired from the 9mm semiautomatic gun the police found on the floor of the Toyota under the driver's seat directly in front of where Ibrahim was sitting. Fingerprint analysis showed

the fingerprints on the cylinder of the .38 caliber revolver the police found under the front passenger seat directly in front of where Shire was sitting matched Shire's left thumb and left middle finger.

On May 21, 2013, the State charged Ibrahim and Shire with assault of Barnes in the first degree while armed with a firearm, assault of Williams in the first degree while armed with a firearm, and unlawful possession of a firearm in the first degree.

The trial was scheduled to begin on September 16, 2013. At the request of Ibrahim, the trial was continued for six weeks until October 28, 2013. Ibrahim's attorney requested the six-week continuance because his new counsel needed "time to prepare." Between October 28 and November 18, the court continued the trial each day because the prosecutor was in trial.[1] Beginning November 20, the court continued the trial because of "[n]o judicial availability."

November 26, 2013 Trial

The trial began on November 26, 2013. The State listed " 'Kip' Barquet" as a witness. The State estimated the trial would "last approximately 10 days including jury selection."

Before jury selection on December 2, the court confirmed when the parties anticipated submitting the case to the jury. The prosecutor told the court the State planned to give closing argument on December 16 and submit the case to the jury on December 17 "[a]t the very latest."

> Your Honor, I'm beginning my holiday leave on the 18th so I have every intention of getting this case to the jury on the 17th.
>
> THE COURT: At the very latest.
>
> [PROSECUTOR]: At the very latest. I think more likely we will be able to, I think perhaps, do closings Monday the 16th. But I would say that

[1] On November 19, the court continued the trial one day for medical leave.

> the State will be making every effort to get the case to the jury on the 17th. No later than the 17th.

Shire's attorney told the court that December 16 was a "reasonable time to do closings" because Shire did not "have any witnesses to offer" and would rest after the State completed its case in chief. Ibrahim's attorney agreed and was "optimistic" that the parties would give closing arguments on December 16.

The jury was empaneled on December 3. Between December 4 and December 16, the State called a number of witnesses to testify, including Williams, Barnes, Arnold, Barnes-Arnold, English, Bentler, Detective Janes, Detective Sevaaetasi, WSPCL firearm examiner Kathy Geil, and Seattle Police Department latent fingerprint examiner Kellie Anderson.

Williams identified Ibrahim and Shire as the shooters. Williams testified that Shire fired a shot "in the air" from a "snubbed nosed" revolver and then pointed the gun "directly at us" and "started firing towards us." Williams said he was standing with Barnes and Ket on "the same sidewalk square" when Shire began shooting. Williams testified that Ibrahim then pulled a 9mm semiautomatic pistol from his waistband and "began to shoot." During the shooting, Williams "felt like [heat] passed my face, like bullets." Williams said Ibrahim initially fired "[t]owards us" and then began to fire "[t]owards the middle of the street" when Barnes ran across the street. Williams testified that as Shire and Ibrahim ran away toward North 85th Street, they "cut through" the nearby housing complex.

Barnes testified that he "kn[e]w a guy named Barket or Kip or Kit." Barnes testified he called him "Ket" but he had "no idea what's his real name." Barnes said he is "one of the homies that come around sometimes." Barnes testified he was eating and

"minding my own business" when shots were fired and "I got hit." Barnes said he did not remember seeing anyone in the street before the shooting. Barnes testified he did not see who shot him or "where these bullets were coming from."

On Wednesday, December 11, the prosecutor told the court the State planned to conclude its case on Monday, December 16. Shire's attorney stated, "At this point, I don't have any witnesses" to call. Ibrahim's attorney told the court he had no witnesses to call, "[t]he same" as Shire. The court told the jury that deliberations would likely begin on Monday, December 16.

> We still plan on getting the case to you for deliberations on Monday, which is the representation I think we made at the outset . . . . [O]ur prediction is that we're going to finish everything up in the morning, hopefully, and get the case to you for deliberations on Monday like we planned.

At the end of the day, the court reiterated that jury deliberations would begin "sometime[ ]" on December 16.

On Monday, December 16, the prosecutor told the court the State planned to conclude the presentation of evidence that day. At the end of the day, the court told the jury the trial was "a little bit behind schedule, but not too much," and the State would call its final witness and the parties would give closing arguments the next day on December 17.

While reviewing the proposed jury instructions the next morning, Shire's attorney told the court and the prosecutor that the defense had located and interviewed the "missing witness, Berkett Kebede." Shire's attorney said that on Tuesday, December 10, Kebede approached him outside the courtroom. The attorney spoke briefly with Kebede to determine "if he was who [he] said he was and if he had any information related to the case." During the next five days, the attorney investigated Kebede and

his potential testimony and discussed whether to call Kebede as a witness with his colleagues and Shire.

The attorney told the court Kebede "would testify that he knows all the parties in the case, that he was present at the shooting, that he did see the shooters and that the shooters are not Mr. Shire or Mr. Ibrahim." Shire's attorney said he served Kebede with a subpoena on Monday, December 16, and Kebede was present in the hallway outside the courtroom.

The court took a recess to allow the State to interview Kebede. With the attorneys present, Seattle Police Department Gang Unit detectives interviewed Kebede for more than an hour. Kebede said he had been in contact with Shire and Ibrahim after they were arrested. Kebede told the detectives he attended the trial when Williams testified on December 5 and he contacted Shire's attorney "the past week." Kebede gave the detectives the telephone number he used to talk to Shire and Ibrahim while they were in jail.

The State moved to exclude Kebede's testimony "given the willful nondisclosure and the other issues with this particular witness' testimony." The State argued the interview established Shire and Ibrahim "were well aware of how to get ahold of [Kebede] and if they wanted him called as a witness they could have disclosed him in a timely manner." The State also pointed out the need to conduct further investigation to "effectively cross-examine" Kebede.

> [T]his particular witness has been in contact with the defendants, both of them, since their arrest apparently via jail calls. . . . He also admits to several jail visits with Mr. Shire and receiving letters from Mr. Shire as well. Obviously, those are all things that the State needs to investigate and look into in order to effectively cross-examine this particular witness. The witness — other issues include like I had mentioned the witness has

> watched part of trial and has indicated that since the 4th or the 5th when he was here for trial the first time, has been in fairly constant contact with the defendant's sister . . . . [S]he has been keeping him abreast of what has been occurring during the trial. So we have some extreme taint issues with this witness as well. Additionally, the State believes we have some 5th amendment issues with this particular witness and he may in fact need to have an attorney present.

The court denied the motion to exclude Kebede from testifying because of the exculpatory nature of the testimony. Specifically, that according to the offer of proof, Shire and Ibrahim "had nothing to do with the shooting." "In this case, it's really clear to me that nobody else is going to be offering th[is] evidence."

The State then requested a "lengthy recess" to conduct "additional investigation based on just what this witness has admitted to."

> I think [a lengthy recess] is the next solution in this particular case, Your Honor. I mean, given what this witness has to say, given the time of the disclosure by defense, and given the additional investigation based on just what this witness has admitted to as far as contact with the defendants in this case. We've already ordered the most recent set of jail calls since the trial began, but obviously, you know, those take time to listen to and investigate.

The court asked Shire's attorney, "[W]hat's your thought on the recess until January 14th?" Shire's attorney stated he was "left in a position to object." The attorney argued there was "no reason we can't [get] through the witnesses and close this case tomorrow." Ibrahim's attorney agreed a lengthy recess is "a problem. . . . So yes, I would object." Ibrahim's attorney also agreed there was "no reason we couldn't conclude this case tomorrow or if we have to the next day." The prosecutor told the court she was available for the next couple of days but argued the State would need more than a day or two to prepare to cross-examine Kebede.

The court rejected a short recess. The court concluded a short recess was not a viable option because the State needed "significant" time to investigate and prepare for cross-examination.

> I think the State is going to need more time than an afternoon to investigate what they're going to need to investigate given the substance of those purported testimony. It's going to be significant.

The court concluded the only option was to recess the trial until January 14 but expressed concerns about doing so.

> So then the only issue I have right now is whether or not I'm going to continue the matter or recess the matter until January 14th, which would require me posing to the jury: Are you willing to come back in January to finish this up for however long it takes? It might be a couple days. It might be a week. We made representations to this jury about how long their serve [sic] was going to be and we've already thrown that out the window, and, frankly, I'm disinclined to ask[ ] them that question.

The court noted it "hate[ed] the thought of granting a mistrial particularly when we put so much into this already" but could not exclude testimony that "purportedly goes right to the heart of the matter."

After a recess, the prosecutor asked the court to poll the jury to determine if jurors would be able to return in January. The court rejected the request to poll the jury about a continuance to January 14.

> I'm not going to poll the jury on this. I just don't feel comfortable doing that. We're talking about an almost month long recess. I can't imagine that they've all taken enough notes during the trial that they can adequately refresh their recollection on all the nuances of the testimony they've heard in this case. . . . Affirmative representations, as I said before, were made to them at the outset of this trial. We told them they'd be in deliberations yesterday. Right now we are nowhere close to getting them into deliberations.

The court also concluded continuing the trial would prejudice the defense.

> [I]t looks a little coercive from my prospective, and . . . don't you think they're going to be wondering what all necessitated this three-week hiatus. And none of us are in a position to be able to explain anything to them at this juncture, and once we get back on the record, if we ever did with this jury, I have a feeling they'd be going, "Oh, I see what happened. It's that defense. Oh, I got it."

Shire's attorney agreed with the court. "[M]y concern with keeping that jury is that they're going to infer the reason for delay and that it will reflect negatively on Mr. Shire regardless of an instruction."

Over the objection of the parties, the court declared a mistrial. The court ruled the "late disclosed" exculpatory defense witness created a "manifest necessity" for a mistrial.

> I'm going to hold to the mistrial, and I don't think jeopardy attaches because in essence it was a late disclosed defense witness that necessitated the mistrial, and I will find manifest necessity for all the reasons I've said already.

Motion to Dismiss Charges as Barred by Double Jeopardy

The second trial was assigned to another judge and scheduled to begin in January 2014. Before trial, Ibrahim and Shire filed a motion to dismiss with prejudice. Ibrahim and Shire argued the court abused its discretion by sua sponte declaring a mistrial and double jeopardy barred retrial of the charges. Ibrahim and Shire argued the court "never realistically considered workable options available other than mistrial." For the first time, Ibrahim and Shire argued the court did not consider the option of ordering the prosecutor or co-counsel to complete the trial.

The State argued the record supported finding manifest necessity and the court did not abuse its discretion in declaring a mistrial. In support, the State filed the

transcript from the interview the detectives conducted with Kebede on December 17, 2013; a transcript of the court hearing on December 17, 2013; and the declaration of Senior Deputy Prosecuting Attorney (DPA) Julie Kline.

Senior DPA Kline described the lengthy investigation after learning the identity of Kebede, including the need to examine approximately 220 jail phone calls.

> .... Prior to December 16, 2013, the State had no knowledge of the identity of the person described by witnesses as "Kip" or "Barquet". This included any knowledge of his address, phone number, physical appearance or true and correct name.
> .... The State and Seattle Police made efforts to identify "Kip" because according to witnesses, the State believed he would not only be able to confirm the identity of the shooters, but was also a victim and his identification would allow for the addition of another count of Assault.
> .... Upon learning the identity and telephone number of "Kip" on December 16, 2013 (true and correct name: Berket Kebede), the State examined the 220+ jail phone calls of both defendants using the telephone number Mr. Kebede provided. Without having Mr. Kebede's telephone number, there was no way to determine the identity of the persons the defendants were calling from Jail. Upon examination, it was discovered that there were multiple calls from the defendants, who remained jailed during the pendency of this case, to Mr. Kebede's telephone number. The first call from defendant Shire to Mr. Kebede was dated May 31, 2013. The first call from defendant Ibrahim to Mr. Kebede was dated June 8, 2013. Parts of these conversations were not in English.
> .... The calls between the defendants and Mr. Kebede frequently made mention of Mr. Kebede coming during jail visitation hours and bringing writing implements to take notes at the instruction of defendant Shire.

Senior DPA Kline also described the need to call rebuttal witnesses.

> .... Mr. Kebede indicated in his defense interview that he was present in court for Vincent Williams' testimony in trial, which occurred December 5, 2013. Both defendants are acquainted with Mr. Kebede, were present in trial on December 5, 2013, and would have been aware of his presence in court.
> .... During his defense interview, Mr. Kebede claimed that he did not name the defendants as the shooters after the incident to the victims or the victims' family members after the incident. This is

> contrary to what these witnesses have stated and rebuttal testimony by these witnesses would have been necessary subsequent to Mr. Kebede's testimony at trial.

Senior DPA Kline states requiring co-counsel to try the case was not a viable option.

> I invited Deputy Prosecuting Attorney Paul Sewell to co-try this case with me in order to gain felony trial experience. At the time this trial began, he had only previously tried one felony jury trial. Mr. Sewell would not have been otherwise assigned this case given the seriousness level and complexity without supervision from a senior deputy prosecutor, such as myself.

In response to the court's questions about the efforts to locate Kebede, DPA Sewell said Barnes' parents knew Kebede only as a friend of Barnes from the neighborhood named "Ket."

> [Barnes' parents] had indicated that [Kebede] was a friend of their son[']s kind of from the area they're aware of. They only knew him as Ket. That was all the information that we had, which is clearly short for his first name. To be perfectly honest the State was under the impression that he was a member of the [Barquet] family, which are fairly well-known by the Seattle Police Department and so that was the avenue that we were going by. I personally was scouring records looking for someone in the family that was either in that area or the same age. So that, of course, ended fruitless because he wasn't a member of that family. It was only when he came forth that we found out — during the trial we found out — his real identity and his real name. As I said, the family members only knew of him as Ket. That's all the information that we received.

The court denied the motion to dismiss the charges as barred by double jeopardy.[2] The court concluded the options "on December 17th where suddenly this witness with potentially exculpatory information" was disclosed were "very limited at that point." The court ruled it was not an abuse of discretion to deny the request to exclude the witness.

[2] Ibrahim does not assign error to this ruling.

The court concluded the parties had "ample opportunity . . . to state their positions."

> The record does indicate that the Court gave ample opportunity to the — to counsel to flush out their positions in order that the Court could give consideration to the various options before it. The Court's determination ultimately is entitled to a significant degree of deference and respect in light of the absence of misconduct and the opportunity for all parties to state their positions.

The court ruled a short continuance "would not have been adequate to fairly allow for the evidence to be properly presented in fairness to all parties in the case."

> Certainly, the State would need at least a week as well to find who this individual is, to get transcripts of any defense interviews, to interview him, to listen to all the relevant phone calls, to conduct any other background investigation that was necessary and to arrange for any potential rebuttal testimony that might be required as result of the witness.

The court also concluded it was not an abuse of discretion to reject a month-long continuance.

> The judge was sensitive to the fact that this was potential exculpatory evidence whether it's believed or not, would be a question for the jury. But the jury should be able to have full information before in making that determination. So the judge concluded and within the range of discretion vested in the trial judge that there was a manifest necessity to declare a mistrial to go back to square one and start the trial over somewhere down the road.
>
> I do not think it is fair to jurors nor is it a good practical solution to have a month-long recess in the middle of the trial. Particularly, one such as this where the testimony has been confusing and hotly debated, difficult credibility decisions had to be made as to a number of the witnesses who had been presented to that jury. To recess the case then from mid-December to mid-January really was not a viable option. As a practical matter, I don't think — I don't think that the jurors would be able to accomplish that mental feet [sic] to keep their minds free and clear and to be able to fully and fairly process the information after taking a month off at the busy holiday season of the year.
>
> In addition, I do think judges are sensitive to what is fair and unfair with respect to the jurors as well as fair and unfair with respect to the parties. It would be an incredible burden to place upon the jurors to put them in that position. So I don't fault the judge for not making the inquiry

> of the jurors as to whether or not they would indicate their willingness to make a good-faith attempt to take a nearly month long recess at the holiday season in the middle of the trial and then come back and try to resume their duties. So, again the stakes are high obviously because it's a motion to dismiss these charges. The Court is going to deny that motion to dismiss and allow the case to proceed at this point.

September 3, 2014 Trial

The second trial began on September 3, 2014. The court granted the State's motion to file an amended information to add assault of Kebede in the first degree.[3] The State called a number of witnesses, including Williams, Barnes, Arnold, Barnes-Arnold, English, Bentler, forensic experts, and detectives. In addition, the State called the surgeon who operated on Barnes' hand.

Detective Janes testified about his unsuccessful efforts to locate Berket Kebede. Detective Janes read into evidence the letter that Shire had written about the need to make sure "none of the victims or the witness" testify.

> What's up, Samira? How's everything. Tell Lucky I said I love her and to do good in school; that I miss her. But yeah, man, my case is looking kind of bad right now that they pushed it back 'til October. And they got my prints on the gun. But really, my case relies on the victims. If the victims don't come, I will get charged with the gun. That's why I'm stressing really. So far they can't get a hold of none of the victims or the witness.
>
> But yeah, I need you give to take Oh Boy out of town to Cali and give him like one thousand a month to live until my shit is over with 'cause if they find him and he comes, I'm cooked. Bad. That's why I need you to do that, because with him I shouldn't — should be good. 'Cause they are — are looking for him.
>
> But yeah, this is my cut-up number, (206)844-5764. Call him and he will let you know how to handle everything. I need this alone ASAP. And call (206)403-6612 and give her the letter and poem please. And I sent a letter awhile back to the house and Hooda had it and didn't give it to her. So it's — it's pretty in her room. I need you — need you to give her that too please.
>
> Samira, don't forget. Try to do it as soon as possible. Much love.

[3] The State filed a subsequent amended information to correct the spelling of Kebede's name.

The jury found Shire guilty of three counts of the lesser included crime of assault in the second degree while armed with a firearm and unlawful possession of a firearm in the first degree. The jury found Ibrahim guilty of three counts of assault in the first degree while armed with a firearm and unlawful possession of a firearm in the first degree. Ibrahim appeals.

Double Jeopardy

Ibrahim contends the court erred in declaring a mistrial and double jeopardy barred retrial on the charges against him.

The Fifth Amendment to the United States Constitution and the Washington State Constitution prohibit the State from twice putting a defendant in jeopardy for the same offense. U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."); WASH. CONST. art. I, § 9 ("No person shall be . . . twice put in jeopardy for the same offense."); State v. Fuller, 185 Wn.2d 30, 33, 367 P.3d 1057 (2016). Because Washington's double jeopardy clause is coextensive with the federal double jeopardy clause, it is given the same interpretation the Supreme Court gives to the Fifth Amendment. State v. Eggleston, 164 Wn.2d 61, 70, 187 P.3d 233 (2008); State v. Glasmann, 183 Wn.2d 117, 121, 349 P.3d 829 (2015).

Jeopardy attaches when a jury has been impaneled and embraces the defendant's right to have the trial " 'completed by a particular tribunal.' " Crist v. Bretz, 437 U.S. 28, 35-36, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978) (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949)); Downum v. United States, 372 U.S. 734, 735-36, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963); Arizona v. Washington, 434

U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). If the jury is discharged without reaching a verdict, double jeopardy bars a retrial unless manifest necessity exists to declare a mistrial. Green v. United States, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); Wade, 336 U.S. at 688-89; Washington, 434 U.S. at 505.

Whether retrial violates double jeopardy is a question of law we review de novo. Fuller, 185 Wn.2d at 34; State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Where manifest necessity to declare a mistrial exists, the prohibition against double jeopardy is not implicated and retrial is permitted. Oregon v. Kennedy, 456 U.S. 667, 672, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982); State v. Wright, 165 Wn.2d 783, 793, 203 P.3d 1027 (2009).

"Necessity" is not interpreted literally. Washington, 434 U.S. at 506; Renico v. Lett, 559 U.S. 766, 774, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010). Manifest necessity exists where " 'extraordinary and striking circumstances' " indicate to a court in the reasonable exercise of its discretion that the " 'ends of substantial justice cannot be obtained without discontinuing the trial.' " State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982) (quoting State v. Bishop, 6 Wn. App. 146, 150, 491 P.2d 1359 (1971)); Renico, 559 U.S. at 783-84. The determination of whether "manifest necessity" exists to justify ordering a mistrial over the objection of the defense is a matter within the discretion of the trial court to be exercised according to the particular circumstances of each case. United States v. Perez, 22 U.S. 579, 580, 9 Wheat. 579, 6 L. Ed. 165 (1824).

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would

> otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere.

Perez, 22 U.S. at 580.[4]

Ibrahim argues "manifest necessity" did not exist to order a mistrial. The State contends the court did not abuse its discretion in finding manifest necessity and declaring a mistrial. We review the decision to declare a mistrial under an abuse of discretion standard and "give '[g]reat deference' to the trial court's decision to declare a mistrial." State v. Strine, 176 Wn.2d 742, 753, 293 P.3d 1177 (2013)[5] (quoting Jones, 97 Wn.2d at 163); State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000); Washington, 434 U.S. at 510. The trial judge has " 'broad discretion' " to determine whether manifest necessity for a mistrial exists and the trial court is best situated to decide whether, for compelling reasons, "the ends of substantial justice cannot be attained without discontinuing the trial." Renico, 559 U.S. at 774 (quoting Illinois v. Somerville, 410 U.S. 458, 462, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973)); Wade, 336 U.S. at 689-90; Strine, 176 Wn.2d at 754; State v. Brunn, 22 Wn.2d 120, 145, 154 P.2d 826 (1945); Gori v. United States, 367 U.S. 364, 368, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961). Further, "the overriding interest in the evenhanded administration of justice" requires that we accord "the highest degree of respect" to the trial court's evaluation that a mistrial was necessary. Washington, 434 U.S. at 511.

> The interest in orderly, impartial procedure would be impaired if [the trial court] were deterred from exercising that power by a concern that any time a reviewing court disagreed with [the court's] assessment of the trial situation a retrial would automatically be barred.

Washington, 434 U.S. at 513.

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[4] Emphasis added.

[5] Alteration in original.

There is no "mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." Somerville, 410 U.S. at 462; Washington, 434 U.S. at 506. Although the United States Supreme Court has avoided establishing clear-cut guidelines on what constitutes manifest necessity, the Court has considered (1) whether the trial court "gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial," Washington, 434 U.S. at 515-16; (2) whether the trial court considered alternatives to a mistrial, United States v. Jorn, 400 U.S. 470, 487, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); (3) whether the trial court acted deliberately rather than "precipitately," Washington, 434 U.S. at 515; and (4) whether the mistrial would be to the benefit of the defendant or the prosecution, Gori, 367 U.S. at 369. See also State v. Melton, 97 Wn. App. 327, 332, 983 P.2d 699 (1999) (identifying the following three factors to consider: (1) whether the court gave both parties the opportunity to explain their positions, (2) whether the court considered the defendant's interest in having the trial concluded in a single proceeding, and (3) whether the court considered alternatives to declaring a mistrial).

Ibrahim does not dispute that the trial court gave all parties the opportunity to fully explain their positions on the propriety of a mistrial or that the trial court acted deliberately in declaring a mistrial. Ibrahim asserts the court did not consider reasonable alternatives before declaring a mistrial and the mistrial was prejudicial to the defense. The record does not support his argument.

The record shows the court considered and rejected several alternatives before declaring a mistrial. The court first considered excluding the testimony of Kebede but

rejected this alternative because of the critical nature of the exculpatory testimony. The court considered the defense request for a brief recess but concluded this alternative was not feasible given the "significant amount of background investigation" the State needed in order to cross-examine Kebede. The court considered but rejected the request to poll the jury to determine whether the jurors would be able to return to complete the trial the next month. Because of the representations made to the jury at the beginning and throughout the trial, the court concluded a lengthy recess would prejudice the defense and declined to poll the jury about returning in mid-January to complete the trial.[6]

Ibrahim argues the court should have considered several other alternatives, including whether another prosecutor could have completed the trial or whether the prosecutor could have returned from a scheduled vacation after completing the investigation of Kebede. These alternatives were never suggested by the defense before the court declared a mistrial. Strine, 176 Wn.2d at 749 (appellate court will not consider claim of error not raised in the trial court); State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009) (a party may not raise an objection not properly preserved).

Unlike in State v. Robinson, 146 Wn. App. 471, 483-84, 191 P.3d 906 (2008), the record shows the court considered a number of alternatives to a mistrial. Further, a court need not exhaustively consider "every conceivable alternative" before finding

[6] We note representations made to the jury about the length of the trial are valid concerns for the court to consider in declaring a mistrial. See United States v. Lynch, 598 F.2d 132, 135 (D.C. Cir. 1978) (where "jury had been selected on the basis of a reasonable expectation of discharge by December, mid-December at the latest," the distraction posed by "the impending holidays" was "supportive of a declaration of a mistrial based on manifest necessity"); Powers v. United States, 412 A.2d 1205, 1207 (D.C. Cir. 1980) ("extension of the jurors' service beyond their scheduled 'last day' " and proximity to Christmas supported decision to declare a mistrial).

manifest necessity for a mistrial. Ross v. Petro, 515 F.3d 653, 668-69 (6th Cir. 2008); see Washington, 434 U.S. at 506.

Ibrahim also argues the State created the time constraints that led to the need to declare the mistrial. Ibrahim cites the continuances from October 28 until November 26, 2013. The record shows that from October 28 until November 18, 2013, the court continued the trial a number of times because the prosecutor was in trial on another case. From November 20 to November 25, the court continued the trial because of judicial unavailability. Setting aside the legitimate need to continue the trial on a day-to-day basis from October 28 to November 26, Ibrahim ignores his request for a lengthy six-week continuance from the originally scheduled trial date to October 28 and the disclosure of Kebede on the last day of trial.

In support of his argument that the mistrial resulted in prejudice, Ibrahim points to differences in the testimony of Williams and the testimony of Dr. Nicholas Vedder in the second trial. The differences Ibrahim relies on do not support his argument of prejudice. At the first trial, Williams testified that when Ibrahim pulled out his gun, he initially fired "[t]owards our way" and then began to fire "across the street" where Barnes and "Ket" were running. On cross-examination, Williams acknowledged that because both Barnes and "Ket" ran across the street, he could not say Ibrahim was aiming specifically for Barnes. In the second trial, Williams testified that it seemed liked Shire and Ibrahim were aiming for Barnes because as Barnes ran across the street, there was a "trail of bullets following him like where he ran." Dr. Vedder did not testify at the first trial. But his testimony at the second trial was cumulative of the testimony about Barnes' hand injury at the first trial.

We conclude the court did not abuse its discretion in finding manifest necessity for a mistrial and the second trial did not violate double jeopardy. The record shows the court gave all parties the opportunity to explain fully their position on the propriety of a mistrial, considered a number of alternatives to a mistrial, acted deliberately, and declared the mistrial on the last day of trial to allow the defense to present the exculpatory testimony of a late-disclosed witness. Washington, 434 U.S. at 505; Kennedy, 456 U.S. at 672; Wright, 165 Wn.2d at 793.

Amended Information

Ibrahim argues the court abused its discretion in allowing the State to amend the information before the second trial to add assault of Berket Kebede in the first degree while armed with a deadly weapon.

Ibrahim and Shire agreed they had notice of the "intent to add this count since January 22, 2014." The defense objected to the amendment under CrR 8.3(c). The court rejected the CrR 8.3(c) argument and granted the motion to amend.

For the first time on appeal, Ibrahim argues assault of Kebede in the first degree was a "related offense" that the State should have charged before the first trial. In support, Ibrahim cites a case that addresses CrR 4.3, State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984). We decline to review the argument Ibrahim raises for the first time on appeal. Powell, 166 Wn.2d at 82.

Sufficiency of the Amended Information

Ibrahim argues his constitutional right to notice was violated because the amended information did not inform him of the elements of the crime of assault in the

first degree. Specifically, that the amended information did not state he could be found guilty as an accomplice or under the theory of transferred intent.

We review challenges to the sufficiency of a charging document de novo. State v. Goss, 186 Wn.2d 372, 376, 378 P.3d 154 (2016); State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). A defendant has a constitutional right to be informed of the "nature and cause" of the charges against him. U.S. CONST. amend. VI; WASH. CONST. art I, § 22 (amend. 10); State v. McCarty, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000). A charging document satisfies these constitutional requirements "if it states all the essential elements of the crime charged." McCarty, 140 Wn.2d at 425; State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

" 'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.' " Goss, 186 Wn.2d at 378[7] (quoting State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013)). Because accomplice liability and the theory of transferred intent are not essential elements of the crime of assault in the first degree, the amended information did not violate the constitutional right to notice. See RCW 9A.36.011(1)(a); State v. Elmi, 166 Wn.2d 209, 214-15, 207 P.3d 439 (2009).[8]

Material Witness Warrant

Ibrahim argues the court violated his constitutional right to compulsory process and to present a defense by denying the request on the last day of the second trial to

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[7] Internal quotation marks omitted.

[8] The State need not allege accomplice liability or transferred intent. See State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003); State v. Johnston, 85 Wn. App. 549, 555, 933 P.2d 448 (1997); State v. Rodriguez, 78 Wn. App. 769, 771-74, 899 P.2d 871 (1995); State v. Clinton, 25 Wn. App. 400, 403-04, 606 P.2d 1240 (1980); United States v. Montoya, 739 F.2d 1437, 1437-38 (9th Cir. 1984).

issue a material witness warrant for Kebede.[9]

Both the United States Constitution and the Washington State Constitution guarantee an accused the right to compulsory process to compel the attendance of witnesses and the right to present a defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22 (amend. 10); State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996); State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). The right to compulsory process is "synonymous" with the right to present a defense. State v. Tracy, 128 Wn. App. 388, 397-98, 115 P.3d 381 (2005). We review a claim of denial of Sixth Amendment rights de novo. State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009).

Neither the right to compulsory process nor the right to present a defense is absolute. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); Maupin, 128 Wn.2d at 924-25. Whether denial of the request to issue a material witness warrant "rises to the level of a constitutional violation requires a case-by-case inquiry." State v. Downing, 151 Wn.2d 265, 275-76, 87 P.3d 1169 (2004).

The availability of the right to compulsory process "is dependent entirely on the defendant's initiative." Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). "In order for the right to be violated, the 'sovereign's conduct' must impermissibly interfere with the right to mount a defense." State v. McCabe, 161 Wn. App. 781, 787, 251 P.3d 264 (2011) (quoting United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990)). The contested act or omission must be attributable to

[9] Ibrahim did not ask the court to issue a material witness warrant for Kebede. But because Shire's attorney requested a material witness warrant, we reject the State's argument that Ibrahim waived his right to argue denial of the motion for a material witness warrant violated his constitutional rights. Under RAP 2.5(a), a party may raise a claim of error on appeal "if another party on the same side of the case has raised the claim of error in the trial court."

the sovereign, and it must cause the loss or erosion of material testimony that is favorable to the accused. McCabe, 161 Wn. App. at 787. There is no violation where "the obstacle to a defendant's getting what he perceives as the full benefit of his Sixth Amendment right is not government interference, but an uncooperative witness." McCabe, 161 Wn. App. at 787.

The right of a defendant to compulsory process is subject to rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. McCabe, 161 Wn. App. at 787; State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)), cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999). We review a trial court's decision to deny a motion for issuance of a material witness warrant for a manifest abuse of discretion. City of Bellevue v. Vigil, 66 Wn. App. 891, 895, 833 P.2d 445 (1992). In exercising its discretion to grant or deny a request for compulsory process, the trial court may consider a number of factors, including "surprise, diligence, materiality and maintenance of orderly procedure." State v. Edwards, 68 Wn.2d 246, 255, 412 P.2d 747 (1966); State v. Schaffer, 70 Wn.2d 124, 129, 422 P.2d 285 (1966); State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

The record supports the trial court's decision to deny the untimely request to issue a material witness warrant on the last day of trial. The record also shows that issuing the material witness warrant would have resulted in either a significant delay or a continuance to locate Kebede.

The trial began on September 3, 2014. The court granted the State's motion to amend the information to add a charge of assault of Kebede in the first degree. The

State identified Kebede as a witness. On September 4, the State issued a subpoena to Kebede to testify at trial. On September 11, the prosecutor told the court that the State would not call Kebede as a witness. The prosecutor said he was not sure Kebede had been served properly with the subpoena and the police had attempted, but failed, to locate him. Shire's attorney told the court he planned to subpoena Kebede to testify at trial.

On September 16, the State called the final witness in its case in chief. During a recess, the court asked the defense attorneys about the witnesses the defense planned to call. Shire's attorney told the court he had not had any contact with Kebede since December 2013 and believed the likelihood that Kebede would come to court was "slim." But the attorney asked the court to "give defense until tomorrow morning" to locate Kebede. Ibrahim's attorney then disclosed for the first time that Kebede had called her during the noon recess that day and said he would come to court to testify the next morning at 8:30 a.m. The court told the defense that if Kebede did not appear, the case would conclude the next day.

> You know, I'd like to be prepared to go with whatever happens tomorrow. If he arrives and testifies and it takes all day, fine, and our jurors are okay if they don't get closings until Thursday morning, but if he doesn't show and if there's no further testimony I'd like to be able to go right into instructions and argument tomorrow morning.

The next morning, Shire's attorney told the court that he talked to Kebede that morning, that Kebede had received the defense subpoena and "would be here at 9:00" a.m. Shire's attorney told the court that if Kebede did not appear, he would be "obliged to ask" for a material witness warrant.

> [SHIRE'S ATTORNEY]: I think the only other thing that I would have would be a motion for a material witness warrant. Unfortunately, the

> service information is as I've described to the Court and that's all I can offer the Court in terms of a basis for that.
>
> THE COURT: Okay.
>
> [SHIRE'S ATTORNEY]: But I would be obliged to ask.

The court ruled, "And I think I would in light of the timing be obliged to decline the invitation." Shire's attorney noted, "That's not a surprise." The prosecutor told the court there "actually is a warrant for Mr. Kebede's arrest" in municipal court.

Shire called the investigator to testify. Kebede did not appear. At approximately 9:40 a.m., Shire's attorney requested the court issue a material witness warrant. The court denied the request.

> And the record will reflect, as I suggested a moment ago, that that would be denied based on the timing. This is too much of a Deja vu all over again with the last trial with Mr. Kebede's possible appearance on the last day of a two-week trial.

The court instructed the jury on the law and closing arguments began later that morning.

The court did not err in denying the request to issue a material witness warrant. The record shows the State did not interfere with the right of the defense to compel attendance of Kebede. The obstacle the defense faced was an uncooperative witness. The record also shows issuing a material witness warrant on the last day of trial would have necessitated a lengthy delay or continuance.

United States v. Moudy, 462 F.2d 694 (5th Cir. 1972), and State v. Edwards, 68 Wn.2d 246, 412 P.2d 747 (1966), are distinguishable. In Moudy, the defendant requested a subpoena for a witness the day before the trial began. Moudy, 462 F.2d at 696. In concluding denial of the subpoena was reversible error, the Fifth Circuit noted the record "does not demonstrate that in fact the trial would have been delayed." Moudy, 462 F.2d at 698. In Edwards, the court denied the defense request on the last

day of trial for a short recess until the end of the lunch break to enforce several subpoenas. Edwards, 68 Wn.2d at 251-52, 254. Because the "court's schedule of trial or orderly procedure" would not have been "seriously disturbed," the Supreme Court concluded the trial court abused its discretion in denying the request for a brief recess over the noon hour. Edwards, 68 Wn.2d at 257-58.

Sufficiency of the Evidence

Ibrahim contends the evidence does not support the jury conviction of assault in the first degree of Kebede.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. Witherspoon, 180 Wn.2d at 883. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201. We defer to the trier of fact on "issues of witness credibility." Witherspoon, 180 Wn.2d at 883.

Ibrahim claims there was no evidence Kebede was injured or "placed in fear." The amended information alleged Ibrahim and Shire committed assault in the first degree of Kebede with a firearm. The amended information alleged:

> That the defendants YUSUF HAISE SHIRE AND MOHAMED IBRAHIM in King County, Washington, on or about May 18, 2013, with intent to inflict great bodily harm, did assault Berket Kebede with a firearm and force and means likely to produce great bodily harm or death, to-wit: a handgun;

> Contrary to RCW 9A.36.011(1)(a), and against the peace and dignity of the State of Washington.

To convict Ibrahim of assault in the first degree as charged in the amended information under RCW 9A.36.011(1)(a), the State had the burden of proving beyond a reasonable doubt that with intent to inflict great bodily harm, Ibrahim assaulted Kebede with a firearm. RCW 9A.36.011(1)(a) states, in pertinent part:

> A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.[10]

Viewing the evidence and all reasonable inferences in the light most favorable to the State, a rational jury could find that with intent to inflict great bodily harm, Ibrahim assaulted Kebede with a firearm. The evidence established Ibrahim used a 9mm semiautomatic pistol to fire at least six shots at Williams, Barnes, and Kebede. Williams testified Shire and Ibrahim fired shots at them while they were standing "in the line of fire" next to each other. Carolyn Barnes-Arnold testified that when she saw Williams and Kebede immediately after the shooting, they were "scared" and in a "panic." Sufficient evidence supports Ibrahim's conviction for assault of Kebede in the first degree.

Sentencing

Ibrahim asserts the court erred by sentencing him to serve the assault convictions consecutively. The court imposed a low-end standard range sentence of 120 months, 93 months, and 93 months for the three assault in the first degree convictions to be served consecutively; mandatory consecutive 60-month terms of

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[10] "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

confinement for the three firearm enhancements; and a concurrent standard range sentence of 54 months for unlawful possession of firearm in the first degree.

Under RCW 9.94A.589(1)(b), when a defendant is convicted of two or more "serious violent offenses" that arise from "separate and distinct criminal conduct," the sentences must be served consecutively. State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005). Assault in the first degree is a "serious violent offense." RCW 9.94A.030(46)(a)(v). " 'Offenses arise from separate and distinct [criminal] conduct when they involve separate victims.' " Cubias, 155 Wn.2d at 552[11] (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 821, 100 P.3d 291 (2004)); State v. Wilson, 125 Wn.2d 212, 220, 883 P.2d 320 (1994).

Ibrahim claims the court erred by requiring him to serve the sentences consecutively because the court did not explicitly find that the three assault convictions involved separate and distinct criminal conduct. Because the State charged Ibrahim with three counts of assault in the first degree of three different victims and the jury returned a separate verdict for each count of assault in the first degree for each victim, the court did not err by imposing a consecutive sentence for the three convictions.

Statement of Additional Grounds

In his pro se statement of additional grounds, Ibrahim relies on State v. Graham, 181 Wn.2d 878, 337 P.3d 319 (2014), to argue the court abused its discretion by not considering the purposes in RCW 9.94A.010 in denying his request for an exceptional sentence below the standard range.

As a general rule, a court must sentence a defendant under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, within the standard range. Graham,

[11] Alteration in original.

181 Wn.2d at 882. But a standard range sentence imposed for multiple serious violent offenses must be served consecutively. RCW 9.94A.589(1)(b). "The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). One mitigating circumstance is where "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). If the imposition of a consecutive sentence is so clearly excessive under the circumstances that it provides " 'substantial and compelling reasons' " for an exceptional sentence below the standard range, the sentencing court may grant that exceptional sentence. Graham, 181 Wn.2d at 885 (quoting RCW 9.94A.535).

Here, the court considered the request to impose an exceptional sentence below the standard range under the multiple offense policy but found "no basis" to conclude the standard range sentence was clearly excessive "in light of the purpose of the sentencing laws." The court did not abuse its discretion in concluding the circumstances did not justify an exceptional sentence downward.

Ibrahim also argues the 486-month sentence constitutes cruel and unusual punishment. The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." The state constitution provides greater protection than the federal constitution. Article I, section 14 of the Washington State Constitution prohibits the infliction of "cruel punishment." A sentence violates the state constitution when it is grossly disproportionate to the crime for which it is imposed.

State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113 (2000). A punishment is grossly disproportionate "if the punishment is clearly arbitrary and shocking to the sense of justice." State v. Smith, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980). Because the imposition of a sentence under the SRA guidelines is not arbitrary and shocking to the sense of justice, we reject Ibrahim's argument. See State v. Farmer, 116 Wn.2d 414, 434, 805 P.2d 200 (1991).

We affirm the jury convictions and entry of the judgment and sentence.

WE CONCUR:

NIELSEN, BROMAN & KOCH P.L.L.C.

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