SUPREME COURT NO. 97114-5

NO. 76119-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN MARSHALL,

Petitioner.

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

The Honorable Tanya Thorp, Judge

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Steven Marshall asks this Court to grant review of the court of appeals' unpublished decision in State v. Marshall, No. 76119-6-I, filed March 25, 2019 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(1), (3), and (4), to determine whether a defendant's pro se legal motions, filed when represented by counsel, are admissible against him to show consciousness of guilt, a constitutional issue of first impression?

2. Is this Court's review warranted under RAP 13.4(b)(2), (3), and (4), where the court of appeals decision is in conflict with several other court of appeals cases holding a prosecutor's deliberate introduction of a loved one's opinion on the accused's guilt constitutes flagrant and ill-intentioned misconduct?

3. Should this Court also review the issues Marshall raised in his Statement of Additional Grounds for Review?

C. STATEMENT OF THE CASE

Marshall was convicted of first degree felony murder. At a jury trial, the State alleged that, on February 17, 2014, Marshall, together with Ryan Erker, caused the death of Ryan Prince while committing or attempting to commit a first degree robbery or first degree burglary.

In February of 2014, Michael Helsel-Perkins (Perkins), his girlfriend Chelsea Dew, and their friend Ryan Prince lived in a house they rented on East Lake Desire Drive in Renton, Washington. 15RP 577-87. Perkins owned several medical marijuana dispensaries and grow operations. 15RP 586-90. Prince helped Perkins build the stores and manage employees. 15RP 586. As a marijuana business, Prince dealt and paid his employees entirely in cash. 15RP 614-18.

Perkins had an alarm system installed at the Lake Desire house, including motion sensors that would alert occupants to vehicles entering the driveway. 15RP 464-68, 594-95. A DVR associated with the alarm system was stored in a downstairs closet. 15RP 592.

On February 17, 2014, Prince got home from work and disarmed the alarm system at 8:05 p.m. 23RP 1847-56; 24RP 2016. No one else was home. 16RP 630-32. Sometime after 8:00 p.m., an uphill neighbor heard a gunshot, a pause of two to five minutes, then two more rapid gunshots. 15RP 517. He called 911 at 8:21 p.m. 15RP 519; 24RP 2018. From his balcony, the neighbor could see silhouettes and hear voices at the Lake Desire house. 15RP 520-23. Moments before the police arrived, the house went dark, like someone had killed the circuit breaker. 15RP 521.

A sheriff's deputy arrived at the Lake Desire House at 8:35 p.m. 15RP 574-76. Prince's vehicle was parked in front of the garage, with a dry

spot next to it where it looked like another car had been parked. 15RP 570-72, 584. All the lights in the house were off and no one answered the door, so the deputy left. 15RP 570-74.

Chelsea Dew returned home that night around 9:30 or 10:00 p.m. 16RP 632. She found all the lights off, the front door unlocked, and the alarm system disarmed. 16RP 632-34. There were signs of a struggle upstairs. 16RP 636; 17RP 755. Dew called 911 when she found Prince downstairs in his bedroom, his face bloody and blankets covering his body. 16RP 639-45. Prince was pronounced dead at the scene. 16RP 676-77. An autopsy revealed Prince died from multiple gunshot wounds, and three .380 caliber bullets were recovered from his body. 20RP 1382-84; 22RP 1666.

Law enforcement responded to the Lake Desire house. 16RP 681. Dew pointed out a pair of broken Burberry brand eyeglasses on the front porch that did not belong to her, Perkins, or Prince. 16RP 647-52. Marshall's brother and ex-wife acknowledged he sometimes wore Burberry glasses and a latent thumb print on the glasses matched Marshall. 17RP 834; 19RP 1183-84; 25RP 2151.

Police found a .40 caliber bullet embedded in a doorjamb just inside the front door of the house. 17RP 769-70; 18RP 982-83. Several shell casings—.22, .380, and .40 caliber—were found on the main floor. 17RP 768-80; 20RP 1382-90; 25RP 2087-89. Police found $27,000 in cash in

Prince's backpack in his room, as well as a loaded pistol. 18RP 903-04; 23RP 1824. The alarm system DVR had been removed from the downstairs closet. 18RP 895-96, 1040.

Police found Prince's cell phone off the side of the road near the house. 18RP 915-23. On Prince's phone was a photograph of a vehicle taken at 8:10 p.m. that night. 23RP 1842-45. The license plate was difficult to read, but a detective used Photoshop to manipulate the photograph. 18RP 1055-61. After doing so, the detective concluded the license plate number was either AKY-8371, associated with a Nissan Coupe, or AKY-8871, associated with a Chrysler PT Cruiser. 19RP 1074-81.

The registered owner of the PT Cruiser was Allison Sierra, who is Marshall's ex-wife. 18RP 924-28; 19RP 1132. Sierra let Marshall drive the PT Cruiser periodically, though the transmission was going bad. 19RP 1141-43, 1171. Sierra had last seen Marshall on February 14, but did not know whether he was driving the PT Cruiser that day. 19RP 1149-52, 1213-14. Marshall would frequently drive other vehicles, including a Dodge Durango belonging to his girlfriend Shamarra Scott and a Nissan Maxima belonging to another girlfriend, Soqueara Bailey. 17 RP 949-50.

On February 22, Marshall was pulled over and arrested driving the Dodge Durango. 20RP 1276-81. Police seized a cell phone from Marshall's person and another that was on the ground near the driver's door of the

Dodge. 18RP 949-51; 20RP 1280-81. In a backpack on the front passenger seat was a .40 caliber SIG Sauer handgun, along with an envelope and identification card with Marshall's name on them. 20RP 1306-15.

Marshall's DNA was found on the magazine and ammunition inside the gun, but no conclusions could be made about DNA on the gun itself. 20RP 1307; 25RP 2094-97. A tool mark examiner test fired the SIG Sauer and identified it as the gun that fired the .40 caliber bullet and shell casings found at the Lake Desire house. 20RP 1372-80, 1392-93.

Police also searched the contents of Marshall's and Erker's cell phones. 23RP 1872-77; 24RP 1898-99. On Erker's phone was a photo of one of Perkins's dispensaries, as well as an internet search of Perkins's business licenses. 24RP 1900-03. Several messages between Erker's phone and Marshall's phone were also admitted at trial. 24RP 1982-2009. For instance, on January 22, 2014, Erker's phone messaged Marshall's saying, "Do I ever have some good fucking news for you," and the next day, "Getting that file together, bro." 24RP 1987-88.

Subsequent messages over the following weeks suggested Erker was staking out Perkins's dispensaries and then the Lake Desire house. 24RP 1988-2000. On February 6, Erker's phone messaged Marshall's, "Brother, I think I've got the address we've been looking for! I'm having it checked tonight." 24RP 1994. Erker's phone later said, "We know here the honey

pot is so we got time, bro." 24RP 2003. Cell tower evidence showed primarily Erker's phone and sometimes Marshall's phone connected to the tower closest to the Lake Desire residence periodically between February 7 and 16. 23RP 1738-42; 24RP 1995-2011; 25RP 2044-45.

Around 8:00 p.m. on February 17, Erker's phone placed three calls to Marshall's phone. 24RP 2014-15. Erker's phone connected to the Lake Desire cell tower and Marshall's phone connected to two cell towers west of Lake Desire. 24RP 2014-15. Marshall's phone called Erker's phone at 8:13 p.m., both connecting to the Lake Desire cell tower. 24RP 2016-18. Marshall's phone received another call at 8:21 p.m. and connected to the Lake Desire tower. 24RP 2018-19. At 8:33 p.m., Erker's phone connected to the Lake Desire cell tower, while Marshall's phone connected to the tower west of Lake Desire. 24RP 2019. The two phones did not communicate again after 8:41 p.m. that night. 24RP 2025-26.

Soqueara Bailey, one of Marshall's girlfriends, introduced Marshall and Erker, and is friends with Erker. 21RP 1414, 1498-1501. Bailey testified that late at night on February 17, Marshall woke up her and told her, "I fucked up." 21RP 1460-63. Bailey explained Marshall had said similar things in the past when he had impregnated other women. 21RP 1507-08. That night, Bailey heard Marshall's and Erker's voices downstairs, but could not hear what they were saying. 21RP 1465-68.

A few days later, Erker asked Bailey to throw away a DVR or DVD player—Bailey could not remember. 21RP 1475-79. She disposed of the device in a dumpster, which she later showed to the police, though the device was never recovered. 18RP 961-63; 21RP 1480-81.

Paul Steve testified that on February 17, he received multiple calls from Erker asking him to sell a PT Cruiser for him because it was used in a crime. 25RP 2115-21. The PT Cruiser was located on February 25, driven by a man named Nevil Neville, who did not know Marshall or Erker. 19RP 1091-95; 24RP 1973-74.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A REPRESENTED DEFENDANT'S PRO SE LEGAL MOTIONS ARE ADMISSIBLE AGAINST HIM AS SUBSTANTIVE EVIDENCE OF GUILT.

Marshall was at all times represented by counsel below. Before trial, Marshall filed several pro se legal motions to suppress evidence. For instance, Marshall filed a typed "motion to challenge search warrant" and "request for Franks[1] hearing," moving to suppress evidence obtained from Sierra, including her cell phone. CP 54-57. Marshall similarly filed a typed "motion to suppress evidence pursuant [to] CrRLJ 3.6," requesting suppression of the Burberry glasses found at the Lake Desire house. CP

[1] Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

32-36. Marshall also moved to suppress the gun seized from Shamarra Scott's Dodge Durango. 22RP 1587-92.

Marshall later brought these motions to the court's attention, aruging, "[i]t's imperative for the Defense to challenge the validity of the warrant." 13RP 178. The court refused to consider them, explaining to Marshall it would only consider motions filed by counsel. 13RP 177-78.

Then, during its direct-examination of Scott, the State inquired about the legal motions Marshall filed, which Scott typed up and put on pleading paper for him, given her legal experience. 22RP 1559-60. Defense counsel objected on relevance grounds. 22RP 1563, 1570. Outside the presence of the jury, counsel additionally argued, "I think these legal pleadings are outside of a relevant standard unless there's something about them that I don't know. It seems to me that Mr. Marshall is entitled to create legal pleadings. He's done that." 22RP 1571 (emphasis added).

In response, the State argued, "within these pleadings is Mr. Marshall's theory of the case." 22RP 1572. The State explained it was offering the legal motions "for Mr. Marshall's consciousness of guilt" and "his attempt to influence the statement of other witnesses." 22RP 1573. The trial court ruled the motions were admissible: "As I think has come up before, I mean, there's no such thing as hybrid representation. Mr. Marshall's represented by Counsel. I consider motions presented by

Counsel when an individual decides to send documents out into the world, they send documents out into the world." 22RP 1573.

The State then questioned Scott at length about the content of Marshall's pro se legal motions, though the exhibits themselves were not admitted into evidence. 22RP 1582-94; Br. of Appellant, 19-21 (summarizing Scott's testimony). Scott agreed Marshall filed motions to suppress Sierra's cell phone, the glasses, and the gun because he did not want that evidence admitted. 22RP 1586, 1592-94. The State emphasized Marshall's pro se motions in closing argument, paraphrasing its view of what Marshall intended with them: "that evidence they're going to bring in against me I don't want in court." 27RP 2213-14.

On appeal, Marshall argued the trial court's admission of his pro se legal motions impermissibly penalized him for the lawful exercise of his constitutional right to access the court system, to due process, and to have inadmissible evidence suppressed. Br. of Appellant, 14-28. The evidence was prejudicial, Marshall contended, because the clear suggestion was he admitted guilt by filing the pro se motions. Br. of Appellant, 32-36.

Criminal defendants have both a constitutional right to counsel and a constitutional right to waive assistance of counsel and represent themselves at trial. State v. Romero, 95 Wn. App. 323, 326, 975 P.2d 564 (1999). But

there is no state or federal constitutional right to "hybrid representation," by which defendants may serve as co-counsel with their attorneys. Id.

As such, trial courts have no duty to rule on defendants' pro se legal motions when they are represented by counsel. State v. Thompson, 169 Wn. App. 436, 494, 290 P.3d 996 (2012). The trial court therefore could have considered Marshall's pro se motions, but acted within its discretion in declining to do so.[2] State v. Blanchey, 75 Wn.2d 926, 938, 454 P.2d 841 (1969) (recognizing "the trial court should make every effort to hear such motions").

Individuals do, however, have a constitutional right of access to the courts, which "is rooted in the petition clause of the First Amendment to the United States Constitution." In re Pers. Restraint of Addleman, 139 Wn.2d 751, 753-54, 991 P.2d 1123 (2000). Criminal defendants also have constitutional rights to suppression of illegally obtained evidence. See, e.g., State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002) (Fourth Amendment and article I, section 7); State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (due process). Individuals may not be penalized for the

[2] See, e.g., State v. Bergstrom, 162 Wn.2d 87, 97, 169 P.3d 816 (2007) ("While the sentencing court could have declined to consider the pro se motion because Bergstrom was represented by competent counsel at the hearing, the sentencing court did consider and rule on Bergstrom's pro se motion."); State v. McDonald, 143 Wn.2d 506, 511 n.3, 22 P.3d 791 (2001) (exercising discretion to consider criminal appellant's pro se briefing after denying his motion for self-representation).

lawful exercise of these constitutional rights. State v. Burke, 163 Wn.2d 204, 221, 181 P.3d 1 (2008); State v. Gauthier, 174 Wn. App. 257, 264, 298 P.3d 126 (2013).

In Addleman, the Indeterminate Sentencing Review Board (ISRB) denied Addleman parole in part because of the extensive litigation and personal grievance actions he had filed. 139 Wn.2d at 753-53. This Court held Addleman's constitutional right of access to the judicial system was violated by the ISRB's adverse action. Id. at 756. "Clearly, the ISRB may not retaliate against a prisoner to punish an exercise of constitutional rights." Id. at 754. "The courts are wary of allowing state action that chills First Amendment activities." Id. at 755. This Court accordingly remanded for a new hearing before the ISRB without consideration of Addleman's constitutionally protected activities—specifically, his First Amendment right to file litigation. Id.

Marshall contended, similar to Addleman, that the trial court's admission of his pro se legal motions as substantive evidence of guilt penalized him for the lawful exercise of his constitutional rights. Br. of Appellant, 25-28. The State's express purpose in introducing the evidence was to show "Mr. Marshall's consciousness of guilt," precisely the forbidden basis for doing so. 22RP 1573.

Marshall had the constitutional right to access the court system. He exercised that right by filing legal motions on his own behalf when his trial counsel would not. As Marshall pointed out to the court, it was "imperative for the Defense to challenge the validity of the warrant." 13RP 178. This was not evidence of guilt, but the exercise of his rights. Marshall further had the constitutional right to seek suppression of illegally obtained evidence. He argued for suppression of the Burberry eyeglasses, as well as the contents of Sierra's cell phone, citing facts and law to support his argument, just as a defense attorney would.

The trial court was correct Marshall did not have the right to hybrid representation. But this merely meant the trial court acted within its discretion in refusing to consider Marshall's pro se motions. The court could very well have considered them and, indeed, should have made "every effort" to do so. Blanchey, 75 Wn.2d at 938. While defendants do not have a constitutional right to have trial courts consider their pro se motions, they do have the constitutional right to be free from penalty for the filing of such motions.

Moreover, it makes no sense to encourage trial courts to consider criminal defendants' pro se legal motions, but then penalize the defendants for filing such motions. Such a procedure raises numerous problematic questions: Are such motions admissible against the defendant only where

the trial court refuses to consider them? Are motions that are granted admissible against the defendant? Are motions to discharge counsel or proceed pro se admissible?

There is an easy answer that avoids this thicket. A criminal defendant's pro se legal motions are not admissible as substantive evidence of guilt. Such motions are simply the exercise of the right to access the courts and petition the government for a redress of grievances. To hold otherwise improperly penalizes defendants represented by counsel for the lawful exercise of their First Amendment rights.

The court of appeals rejected Marshall's argument. Opinion, 6-14. The court concluded Marshall did not adequately preserve the issue because "his trial counsel's objections were not sufficiently related to his current constitutional claim." Opinion, 11. The court reached this conclusion despite defense counsel's objection that Marshall was "entitled to create legal pleadings," and the trial court's admission of the evidence because "there's no such thing as hybrid representation. 22RP 1571, 1573. As Marshall pointed out below, this is the central issue now presented on appeal. Reply Br., 3-4. The court of appeals' finding of waiver raises the ongoing issue of how specific of an objection is necessary to preserve an issue for appeal, warranting this Court's guidance.

The court of appeals further concluded Marshall failed to establish a manifest constitutional error. Opinion, 14. The court reasoned, "[b]y accepting legal representation, Marshall gave up the right to contribute to his defense by filing pleadings. If a represented defendant wants to file a motion to suppress, he has a constitutional right to do so only through his counsel." Opinion, 14. The court accordingly held "Scott's testimony about Marshall's pro se motions did not violate any constitutional right of Marshall," because he had no right to hybrid representation. Opinion, 14.

In essence, then, the court of appeals held a represented defendant's pro se legal motions are admissible against him as substantive evidence of guilt, even though this Court has recognized trial courts "should make every effort" to consider such motions. Blanchey, 75 Wn.2d at 938. This is a constitutional issue of first impression—no Washington court has previously considered it. There is tension in the case law between the right to access the court system and the lack of right to hybrid representation.

This Court's review is warranted under RAP 13.4(b)(1), given the conflict with Addleman; (b)(3), given the significant constitutional question; and (b)(4), given the public's interest in a fair criminal justice system. This Court's guidance on the issue will help trial courts,

practitioners, and especially criminal defendants, who may need to think twice about filing pro se legal motions while represented by counsel.

2. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER PURPOSEFULLY ELICITING A LOVED ONE'S OPINION ON GUILT CONSTITUTES FLAGRANT AND ILL-INTENTIONED PROSECUTORIAL MISCONDUCT.

At the end of its direct-examination of Shamarra Scott, Marshall's longtime romantic partner, the State asked her about a letter she wrote to Marshall in late February or early March of 2014:

> Q. You wrote him an eight-page letter. And, in this statement, you told the detective that in that letter, you asked him, you told him, that he needed to remove the wickedness from his life; is that correct?
>
> A. That's correct.
>
> Q. What wickedness?
>
> A. Everybody has wickedness, because everyone sins every day. So he needs to ask for forgiveness of his sins from being a young child, from harsh words, what it is you say against other people, thoughts, everything.
>
> Q. When you wrote him this letter, he was in jail for murder, and you had asked him about it, and he told you to shut up. In this letter, did you tell him that he needed to ask God for forgiveness?
>
> A. We ask God for forgiveness every day.
>
> Q. Ms. Scott, he needed to ask God for forgiveness for murdering Ryan Prince. Isn't that what you meant?

A. No, that's not what I meant.

[Prosecutor]: I don't have any more questions.

22RP 1626-27. Defense counsel did not object. See 22RP 1626-27.

On appeal, Marshall argued the prosecutor committed flagrant and ill-intentioned misconduct by purposefully introducing Scott's opinion on Marshall's guilt. Br. of Appellant, 36-47. A witness's opinion on the guilt of the defendant or the veracity of witnesses violates the defendant's right to trial by an impartial jury. State v. Montgomery, 163 Wn.2d 577, 590-91, 183 P.3d 267 (2008) (citing U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22). "A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

The court of appeals agreed "the prosecutor intentionally asked for Scott's opinion on Marshall's guilt." Opinion, 17. The court accordingly held, "[b]ecause this testimony violated Marshall's constitutional right and the prosecutor intentionally elicited it, the prosecutor committed misconduct." Opinion, 17.

Yet the court of appeals further held "the prosecutor's conduct was not so flagrant and ill-intentioned that an instruction would not have cured any resulting prejudice." Opinion, 17. This conclusion is contrary to several

court of appeals cases holding that intentionally eliciting a witness's opinion on guilt is incurable flagrant and ill-intentioned misconduct.

In State v. Jerrels, 83 Wn. App. 503, 506-08, 925 P.2d 209 (1996), for instance, defense counsel did not object to the prosecutor's questions of the mother about whether her children were telling the truth that her husband, Jerrels, had sexually assaulted them. The court concluded this misconduct was flagrant and ill-intentioned, given that the questions "were material and highly prejudicial." Id. at 508. "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." Id. The court accordingly held Jerrels was denied a fair trial, and reversed. Id.

The same was true in State v. Jones, 117 Wn. App. 89, 90, 68 P.3d 1153 (2003), where there was no objection when the prosecutor elicited testimony that a police officer did not believe Jones. The court concluded "an instruction would not have cured the harm" resulting from the prosecutor's questions and ensuing testimony. Id. at 92. Like Jerrels, the flagrant and ill-intentioned misconduct necessitated reversal. Id.

Though not a misconduct case, the court of appeals in State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009), held it was manifest constitutional error to admit Johnson's wife's opinion on the truth of the complainant's accusations. The court reasoned the testimony

shed "little or no light on any witness's credibility or on evidence properly before the jury and really only tells us what [Johnson's wife] believed." Id. at 933. The testimony "served no purpose except to prejudice the jury," thereby denying Johnson a fair trial. Id.

These cases demonstrate it constitutes flagrant and ill-intentioned misconduct for a prosecutor to elicit a witness's opinion on guilt. The prejudice resulting from such misconduct is exacerbated when the opinion comes from a loved one of the accused. Here, the State committed flagrant and ill-intentioned misconduct by introducing Scott's clearly inadmissible opinion that Marshall, her longtime partner and son's adoptive father, was guilty of murder. 21RP 1521-24, 1537-38. The clear implication of the State's questions was that Scott told Marshall to ask God for forgiveness and remove the wickedness from his life because she believed he committed the murder. The State also ended its direct-examination of Scott with those questions, for heightened prejudicial effect.

The court of appeals affirmance of Marshall's conviction despite this misconduct is at odds with Jerrels, Jones, and Johnson. Given this conflict, as well as the significant constitutional rights at stake, this Court's review is warranted under RAP 13.4(b)(2), (3), and (4).

3. THIS COURT SHOULD ALSO ACCEPT REVIEW OF MARSHALL'S CHALLENGES IN HIS STATEMENT OF ADDITIONAL GROUNDS.

In his Statement of Additional Grounds for Review, Marshall made the following arguments: (1) the police conducted an illegal pretextual stop, illegal seizure, and illegal custodial interrogation of Sierra; (2) police interrogation of Sierra violated his privacy right and spousal privilege; (3) King County Jail illegally intercepted Marshall's mail to and from Sierra without a warrant; (4) his trial counsel was constitutionally ineffective for failing to file motions to suppress illegally obtained evidence, failing to move to excuse a biased juror for cause, and failing to request lesser included offense instructions; and (5) Paul Steve's testimony about Erker's statements violated his confrontation right. See Am. Statement of Additional Grounds (filed March 14, 2018). The court of appeals rejected Marshall's arguments. Opinion, 20-25. Marshall also respectfully requests review of these issues.

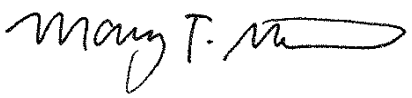
E. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse the court of appeals, and remand for a new trial.

DATED this 23rd day of April, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Petitioner

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEVEN M. MARSHALL, Appellant.	)	No. 76119-6-I DIVISION ONE UNPUBLISHED OPINION FILED: March 25, 2019

LEACH, J. — Steven M. Marshall appeals his convictions for murder in the first degree and second degree unlawful possession of a firearm. Marshall filed pro se motions with the trial court while counsel represented him. He claims that testimony about these motions violated his constitutional right to access the courts and ER 403. He also contends that the prosecutor committed prejudicial misconduct when she elicited a lay witness's opinion about his guilt.

First, because a criminal defendant does not have a constitutional right to hybrid representation, testimony about Marshall's pro se motions did not penalize him for exercising his constitutional rights to access the courts. And Marshall did not preserve his ER 403 claim for appeal because he did not raise it in the trial court. Second, when, as here, defense counsel does not object at trial to the alleged prosecutorial misconduct, the defendant must show that the misconduct

was so flagrant and ill-intentioned that a jury instruction would not have cured any prejudice. Because Marshall does not show this, we affirm.

FACTS

Ryan Prince helped Michael Helsel-Perkins (Perkins) build medical marijuana dispensaries and manage the dispensaries' employees. Prince lived with Perkins and Perkins's girlfriend, Chelsea Dew, at a house in Renton. Perkins had an alarm system installed at the house. The security system's digital video recorder (DVR) was in a downstairs closet.

On February 17, 2014, Prince arrived home around 8:00 p.m. and disarmed the alarm system. No one else was home. Neighbor James McDonald heard gunshots at Prince's house close to 8:00 p.m. McDonald texted a neighbor at 8:11 p.m., asking if his neighbor also had heard them. He called 911 around 8:20 p.m. From McDonald's balcony, he thought he heard voices or wrestling and saw the silhouettes of more than one person in Prince's house. He testified that before the police arrived, all the lights went off at Prince's house "like they were killed with a circuit breaker."

When Deputy William Brown arrived at Prince's house, he saw Prince's vehicle parked in front of the garage with a dry spot next to it where it looked like another car had been parked. All the lights in the house were off. No one answered the door, so Brown left.

Dew returned home later that night and found Prince on the floor in his bedroom with a bloody face and blankets covering his body. Dew called 911. Prince was pronounced dead at the scene. Police collected a pair of broken Burberry-brand eyeglasses on the front porch, which Dew testified did not belong to her, Perkins, or Prince. Both Marshall's brother and ex-wife testified that Marshall sometimes wore Burberry glasses. The only latent print on the glasses matched Marshall's thumb. Someone had removed the alarm system's DVR from the downstairs closet. Police found $27,000 in cash in Prince's backpack in his bedroom.

Police also found a 40-caliber bullet embedded in the bathroom closet, a 40-caliber shell casing just outside the house, a 22-caliber casing in a groove between planks on the porch and on the downstairs landing, a 380-caliber casing in the dining room, and a 40-caliber casing in the dining room. A medical examiner performed an autopsy on Prince and determined that he died from multiple gunshot wounds. She found four gunshot wounds and recovered three bullets from Prince's body.

Police found Prince's cell phone off the side of the road near his house. On Prince's phone they discovered a photograph of a vehicle taken at 8:10 p.m. the night of his murder. The license plate number belonged to a Chrysler PT Cruiser registered to Allison Sierra, Marshall's ex-wife. She testified that

Marshall had been the full-time driver of the PT cruiser since September 2013. She stated that he had been driving it on February 14, 2014, when she last saw him before the incident.

On February 22, the police stopped and arrested Marshall while he was driving a Dodge Durango registered to a girlfriend, Shamarra Scott. Police seized "several" cellular phones from Marshall's person and another that was on the ground near the driver's door of the Dodge. They found a 40-caliber SIG Sauer handgun in a backpack on the front passenger seat. They also found an envelope, an identification card, and a prescription pill bottle with Marshall's name in this backpack. Marshall's DNA (deoxyribonucleic acid) was found on the magazine and ammunition inside the gun. Testing showed that this gun fired the 40-caliber bullet and shell casings found at Prince's house.

Police also searched the contents of Marshall's cell phones and the cell phone of Ryan Erker, Marshall's co-defendant. Marshall and Erker exchanged several text messages and calls with one another using these phones. Their text messages suggested that Erker was monitoring Perkins's dispensaries and attempting to locate his house. On February 6, 2014, Erker sent Marshall a message stating, "Brother, I think I've got the address we've been looking for! I'm having it checked tonight. . . . Keep your fingers crossed. This is the big one." On February 12, Erker texted Marshall, "We know where the honey pot is,

so we got time, bro." Marshall responded, "Yeah. We'll put it off for another day. Let's shoot for tomorrow."

Cell tower evidence showed primarily Erker's phone and sometimes Marshall's phone connected to the tower closest to Prince's house periodically between February 7 and 17, 2014. Neither phone had connected to the tower closest to Prince's house before February 7. And neither phone connected to that tower after February 17. On February 17, between 8:00 p.m. and 8:40 p.m., Erker and Marshall placed multiple calls to each other. Each of their phones connected to the cell tower closest to Prince's house for some of these calls. At 8:13 p.m., both Erker's and Marshall's cellular numbers connected to the tower closest to Prince's house. Erker called Marshall several times between 8:37 p.m. and 8:41 p.m. All these calls connected to a tower west of the tower closest to Prince's house.

Marshall had another girlfriend at the time, Soqueara Bailey. She testified that on the night of February 17, she heard Marshall's and Erker's voices downstairs but could not hear what they were saying. Late that night, Marshall woke her up and told her, "I fucked up." Marshall had told her similar things in the past when he had impregnated other women. She stated that a few days later, Erker asked her to throw away a DVR or DVD player, which she threw in a dumpster. Paul Steve had bought and sold cars for Erker. He testified that on

February 17, Erker called him to ask him to sell a PT Cruiser because it had been used in a crime.

The State charged Marshall with one count of first degree murder and one count of second degree unlawful possession of a firearm. It alleged that Marshall caused Prince's death while committing or attempting to commit first degree robbery and first degree burglary. It also claimed that Marshall knowingly had a handgun in his possession or control and had previously been convicted of first degree malicious mischief. The jury found him guilty of first degree murder and returned a special verdict finding that he was armed with a firearm during the crime. At a bifurcated bench trial, the trial court found Marshall guilty of second degree unlawful possession of a firearm. Marshall appeals.

ANALYSIS

Pro Se Legal Motions

Marshall challenges "the trial court's admission of [his] pro se legal motions as substantive evidence of guilt" on constitutional and evidentiary grounds. We reject his challenges. We also note that information about the content of these motions was admitted through Scott's testimony only; contrary to Marshall's argument, the trial court did not admit the motions themselves as exhibits.

The State called Scott as a witness. During her direct examination of Scott, a prosecutor asked about handwritten documents that Marshall had mailed to Scott before trial. Scott testified that she helped Marshall put some of these documents on pleading paper. While represented by an attorney, Marshall filed these pleadings as pro se motions on his own behalf. He filed a "motion to challenge search warrant" and "request for Franks[1] hearing." He asked the court to suppress evidence that the police obtained from Sierra, including evidence from the search of her cell phone. Marshall also filed a "motion to suppress evidence pursuant [to] CrRLJ 3.6," requesting suppression of the Burberry glasses found at Prince's house.

At trial, Scott identified exhibit 106 as "a motion to suppress," which she confirmed were the handwritten documents that Marshall had mailed to her. The State asked, "Motion to suppress what?" Defense counsel objected "as to relevance." The trial court sustained the objection. The State then asked about the similarities between Marshall's assertions in these documents and the declaration that Scott filed with the court after receiving them. The State offered exhibit 106 into evidence, and Marshall objected based on relevance. The State reserved the issue. Scott testified that the documents she received from Marshall included assertions about police treating Sierra poorly. The State asked

[1] Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

what the documents said about Sierra. Marshall objected based on hearsay and relevance. Outside of the presence of the jury, the State maintained, "[W]ithin these pleadings is Mr. Marshall's theory of the case." The State asserted that it was offering the handwritten letters "strictly for Mr. Marshall's consciousness of guilt, his attempt to influence the statement of other witnesses, [and] his successful attempt to do it." Marshall maintained his previous objection.

The trial judge stated, "As I think has come up before, I mean, there's no such thing as hybrid representation. Mr. Marshall [is] represented by Counsel. I consider motions presented by Counsel when an individual decides to send documents out into the world, they send documents out into the world." The trial court ruled that Marshall's statements in the documents he sent Scott were not hearsay. But it stated that the motions contained statements that were "maybe subject to a 403 analysis," including Marshall's mention of spousal privilege, Ferrier[2] warnings, and Miranda.[3]

The State stated that it would prepare a redacted version of exhibit 106.[4] Marshall's counsel responded, "[T]here's a 403 objection as well, but it's all the same thing. If [the State is] going to inquire as to portions [of the exhibit], we'll

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[2] State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] The record does not show that the State ever prepared a redacted version of exhibit 106 or that the trial court ever admitted exhibit 106 as an exhibit.

just raise objections as those come forward." The trial court ruled that because the question to which Marshall had objected had asked what exhibit 106 said about Sierra and the document said a lot about her, some of which may be inadmissible, Marshall's objection was sustained on "that phrasing."

Then, twice over Marshall's relevance objections, the State asked Scott if Marshall had asked her to type his motions, in part, to prevent Sierra's cell phone from being available in evidence. Without objection, the State proceeded to elicit more testimony about the factual statements in exhibit 106 and about Scott's encounter with the police.

Again, without objection, Scott testified that one of the handwritten motions Marshall sent her asked the court to suppress evidence about the gun found in the backpack in her Durango. The State showed Scott exhibit 108, which Scott confirmed were the motions that she had typed for Marshall based on the documents he sent her. The record does not show that the trial court admitted exhibit 108. Marshall did not object when Scott confirmed that one of the motions asked the court to suppress evidence about the pair of Burberry eyeglasses found at the scene based on Marshall's claim that they were not his. Marshall also did not object when the prosecutor read paragraphs from the motions detailing Marshall's argument about the glasses.

A. Constitutional Claim

First, Marshall claims that Scott's testimony about his pro se legal motions violated his constitutional rights to access the court system, to due process, and to have inadmissible evidence suppressed. We reject this claim.

As a preliminary matter, the State contends that Marshall did not preserve this claim below. An appellate court may refuse to review any claim of error that a party did not raise in the trial court unless one of three exceptions applies.[5]

First, Marshall claims that his trial counsel raised the issues at trial. Normally, a party may appeal an evidence decision only on the specific ground of the objection made at trial.[6] But an appellate court will review an evidence ruling if the specific basis for the objection is "'apparent from the context.'"[7] Here, when the State asked Scott what the letters said about Sierra, Marshall's trial counsel objected, stating, in part, "It seems to me that Mr. Marshall is entitled to create legal pleading. He's done that." Marshall contends that this objection informed the trial court that he had a right to file legal motions and preserved his claim that testimony about his pro se motions violated his constitutional right to access the courts. Marshall also claims that his counsel's objections based on relevance

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[5] RAP 2.5(a).

[6] State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

[7] State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (internal quotation marks omitted) (quoting State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)).

"further alerted the trial court to the dispositive issue" that Marshall was exercising his right to file legal motions.

The trial court responded, in part, "[T[here's no such thing as hybrid representation." Marshall asserts that this statement means the trial court "clearly understood the nature of the constitutional objection" because the central issue on appeal is "tension" between the right to access the court system and the lack of a right to hybrid representation. But because Marshall now challenges testimony about his pro se motions based on his constitutional right to access the court system, not based on a claimed right of hybrid representation or relevance, his trial counsel's objections were not sufficiently related to his current constitutional claim to preserve it.

Alternatively, Marshall asserts that admission of his pro se motions during trial qualifies as manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3). An error is manifest if it caused actual prejudice.[8] This means the defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial.[9] But this court first decides whether the alleged error implicates a constitutional right. To determine if an error is of constitutional magnitude, a reviewing court assumes the alleged

[8] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).
[9] Kirkman, 159 Wn.2d at 935.

error occurred and then assesses if that error actually violated the defendant's constitutional rights.[10]

Criminal defendants have a constitutional right to counsel.[11] They also have a constitutional right to waive assistance of counsel and represent themselves.[12] Marshall acknowledges, however, that they do not have a state or federal constitutional right to "hybrid representation," through which defendants may serve as co-counsel with their attorneys.[13] Represented defendants have no constitutional right to file pleadings with the trial court.[14] But Marshall contends that individuals do have a constitutional right of access to the courts to redress grievances, which "is rooted in the petition clause of the First Amendment to the United States Constitution."[15] They also have a constitutional right to suppression of illegally obtained evidence.[16] And individuals may not be penalized for the lawful exercise of a constitutional right.[17] Marshall relies on three cases to illustrate this principle.

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[10] State v. Kalebaugh, 179 Wn. App. 414, 420-21, 318 P.3d 288 (2014).
[11] State v. Romero, 95 Wn. App. 323, 326, 975 P.2d 564 (1999).
[12] Romero, 95 Wn. App. at 326.
[13] Romero, 95 Wn. App. at 326.
[14] State v. Blanchey, 75 Wn.2d 926, 938, 454 P.2d 841 (1969).
[15] In re Pers. Restraint of Addleman, 139 Wn.2d 751, 753-54, 991 P.2d 1123 (2000).
[16] State v. Duncan, 146 Wn.2d 166, 170, 176, 43 P.3d 513 (2002).
[17] State v. Burke, 163 Wn.2d 204, 221, 181 P.3d 1 (2008).

First, Marshall relies on In re Personal Restraint of Addleman,[18] where our Supreme Court held that the Indeterminate Sentencing Review Board's decision to deny Addleman parole, in part, because of the litigation and personal grievance actions he had filed, violated Addleman's constitutional right of access to the judicial system. Second, Marshall cites State v. Burke,[19] where our Supreme Court held that the prosecution's use of Burke's silence as substantive evidence of his guilt violated the Fifth Amendment and article I, section 9 of the Washington Constitution. Third, Marshall relies on State v. Gauthier,[20] where this court held that the prosecution's presentation of evidence that Gauthier refused to consent to warrantless sampling of his DNA as substantive evidence of his guilt violated Gauthier's right to invoke with impunity his Fourth Amendment and article I, section 7 protections.

While the trial court did not admit Marshall's pro se motions into evidence, he claims that like these three cases, "the trial court's admission of [his] pro se legal motions as substantive evidence of guilt penalized him for the lawful exercise of his constitutional right[ ]" to access the court system and have illegally obtained evidence suppressed. In Addleman, Burke, and Gauthier, the conduct at issue penalized the defendants for exercising a constitutional right: the right to redress grievances, the right to remain silent, and the right to refuse consent to a

[18] 139 Wn.2d 751, 753-56, 991 P.2d 1123 (2000).
[19] 163 Wn.2d 204, 208-10, 221-23, 181 P.3d 1 (2008).
[20] 174 Wn. App. 257, 261-63, 267, 271, 298 P.3d 126 (2013).

warrantless sampling of DNA. But here, a defendant's rights to access the court system and have illegally obtained evidence suppressed do not include a constitutional right to file pro se pleadings while represented by counsel. By accepting legal representation, Marshall gave up the right to contribute to his defense by filing pleadings. If a represented defendant wants to file a motion to suppress, he has a constitutional right to do so only through his counsel. Because a represented defendant does not have a constitutional right to hybrid representation, Scott's testimony about Marshall's pro se motions did not violate any constitutional right of Marshall. He does not show manifest constitutional error.

B. Evidentiary Claim

Alternatively, Marshall claims that the trial court abused its discretion by admitting testimony about his pro se motions in violation of ER 403. As a preliminary issue, the State contends that Marshall did not preserve this claim on appeal because he objected on the basis of ER 403 only once and the court sustained that objection. All his other objections cited as grounds either relevance or hearsay.

The State correctly describes the record. Marshall made an ER 403 objection to the State's question about what the letters that Marshall mailed to Scott said about Sierra. And the trial court did sustain this objection. Then

Marshall's trial counsel stated that he would object to questions the State asked about the exhibit as necessary going forward. Marshall's trial counsel based all later objections on relevance and hearsay only. Because this court generally may refuse to review any claim of error that a party did not raise at the trial court, we decline to consider Marshall's ER 403 challenge.

Prosecutorial Misconduct

Next, Marshall claims that the State committed prejudicial prosecutorial misconduct by purposefully eliciting a witness's opinion about his guilt. We disagree.

The State questioned Scott about a letter she wrote Marshall in late February or early March of 2014. Marshall did not object to the State's questions.

> Q. You wrote him an eight-page letter. And, in this statement, you told the detective that in that letter, you asked him, you told him, that he needed to remove the wickedness from his life; is that correct?
>
> A. That's correct.
>
> Q. What wickedness?
>
> A. Everybody has wickedness, because everyone sins every day. So he needs to ask for forgiveness of his sins from being a young child, from harsh words, what it is you say against other people, thoughts, everything.
>
> Q. When you wrote him this letter, he was in jail for murder, and you had asked him about it, and he told you to shut up. In this letter, did you tell him that he needed to ask God for forgiveness?

A. We ask God for forgiveness every day.

Q. Ms. Scott, he needed to ask God for forgiveness for murdering Ryan Prince. Isn't that what you meant?

A. No, that's not what I meant.

[State]: I don't have any more questions.

(Emphasis added.)

Prejudicial prosecutorial misconduct violates the defendant's Sixth Amendment right to a fair trial.[21] "Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction."[22]

ER 701 permits lay witness testimony when it is (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. But opinion testimony about a criminal defendant's guilt violates the defendant's constitutional right to a trial by an impartial jury.[23] A prosecutor commits misconduct when her questioning of a witness asks a witness to provide inadmissible testimony.[24] "A prosecutor has no right to call to

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[21] State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009).

[22] Fisher, 165 Wn.2d at 747 (internal quotation marks omitted) (quoting State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)).

[23] State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

[24] State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996).

the attention of the jury matters or considerations which the jurors have no right to consider."[25]

Here, the prosecutor intentionally asked for Scott's opinion about Marshall's guilt when the prosecutor asked Scott if she wrote to Marshall that "he needed to ask God for forgiveness for murdering Ryan Prince." Because this testimony violated Marshall's constitutional right and the prosecutor intentionally elicited it, the prosecutor committed misconduct. But the prosecutor's conduct was not so flagrant and ill-intentioned that an instruction would not have cured any resulting prejudice.

First, Marshall claims that because there were no eyewitnesses to the murder and the primary issue at trial was identity, an instruction could not have cured the resulting prejudice. But the other evidence of Marshall's guilt was sufficiently abundant that an instruction could have cured any resulting prejudice.

Marshall's and Erker's text messages establish that they located Prince's home, referred to it as the "honey pot," and intended to carry out a plan that required them to locate his home. Cell phone data shows them near Prince's house in the days leading up to the murder and at the time of the murder. In addition, police found Burberry eyeglasses with only Marshall's fingerprint at the scene, witnesses testified that they had seen him wear Burberry glasses, and a

[25] State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Facebook picture shows him wearing Burberry glasses. Sierra testified that since September 2013 Marshall had been the primary user of her PT Cruiser, which was photographed at Prince's house at the time of his murder. And Steve testified that Erker asked him to sell that PT Cruiser on the night of the murder because it had been used in a crime. Further, the gun located in Marshall's backpack fired the bullet and some of the cartridge casings found at the scene. After the murder, Marshall told Bailey that he had "fucked up." And only after Scott received a letter from Marshall stating that police treated her poorly did she file a declaration making this claim.

Second, the record does not show that the prosecutor further questioned Scott about her letter or referred to Scott's testimony about the letter at any later point during trial. Marshall relies on State v. Jerrels,[26] where Division Two of this court held the prosecutor committed prejudicial misconduct by asking the child-victims' mother her opinion about whether her children were telling the truth about the alleged sexual abuse. But in Jerrels, "[t]he improper questions were asked three different times, giving them a cumulative effect."[27] This "cumulative effect" is absent here where the prosecutor referenced Scott's letter only the one time while she was questioning Scott.

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[26] 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996).
[27] Jerrels, 83 Wn. App. at 508.

Third, Marshall also relies on Jerrels to support the proposition that a loved one's opinion on the guilt of the accused or the veracity of a witness is highly prejudicial. There, the court reasoned that the prosecutor's improper questioning was prejudicial, in part, because "[a] mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so."[28] Here, Scott testified that she has been "considered [Marshall's] common law wife [for s]everal years now." And they have a child together. But she also testified that she has known Marshall for 10 years and they have "been friends in between things. [They]'ve both had other relationships." Indeed, at the time of the murder, Marshall had at least three girlfriends, including Scott. Regardless of how Scott characterizes her relationship with Marshall, her sporadic romantic relationship with him is not like a mother's relationship with her children.

Fourth, Marshall notes that the religious implications of Scott's letter may have been "particularly persuasive for some jurors." The opposite assumption, however, is equally as reasonable. We do not consider this argument persuasive.

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[28] Jerrels, 83 Wn. App. at 508.

Last, the trial court gave the standard instruction to the jury that the lawyers' remarks, statements, and arguments are not evidence. And "[j]urors are presumed to follow the court's instructions."[29]

For these reasons, we conclude that the prosecutor's misconduct was not so flagrant and ill-intentioned that it could not have been cured by an instruction.

Statement of Additional Grounds

Marshall makes a number of constitutional challenges in his statement of additional grounds. This court reviews constitutional challenges de novo.[30] We reject Marshall's claims.

A. Fourth Amendment

Marshall contends that his Fourth Amendment right to privacy was violated on three grounds. We disagree.

The Fourth Amendment protects individual privacy against certain kinds of governmental intrusions.[31] It guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[32] A search occurs under the Fourth Amendment when the government intrudes upon a subjective and reasonable expectation of privacy.[33]

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[29] Kirkman, 159 Wn.2d at 937.
[30] State v. Budd, 185 Wn.2d 566, 571, 374 P.3d 137 (2016).
[31] Katz v. United States, 389 U.S. 347, 350, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).
[32] U.S. CONST. amend. IV.
[33] State v. Goucher, 124 Wn.2d 778, 782, 881 P.2d 210 (1994).

First, Marshall claims that the police conducted an illegal pretexutal stop, an illegal seizure, and an illegal custodial interrogation of Sierra. But a party alleging a constitutional claim must have standing.[34] "Fourth Amendment rights are personal rights which may not be vicariously asserted. . . . A defendant may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized."[35] Because the stop and interrogation of Sierra and the search of her cell phone implicate Sierra's privacy interest, not Marshall's, he does not have standing to challenge this conduct under the Fourth Amendment.

Second, Marshall claims that the police interrogation of Sierra violated his privacy right because the spousal privilege statute protects him. RCW 5.60.060(1) prohibits a husband or wife or domestic partner from testifying against the other during their marriage or domestic partnership or after the marriage or domestic partnership about a communication made during the marriage or domestic partnership without the consent of the nontestifying spouse. But Marshall does not contest that at the time of Prince's murder, he and Sierra were divorced and had been in only an "ongoing domestic relationship for over 14 years." An "ongoing domestic relationship" is not a relationship protected by the spousal privilege statute.

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[34] See Goucher, 124 Wn.2d at 787 ([W]e must decide whether the Defendant has the standing to challenge the scope of this warrant.").

[35] Goucher, 124 Wn.2d at 787.

Third, Marshall claims that the State had the King County Jail intercept his incoming and outgoing mail to his "spouse"[36] without a warrant. But he did not raise this claim below and does not claim manifest constitutional error. Because an appellate court may refuse to review any claim of error that a party did not raise in the trial court unless one of three exceptions applies,[37] we decline to consider Marshall's claim.

B. Ineffective Assistance of Counsel

Marshall next claims that he received ineffective assistance of counsel on three grounds. We disagree.

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel to help ensure a fair trial.[38] To prove ineffective assistance of counsel, an appellant must show that (1) counsel provided representation so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him.[39] To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness.[40] Appellate courts examine trial counsel's performance with great deference, and the defendant must overcome

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[36] It is unclear to whom Marshall refers when he says "spouse." Sierra is his ex-wife, and Scott testified that she was Marshall's "common law wife."

[37] RAP 2.5(a).

[38] State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

[39] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

[40] Strickland, 466 U.S. at 687-88.

the presumption that the challenged action "'might be considered sound trial strategy.'"[41] Counsel's performance is not deficient for failing to object to admissible evidence.[42] The prejudice prong requires that the defendant establish there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different.[43]

First, Marshall claims deficient performance on the ground that his trial counsel did not ask the trial court to suppress the evidence from Sierra's cell phone that Marshall asked the court to suppress in his pro se motions. As discussed above, Marshall does not have standing to challenge the evidence police obtained from Sierra's cell phone. Although Marshall also appears to challenge admission of this evidence based on ER 403, he did not object on this basis at trial, so we decline to consider it under RAP 2.5(a).

Second, Marshall contends that he received deficient performance because his trial counsel did not ask to have a biased juror excused for cause. If the record demonstrates the actual bias of a juror, seating this juror is manifest error.[44] Here, a juror told the court that a friend of hers had died in a home invasion and it "brought back memories and . . . feelings." This juror testified that she did not "think that there's too much of an emotional connection" or that her

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[41] Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).

[42] Grier, 171 Wn.2d at 32.

[43] Grier, 171 Wn.2d at 34.

[44] State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015).

"decision-making would be compromised." She thus stated that she could remain impartial, so the record does not demonstrate actual bias.

Third, Marshall maintains that his trial counsel should not have used an "all or nothing" strategy and should have requested lesser-included offense instructions on first and second degree manslaughter. The decision to exclude or include lesser included offense instructions "ultimately rests with defense counsel."[45] In State v. Grier,[46] our Supreme Court reasoned that an all or nothing strategy is not necessarily evidence of deficient performance because the defendant and his counsel could reasonably have believed that this strategy was the best approach to achieve an acquittal. The court also stated Grier did not prove prejudice because the court assumed, as it was required to, that the jury could not have convicted Grier of the charged offense unless the State had met its burden; and the availability of a lesser included offense would not have changed the outcome.[47] Similarly, here, Marshall cannot show prejudice because we must assume that the jury would not have convicted him of first degree murder unless the State met its burden of proof.

C. Confrontation Clause

Last, Marshall claims Steve's testimony that Erker told Steve, "one of the guys owns the car," violated his Sixth Amendment right to confront witnesses

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[45] Grier, 171 Wn.2d at 32.
[46] 171 Wn.2d 17, 43, 246 P.3d 1260 (2011).
[47] Grier, 171 Wn.2d at 43-44.

against him because he was unable to cross-examine Erker. But the record does not show that Steve provided the quoted testimony. We do not consider this claim.

DNA Fee

Marshall asks that this court strike his $100 DNA fee from his judgment and sentence consistent with our Supreme Court's recent holding in State v. Ramirez.[48] There, our Supreme Court discussed and applied House Bill (HB) 1783, which became effective June 7, 2018, and applies prospectively to all cases on direct appeal.[49] The court stated that HB 1783 amended RCW 43.43.7541 to provide that "the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction."[50] The court also explained that HB 1783 "amends former RCW 10.01.160(3) to expressly prohibit courts from imposing discretionary costs on defendants who are indigent at the time of sentencing: 'The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).'"[51]

Here, Marshall has a felony conviction from 2011. RCW 43.43.754 would have required that he have a DNA sample collected as a result of that felony.

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[48] 191 Wn.2d 732, 426 P.3d 714 (2018).
[49] Ramirez, 191 Wn.2d at 747.
[50] Ramirez, 191 Wn.2d at 747.
[51] Ramirez, 191 Wn.2d at 748 (quoting LAWS OF 2018, ch. 269, § 6(3)).

Because Marshall's DNA fee was previously collected, the DNA fee is no longer mandatory under RCW 43.43.7541. The trial court found Marshall indigent and ordered him to pay the $100 DNA fee. Because a trial court may not impose discretionary fees on indigent defendants under RCW 10.01.160(3), we strike Marshall's $100 DNA fee from his judgment and sentence.

CONCLUSION

We affirm. Testimony about the substance of Marshall's pro se motions that he filed while counsel represented him did not violate his constitutional right to access the courts because a criminal defendant does not have a hybrid right to representation. Because ample evidence supports Marshall's guilt, he does not show that the prosecutor's misconduct caused him prejudice.

Leach, J.

WE CONCUR:

Chun, C.J.

Schindler, J.

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

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