No. 92310-8

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

NO. 40333-1

STATE OF WASHINGTON,

Respondent.

vs.

KENNETH SLERT,

Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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2. The crime scene in this case was a "dispersed camping" site on public land, from which Slert had no right to exclude passers-by. Did the police need to obtain a warrant to search this area, which was open to the public, or to observe items in open view? Moreover, may Slert relitigate the constitutionality of this search if he stipulated to it during the first trial?

3. Forest Service Rangers took Slert into protective custody while they traveled to the campsite to verify his confession to the shooting. When they discovered the dead body as Slert described it, they treated Slert as though he had been arrested. If probable cause was readily apparent, was there any constitutional problem with this procedure?

4. Slert's trial counsel made arguments only if they were arguably meritorious or furthered his trial strategy. Was trial counsel constitutionally ineffective for picking his battles?

5. To begin voir dire, the trial court consulted with counsel about the jurors' questionnaire answers and then announced some agreed-upon excusals for cause on the record. Should the entire trial be discarded because the judge did not conduct a *Bone-Club* analysis first?

6. The defendant was not present for the above voir dire discussion. Was the decision not to include the defendant in this legal matter a manifest constitutional error?

7. Slert's trial counsel wished to cross-examine two of the State's witnesses on several collateral topics, some of which were irrelevant or prejudicial. Did the trial court err in limiting these lines of questioning?

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9. When Mirandized for a fourth time as part of a request for a taped statement, Slert said, "Why don't we just leave it at that and then, uh, I won't say anymore." Did the trial court err when it suppressed Slert's subsequent statements at the scene, but not his later statements?

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STATEMENT OF THE CASE

Kenneth Slert appeals his second-degree murder conviction. This was the third time a jury has found him guilty. Appeals from his previous two convictions can be found at *State v. Slert* (*Slert I*), No. 31876-8-II, 128 Wn. App. 1069, 2005 WL 1870661 (Aug. 9, 2005) and *State v. Slert* (*Slert II*), No. 36534-1-II, 149 Wn. App. 1043, 2009 WL 924893 (Apr. 7, 2009).

I. Statement of Facts

In October of 2000, Slert was camping in a "dispersed camping" area of National Forest in Lewis County. Verbatim Report of Proceedings (VRP) (Nov. 18, 2009) at 17, 20, 58. A man named John Benson drove into Slert's campsite. VRP (trial) at 492.[1] The two were strangers. VRP (Nov. 18, 2009) at 229. Benson invited Slert into his truck to talk and to share some whiskey. VRP (trial) at 492. During the conversation, Benson expressed political views that offended Slert. *Id.* at 265. Slert punched Benson a few times and exited the vehicle. *Id.* at 492. According to Slert, Benson got out of the truck and attacked him, eventually choking him. *Id.* at 493-94. The two wrestled, then Slert

[1] The VRP of the jury trial is consecutively paginated. Rather than refer to each volume by date, the State refers to all trial volumes as "VRP (trial)." VRP of other hearings are identified by their date.

broke free and went into his tent to retrieve his gun. *Id.* As Benson approached the tent, Slert feared for his life and shot Benson. *Id.* at 215, 494. Slert then stepped out of the tent over Benson's body. *Id.* at 495. Slert claimed that Benson grabbed his leg, so Slert shot him a second time, in the head. *Id.* at 513. He explained that he shot Benson the second time because he was "still moving." *Id.* at 495. Slert did not report the incident to the police that day. *Id.* at 180-81.

The next morning, Slert left the campsite. As he passed Ranger Nehring's car, Slert stopped short. *Id.* at 176-77. Slert told Nehring that he had shot someone and still had the guns in his car. *Id.* Nehring removed the guns from Slert's car and spoke with Slert about what happened. *Id.* at 179-182. Two other Rangers arrived and took Slert into protective custody. *Id.* at 182. Nehring asked Slert's permission to search the car, which Slert granted. *Id.* at 182, 197, 228. Nehring performed the search while the other Rangers transported Slert up to the campsite to verify his account. *Id.* at 182-83. On the way, they read Slert his constitutional rights. *Id.* at 226. Once aid personnel arrived and declared Benson dead, the Rangers handed off the investigation to Deputy Shannon of the Lewis County Sheriff's Office. *Id.* at 231, 241, 263. Shannon read

Slert his constitutional rights and spoke with him about the shooting. *Id.* at 264-266. Slert was so forthcoming that Shannon had to ask him to stop talking to her and to wait for detectives from the Sheriff's Office to arrive. *Id.*

Detectives Wetzold and Brown arrived to investigate. *Id.* at 484-85. Wetzold reread Slert his constitutional rights. *Id.* at 491. Slert agreed to speak with him and told him his version of events. *Id.* at 491-95. Afterwards, Wetzold asked Slert to provide a taped statement. VRP (Nov. 18, 2009) at 197-98. On the tape, Wetzold advised Slert of his constitutional rights for a fourth time. *Id.* at 198. At that point, Slert said, "Why don't we just leave it at that and then, uh, I won't say anymore." *Id.* at 200. Wetzold interpreted this as a refusal to give a taped statement. Later, Wetzold returned to tell Slert that the physical evidence at the scene was inconsistent with what Slert had told him. *Id.* at 204-05. Two other law enforcement officers asked Slert at the scene if he sustained any injuries. VRP (Nov. 20, 2009) at 135-36.

Law enforcement officers searched the grounds around Slert's tent, which was public land. VRP (trial) at 508-09; VRP (Nov. 18, 2008) at 17, 20, 58. Slert had no right to exclude others

from this area. VRP (Nov. 20, 2009) at 23-24, 55-60. Slert's tent was open on one side, so that the interior of the tent was visible from outside of it. VRP (Nov. 20, 2009) at 45-46. The officers saw certain items inside Slert's tent in open view. *Id.* The officers also entered Slert's tent and seized several items.

Then-Lewis County Sheriff McCroskey was also on the scene. VRP (Nov. 18, 2009) at 105. McCroskey drove Slert to jail, where Slert would be held until the detectives arrived. *Id.* During the drive, Slert began conversing with McCroskey. *Id.* at 106, 139-40. The conversation was mutual and on a wide range of topics. *Id.* at 107-08, 127-28. Slert made unsolicited comments about his own case during this conversation. *Id.* McCroskey asked some questions in response, but only if Slert brought the case up. *Id.*

Once back at the jail, Slert was placed in a holding cell to await Detectives Wetzold and Brown. VRP (trial) at 622-23. Wetzold and Brown spoke with Slert when they returned from the scene. VRP (Nov. 18, 2009) at 176-77. Before this questioning, Wetzold reminded Slert that his constitutional rights were still in effect. VRP (Nov. 20, 2009) at 48-49, 74, 76-77. Slert also provided a taped statement at the jail, before which Brown reread

him his constitutional rights. VRP (Nov. 20, 2009) at 50. Slert was booked into jail. VRP (Nov. 18, 2009) at 213-14. The next day, he agreed to submit to a polygraph examination. VRP (Nov. 20, 2009) at 115-16. Brown readvised him of his constitutional rights again before the polygraph examination. *Id.*

Slert was released without charges. VRP (Nov. 18, 2009) at 178. Periodically, Slert called Wetzold to inquire about his car and the case. *See id.* at 178-87. Slert was not in custody during these conversations. *Id.* At one point, Slert asked Wetzold about acquiring an attorney. *Id.* at 215-16.

Slert's multiple statements over the course of the investigation were inconsistent, as though he were changing his story to accommodate the evidence. *See* VRP (trial) at 903-04 (summarizing the inconsistencies). There was also evidence inconsistent with Slert's self-defense story. For example, the autopsy of the victim revealed that Slert's first shot, hitting Benson in the neck, was fired with the gun only a few inches from the surface of Benson's skin. *Id.* at 345, 349. That shot would have result in Benson being paralyzed from the armpits down within a minute or two. *Id.* at 352-54. The second shot, which entered the

victim's head, was fired with the barrel of the gun touching the victim's scalp. *Id.* at 363-64. Also, a jailhouse informant named Douglas Schwenk said Slert confessed that he killed Benson because Benson had come on to him and Slert wanted to see Benson dead. VRP (trial) at 433, 478.

II. Procedural History

Slert was eventually charged with murder in the second degree. He was convicted after a jury trial. During that trial, the state and defense agreed upon what evidence would be admissible from the search of Slert's tent and campsite. State's Response to 3.6 Motion to Suppress Evidence, CP 274 at 4. The State conceded that the evidence seized from inside Slert's tent itself was unconstitutional seized and inadmissible. The defense agreed that the evidence seized from the area surrounding the tent, and testimony regarding what the officers saw in open view within the tent, was admissible. The agreement was reduced to a written order signed by the judge. *Id.* at 4 & ex. 3.

The parties also litigated the admissibility of several of Slert's statements. *See State v. Slert (Slert I)*, No. 31876-8-II, 2005 WL 1870661 at *1-2, *5. (Aug. 9, 2005). Slert argued that law

enforcement had unconstitutionally elicited statements from him after he invoked his right to remain silent at the scene of the crime. The trial court suppressed Slert's subsequent statements at the scene, *Id.* at *5 n.6, but did not suppress the mutual conversation Slert had with McCroskey on the way to jail, Slert's statements to Brown and Wetzold at the jail, or the taped statement Slert provided there, *id.* at *1-2, *5. This ruling was affirmed on appeal. *Id.* *5-6.

Other rulings of the first trial court did not survive appeal. Slert's conviction was overturned, inter alia, because the trial court erred in refusing one of Slert's proposed self-defense instructions. *Id.* at *2-4. Slert was convicted again on remand. However, that conviction was also overturned: the trial judge violated the appearance of fairness doctrine by failing to recuse himself on a suppression issue. *State v. Slert* (*Slert II*), No. 36534-1-II, 149 Wn. App. 1043, 2009 WL 924893 at *4-5 (Apr. 7, 2009).

Slert was tried for a third time and convicted. VRP (trial) at 977-79. Sentencing took place one week after the end of the trial; both trial and sentencing were before the same judge. VRP (trial) at 1, 873; VRP (Feb. 10, 2010) at 1. Slert received a sentence at the top of the standard range, 280 months. VRP (Feb. 10, 2010) at

8. This was the same sentence he received after the two previous trials. *Id.* at 2-3. He now appeals.

ARGUMENT

For ease of comparison, the State has used the same argument structure as the defense's opening brief. Each argument section is prefaced by a recapitulation of the relevant facts.

I. No Fourth Amendment or Article I, section 7 violation occurred in this case.

A. The trial court's admission (without objection) of evidence from the consensual search of Mr. Slert's car was not a manifest error affecting a constitutional right.

Part of the trial evidence consisted of Slert's first interaction with law enforcement: Slert stopped his car short, flagged down Ranger Nehring, and told Ranger Nehring that he had just shot someone and still had the guns in his car. Ranger Nehring asked Slert what happened, removed the guns from Slert's car, and then took Slert into protective custody. He asked Slert's permission to search the car, which Slert granted. Ranger Nehring then performed the search. The defense never challenged the constitutionality of this search. On cross, the defense reiterated that Slert consented to the search and otherwise cooperated with law enforcement. VRP (trial) at 197.

Consent is an exception to the constitutional warrant requirement. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). It was undisputed that Slert consented to the search. VRP (trial) at 182, 228. He initiated contact with Ranger Nehring for the express purpose of reporting the shooting. The defense's theory was that Slert did so because he had nothing to hide---the defense *wanted* the evidence of Slert's initial contact with Ranger Nehring in evidence to bolster Slert's argument that he had been truthful and cooperative from the outset and that his self-defense story was true. Under the circumstances, the State had no reason to introduce further evidence regarding Ranger Nehring's request for consent. The trial court did not err to receive this admissible evidence, especially in light of the defense failure to object. Even if error, the error would not be "manifest" because it was not "so obvious on the record that the [it] warrants appellate review." *See State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009) ("It is not the role of an appellate court on direct appeal to address claims where . . . trial counsel could have been justified in [his] actions or failure to object."). Moreover, any error was harmless because it bolstered the defense case. *See id.* (distinguishing the "manifest" and "harmless error" analyses).

B. The search of the public land surrounding Mr. Slert's tent, and the testimony regarding items in open view, were permissible under the law of the case and the state and federal constitutions.

The crime scene centered around Slert's tent, which was pitched in a "dispersed camping" area in which there were no designated campsites and no Forest-Service-provided fire pits or facilities. *See* VRP (Nov. 20, 2009) at 23-24, 55-60 (contrasting designated campsites with "dispersed camping"). This area was open to the public, so Slert had no right to exclude anyone from the grounds near his tent. In fact, the victim drove right up to the scene despite never having met Slert before. Once law enforcement arrived and verified that the victim was deceased, officers thoroughly searched the grounds for evidence. They also looked into Slert's tent, which was open on one side, from outside the entrance and saw certain items in open view. Afterwards, the officers searched Slert's tent itself.

During the first trial, the parties stipulated that the evidence seized from inside Slert's tent was inadmissible. State's Response to 3.6 Motion to Suppress Evidence, CP 274 at 4. However, they agreed that the evidence seized from the area around Slert's tent, and testimony regarding what law enforcement saw in open view

within the tent, was admissible. The court accepted the stipulation, which was reduced to a written order. *Id.* at 4 & ex. 3. The defense renewed its challenge to the search of Slert's tent and the area nearby during this (third) trial. Consistent with the first trial, the court below ruled that Slert had an expectation of privacy in his tent, but did not have an expectation of privacy or any "curtilage" surrounding his tent. The court therefore suppressed any evidence seized from within the tent, but allowed evidence from the search of the area outside the tent and testimony about what the officers could see in open view when they looked into the tent from the outside.

The first trial court's decision to suppress only evidence from within Slert's tent---i.e., not evidence from the surrounding area or evidence seen in open view from there---was binding in the third trial as the law of the case. The law of the case doctrine prevents relitigation of previously adjudicated matters when a case is remanded. *See State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) ("[Q]uestions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause."

(quoting *Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988)). The resolution of any issue not preserved as error and appealed on after trial becomes binding upon the parties. *Id.* Here, because the first trial court addressed the legitimacy of the search of Slert's campsite and Slert did not appeal its decision, Slert was barred from relitigating the search issue in the subsequent trials. The trial court in this third trial properly followed the ruling of the prior court.

Moreover, this ruling is the correct one under the state and federal constitutions. Slert challenges the officers' authority of law to search the "curtilage" of his tent without a warrant. No warrant was necessary: the tent was on public land in a dispersed camping area, from which Slert could not exclude the public. At common law, the term curtilage denoted the fenced-in private property surrounding a home, which was part of the homeowner's estate. *See State v. Engel*, 166 Wn.2d 572, 579-580, 210 P.3d 1007 (2009) (defining burglary with reference to common-law curtilage). Although the focus of the Fourth Amendment and Article I, section 7 has shifted to privacy rather than property rights, curtilage still retains its connection to the private property surrounding a home. *See, e.g.*, *State v. Ross*, 141 Wn.2d 304, 312-13, 4 P.3d 130

(2000) (examining the police's ability to intrude upon the defendant's driveway). The fact that curtilage is private land is what imbues it with constitutional protection, because that is the basis for the proprietor's reasonable expectation of privacy in it. *See, e.g.*, *State v. Cleator*, 71 Wn. App. 217, 220-21, 857 P.2d 306 (1993) (summarizing several cases in which the defendant had no expectation of privacy in land, which was not his, surrounding his temporary dwelling). Thus, without some indication that the land surrounding a tent on public land is distinct or private, the occupant has no reasonable expectation of privacy in the area around the tent.[2]

The campsite here was especially open: the victim in this case drove right up to Slert's tent without any invitation despite being a complete stranger to Slert. VRP (trial) at 179, 264-65, 492; VRP (Nov. 18, 2009) at 229. Far from thinking that the victim was violating his privacy, Slert engaged him in conversation and even got into his truck to share a drink. *Id.* These circumstances prove

[2] The State does not maintain that curtilage could *never* surround a home on public land. A rented and numbered campsite, for example, might constitute curtilage because the area is designated as separate, the camper can reserve the space ahead of time, and the camper can exclude others from the site during the duration of the rental.

that Slert had no expectation of privacy nor any "curtilage" in the area around his tent.

Because the officers needed no warrant to search the public land surrounding Slert's campsite, the "open view" doctrine allowed testimony about what the officers saw in Slert's tent when looking into it from the outside. *See generally State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). An officer is free to keep his eyes open when traversing space a regular citizen would be able to traverse. *Id.* at 902. Here, the officers were allowed to be in the area surrounding Slert's tent because it was public land and they had legitimate business there, investigating Benson's death. They saw items in open view within Slert's tent from their permissible vantage point. The open view doctrine permits them to testify to what they saw. *See id.* at 902-03.

Ross is also instructive. In *Ross*, officers walked up the defendant's driveway at night to see if they could smell marijuana growing in his garage; they did not attempt to contact the homeowner at any time. *Ross*, 141 Wn.2d at 307-08. The general rule was that "an officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, is permitted to

enter the curtilage areas of a private residence which are impliedly open." *Id.* at 312. However, the officers' entry under cover of darkness to view the defendant's garage was not something a regular citizen could do—it was trespass. *Id.* at 314. The open view exception therefore did not apply to their observations. *Id.* In this case, any citizen could have walked up to Slert's tent because the land was public. That it was "impliedly open" is demonstrated by the fact that Benson could drive right up to Slert's tent as a stranger. Unlike *Ross*, where the officers' investigation of crime did not give them permission to walk up the defendant's driveway, Slert himself reported the shooting and directed the officers to his campsite. The officers' examination of the site was clearly legitimate business. Because the officers had authority to be in the area surrounding Slert's tent, the open view doctrine applies.

Finally, it is worth noting that suppression of the evidence seized from Slert's tent, which was part of the agreed resolution of this issue during the first trial, was not a foregone conclusion. The "plain view" exception (which is different than the open view doctrine) arguably applied to everything found in the tent. However, the State recognizes that it is bound by the first trial court's ruling, just as the defense ought to be bound by it. The

State asks this court to affirm the ruling of the trial court as a fair, balanced, and well-reasoned resolution of the matter.

C. Mr. Slert's initial detention, which became an arrest, was constitutional because Mr. Slert was in public and there was probable cause that he murdered Benson.

When Slert contacted Ranger Nehring to admit to the shooting, Nehring immediately detained Slert and removed Slert's guns from the front passenger seat. Nehring spoke with Slert about the incident. As two other Rangers arrived, Nehring placed Slert in protective custody and asked for consent to search Slert's car, which Slert granted. While Nehring performed the search, the other Rangers transported Slert to the scene of the shooting to verify Slert's account and to attempt to render aid. These officers Mirandized Slert on the way to the scene. Slert remained in custody while emergency personnel arrived and verified that Benson had been shot and was deceased. Other law enforcement arrived and took over the investigation. At least two other officers read Slert his constitutional rights when they encountered him in custody at the scene. However, no officer ever formally arrested Slert. LCSO Chief McCroskey eventually volunteered to drive Slert to jail. Upon arriving at the jail, Slert was placed in a holding cell to await two detectives. The two detectives arrived after finishing their

investigation at the scene, whereupon they reminded Slert of his constitutional rights, spoke with him, and obtained a fully-Mirandized taped statement. Slert was booked into jail. *See* VRP (Nov. 18, 2009) at 213-14. The next day he consented to a polygraph examination. VRP (Nov. 20, 2009) at 115-16. Afterwards, he was released from custody without charges. VRP (Nov. 18, 2009) at 178. The prosecutor's office filed charges much later.

For the first time on appeal, Slert now claims that his detention was unconstitutional. Searches and seizures are constitutionally permissible if "reasonable" under the Fourth Amendment and undertaken with "authority of law" under Article I, section 7. Both constitutions permit an officer to seize someone for investigative purposes without a warrant if the officer has reasonable suspicion that the person has committed a crime. *See Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (federal constitution); *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (same); *State v. Brown*, 154 Wn.2d 787, 796, 117 P.3d 336 (2005) (state constitution). The seizure is allowed when the officer has specific and articulable facts warranting the officer's suspicion. *Acrey*, at 747. The length of the seizure must

be limited: if the ensuing investigation dispels the officer's suspicions, the stop must end, but the stop may persist or be extended if the officer's suspicions are confirmed or further aroused. *Id.* The officer may detain a suspect for safety purposes during an investigation or consent search. *See, e.g.*, *State v. King*, 89 Wn. App. 612, 618-20, 949 P.2d 856 (1998); *see also Michigan v. Summers*, 452 U.S. 692, 702-03, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981) (recognizing the legitimate interest in officer safety).

Separately, both the state and federal constitutions permit warrantless arrests when the officer has probable cause that a suspect who is in a public place has committed a felony. *See* RCW 10.31.100 (providing authority of law for such arrests); *State v. Solberg*, 122 Wn.2d 688, 696, 861 P.2d 460 (1993); *State v. Ringer*, 100 Wn.2d 686, 692, 674 P.2d 1240 (1983) (approving of the rule as part of the common law); *New York v. Harris*, 495 U.S. 14, 18, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990) (noting that the rule had "long been settled" under the federal constitution). Both constitutions also recognize an "independent source" doctrine, which approves of searches and seizures if they are invalid for one reason but constitutional under some independent rationale. *State*

v. Gaines, 154 Wn.2d 711, 722, 116 P.3d 993 (2005); *accord State v. Winterstein*, 167 Wn.2d 620, 633-34, 220 P.3d 1226 (2009).

In this case, Ranger Nehring immediately acquired reasonable suspicion to detain Slert when Slert told him he had shot another man and still possessed the gun. This was a specific, articulable fact that would cause any reasonable person to suspect Slert of homicide. The more the Ranger investigated, the more his suspicions were confirmed: Slert in fact had a gun and appeared to have consumed alcohol. He indicated that he shot the other man because the other man attacked him, but admitted he was drunk at the time. Furthermore, he did not report the death right away, which Ranger Nehring thought highly unusual. In all, the Ranger had ample reason to suspect Slert of a homicide---the logical thing to do was extend the stop to investigate Slert's story.[3] Had there been no evidence of Slert's claim, their suspicions might have been dispelled and Slert released. Upon arriving, however, they saw the victim's body by Slert's tent. Again, the evidence confirmed their suspicions.

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[3] Slert also consented to go with the Rangers to the scene. VRP (trial) at 228, 240-41. He self-reported the incident and was as cooperative as possible. After being *Mirandized*, he directed the officers to his campsite.

At some later point, this continued detention exceeded the scope of *Terry* and became an arrest.[4] *Cf. State v. Williams*, 102 Wn.2d 733, 741, 689 P.2d 1065 (1984) (holding that probable cause to arrest becomes necessary in such a situation). However, as soon as the officers discovered the victim's body, they had probable cause to believe that Slert, who admitted to the shooting in detail, had committed a homicide. They did not have to credit Slert's self-defense claim, which was self-serving and inconsistent with Slert's delay in reporting. Therefore, the officers had probable cause to arrest Slert before *Terry* ceased to justify his detention.

Under the constitution, the officers' initial seizure of Slert was justified under *Terry*, as was their extension of that stop to travel to the scene to verify Slert's claims. *See Acrey*, at 747. Once at the campsite, which was public property, the officers discovered Benson's body and so acquired probable cause justifying Slert's arrest. Slert's continued seizure was therefore both reasonable and supported by authority of law. RCW 10.31.100; *Solberg*, 122

[4] Regardless of whether an officer formally told Slert he was under arrest for homicide, it is clear from the record that Slert was arrested. Slert was not released from custody at the scene. Several officers reread him his constitutional rights when conversing with him. Eventually, he was transported to the jail by law enforcement and placed in a holding cell to await further questioning. Slert was booked, like any other arrestee. He spent the night in jail before voluntarily submitting to a polygraph. These are things that occur upon arrest.

Wn.2d at 696; *Harris*, 495 U.S. at 18. Even if it violated Slert's rights to continue to detain him under *Terry* rather than formally arrest him, an independent source of constitutional authority, probable cause, countermands the violation. *Cf. Gaines*, 154 Wn.2d at 722. Thus, it was not error for the trial court to admit evidence (without objection) following from Slert's detention. Certainly it was not a manifest constitutional error that may be first raised on appeal. *See* RAP 2.5.

The defense argues for a per se rule that a lengthy detention without a formal arrest violates Article I, section 7 regardless of the presence of probable cause. No authority for such a rule exists. The cases cited by the defense deal with searches incident to arrest and pretextual stops. *See State v. O'Neill*, 148 Wn.2d 564, 584-86. 62 P.3d 489 (2003) (concluding that an actual arrest must precede a search incident to arrest); *State v. Ladson*, 138 Wn.2d 343, 351, 979 P.2d 833 (1999) (holding that pretextual seizures are unconstitutional). Neither of those issues is before the court. Rather, the question is whether it constitutional to detain someone beyond the limits of *Terry* if probable cause exists and they are in a public place. Because probable cause gives the officers authority to arrest in such a situation, the continued detention is supported by

"authority of law" and no Article I, section 7 violation occurs. Indeed, a per se rule to the contrary would be inconsistent with the independent source doctrine, for it would exclude evidence despite an independent, constitutional source of authority for the detention. *See Gaines*, 154 Wn.2d at 722. The court should reject the defense's proposed new rule.

II. Mr. Slert was ably represented by a respected private attorney, who declined to raise issues below only if they were not meritorious, not useful, or not strategic.

Slert's trial counsel was Rick Cordes, a well-respected private attorney. [5] *See* Clifford F. Cordes III, *available at*http://www.lawyers.com/Washington/Olympia/Clifford-F-Cordes-III-1762607-a.html?tab=rating#details (showing his peer-review rating as 4.4 out of 5). Mr. Cordes's trial strategy was clear: emphasize that Slert claimed self-defense since the beginning and that he consistently cooperated with law enforcement. VRP (trial) at 912, 930, 959-62. Mr. Cordes also attempted to show that the physical evidence was consistent with Slert's story and to discredit the state's jailhouse informant as an unscrupulous opportunist. *Id* at

[5] Rather than maintain a public defenders' office, Lewis County courts appoint private contract attorneys to represent indigent defendants. Mr. Cordes was appointed by the court in this case, but he also represents retained clients in Lewis and other counties.

934-49. This court should consider the course of the trial in light of this strategy.

a. Counsel's performance must be constitutionally deficient and result in actual prejudice to the client; strategic choices are not deficient.

Ineffective assistance of counsel claims receive de novo review. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017 (2010). *Grier* noted:

> We give great judicial deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. . . . We will not find ineffective assistance of counsel if the action complained of is a legitimate trial tactic and does not fall below "an objective standard of reasonableness based on consideration of all the circumstances."

Id. at 644 (citations omitted) (quoting *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994)). The defendant must show not only deficient performance but also prejudice. *Id.* This requires proof of a reasonable probability that the outcome would have been different absent the deficient performance. *Id.*

Slert's ineffective assistance claim fails because he cannot show deficient performance: each of the actions Mr. Cordes supposedly should have taken during trial would have been

ineffective, irrelevant, or antithetical to his trial strategy. To the extent that Mr. Cordes should perhaps have acted differently, the outcome of the trial would have been the same.

b. The evidence easily satisfied the *corpus delicti* rule; no objection would have been worthwhile.

There is no meritorious *corpus delicti* claim to be made on the facts of this case. The *corpus delicti* rule requires the State to produce prima facie evidence of the crime with which a defendant is charged, independent of any admissions, to convict. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). Confessions alone are insufficient. *Id.* On review, the court considers the evidence in the light most favorable to the State. *Id.*

The State presented evidence that the victim's body was found at Slert's campsite with two gunshot wounds, one in the chest and one in the head. The wounds were from a gun that matched one found in the passenger seat of Slert's car. The autopsy indicated that the head wound was inflicted by a gun touching the back of the victim's skull. Looking at the evidence in the light most favorable to the state, this head wound was prima facie evidence of a "kill shot," suggesting intent to kill. A dead body in Slert's campsite, killed intentionally by a gun of the type in Slert's

possession, constitutes prima facie evidence of second degree murder. Thus, Mr. Cordes did not object on *corpus delicti* grounds because the objection was clearly ill-founded.

c. Manslaughter instructions were not supported by evidence and seeking them would have been poor trial strategy.

Manslaughter instructions were not supported by the evidence. A litigant is not entitled to jury instructions if they are unsupported in the evidence. *See State v. Hunter*, 152 Wn. App. 30, 43-44, 216 P.3d 421 (2009), *review denied*, 168 Wn.2d 1008 (2010). Under any view of the facts, Slert intended to kill Benson: he admitted that he shot Benson in the chest and the head at close range, but claimed that he did so because he believed Benson intended to harm him. The reason Slert gave for shooting Benson the second time was that Benson had grabbed his leg and was "still moving." Even taken in the light most favorable to Slert, his realization that the second shot was for the purpose of stopping Benson from moving indicates his intent to kill. This intent distinguishes second-degree murder from manslaughter without regard to whether Slert's self-defense claim justified his act. *Compare* RCW 9A.32.050 (requiring "intent to cause the death of another person" for murder) *with* RCW 9A.32.060 (requiring

recklessness for first-degree manslaughter) *and* RCW 9A.32.070 (requiring criminal negligence for second-degree manslaughter). Perhaps Slert was reckless or negligent in appraising the danger Benson posed to him, which might affect the validity of his self-defense claim, but it was undisputed that he intended to kill Benson.

Even if Slert were entitled to manslaughter instructions, however, it would have been a mistake for Mr. Cordes to seek them. Slert's trial strategy centered on the self-defense claim, including psychiatric testimony about Slert's hypervigilance. If the jury had been persuaded that it was reasonable for Slert to fear Benson—if the jurors had even one reasonable doubt that the second shot was justified because Benson grabbed Slert's leg—then they would have had a duty to acquit Slert. *See* VRP (trial) at 914 (arguing the point during closing). With such a consistent self-defense claim, the defense argued that there was "reasonable doubt all over the place." *Id.* at 961. Instructing the jurors on manslaughter would have given them an easy out, allowing them to convict on a lesser-included charge to minimize the discomfort of deciding the difficult self-defense issue. It was a risk the defense

decided was worth taking. This decision was not objectively unreasonable on the facts of the case.

Finally, the jury did not credit Slert's self-defense story, or at least did not credit it to the point that it justified Slert's actions. The physical evidence indicated that Slert's second shot occurred with the gun right up against Benson's head. The first shot stretched Benson's spinal cord so that he would have been paralyzed below the armpits. The blood on Slert's clothing indicated that he had kneeled by the body. These facts suggest that Slert kneeled beside the body, put the gun up to Benson's head, and fired a second, killing shot. Because the jury appears to have credited this evidence, it is hard to imagine how they would have found Slert to have committed manslaughter rather than murder. The absence of the manslaughter instructions therefore did not prejudice Slert.

d. Counsel raised all meritorious suppression issues that furthered Mr. Slert's self-defense case.

Mr. Cordes did not raise every conceivable issue or argument at trial. Instead, he chose only those grounds on which he might win and through which he might bolster Slert's self-defense claim. For example, Mr. Cordes attempted to suppress the physical evidence from the search of the scene, which was

inconsistent with Slert's story. But, he did not contest the consensual search of Slert's car, his voluntary self-report of the incident to Ranger Nehring, or his cooperation with law enforcement while in custody during their investigation of the scene. As indicated above, none of these issues was winning: the first search was consensual, his self-report was consensual and not in custody, and his custody at the scene was fully justified under *Terry* and then arrest. But more than simply being losing issues, the introduction of this evidence bolstered Slert's defense. It was a key selling point of Slert's defense that he had initiated the investigation and consistently maintained his claim of justification. Ultimately, Slert's position was that the State could only "poke holes" in his story, not refute it. VRP (trial) at 912. On this basis, the defense hoped to raise a reasonable doubt that Slert's story was true.

Failing to challenge the admission of evidence is ineffective assistance only if there is no legitimate strategic reason for doing so, the challenge would likely have succeeded, and the results of the trial would have been different. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). The challenges Slert raises for the first time on appeal would not have succeeded and were

antithetical to Mr. Cordes's legitimate strategy. There was no ineffective assistance.

e. The sentencing judge heard the whole trial, so it was unnecessary for defense counsel to reargue mental health issue and self-defense.

Slert argues that his trial counsel was ineffective for failing to raise his mental-health problems and failed self-defense claim at sentencing. However, these issues were thoroughly explored at the seven-day trial, which ended only one week prior to the sentencing date. VRP (trial) at 1, 873; VRP (Feb. 10, 2010) at 1. The trial judge was the sentencing judge. *Id.* (Hon. James Lawler). Mr. Cordes had no need to rehash what everyone had heard only a week earlier. *See* VRP (Feb. 10, 2010) at 7-8. Even if he had done so, it would not have alerted the judge to anything that would have changed his mind. *See id.* at 9 (basing the sentence on the crime's impact on the victim's family). Moreover, this was Slert's third sentencing for the same offense. The sentence imposed was the top of the standard range, which was no different than the sentence imposed after each of the two previous trials. *Id.* at 2-3, 8. Slert cannot show prejudice when the judge, based on all the facts, exercised his discretion in a manner consistent with other judges who heard the same case.

f. Conclusion: Slert's trial counsel was competent and reasonable.

In sum, Slert's trial counsel capably pursued a clear trial strategy that, although unsuccessful, was in no way unreasonable. It is easy to Monday-morning-quarterback trial counsel after a guilty verdict. The court should resist the temptation to do so here and deny Slert's ineffective assistance claim.

III. A *Bone-Club* analysis is not required before a private discussion with both counsel regarding purely legal matters and agreed-upon facts.

Before voir dire began in this case, the trial court conferred with both counsel regarding the panel members' answers to the jury questionnaire. The court then put on the record that, based on their questionnaire responses, four panel members were excused for cause on agreement of the parties. VRP (trial) at 5; Clerk's Minutes (1/25/10), Supp. CP 329 at 1. Slert was present with counsel. VRP (trial) at 3. Neither he nor his attorney objected to this announcement or asked for clarification. VRP (trial) at 5. Afterwards, voir dire took place in open court. When discussing sensitive matters that might taint the jury pool, the court brought jurors into the courtroom one at a time for questioning on the record, in Slert's presence. *See id.* at 10-14. (explaining the

process). The courtroom was open to the public during this process.

A criminal defendant has a constitutional right to a public trial, and arguably has a right to an open proceeding merely by being a member of the public. U.S. CONST. amend VI; WASH. CONST. Art. I, § 22; *id.* Art. I, § 10. The public trial right under the two Washington provisions is closely related, such that "the two sections confer essentially the same rights." *In re Det. of Ticeson*, No. 63122-5-I, slip op. at 7 (Div. 1 Jan. 18, 2011). This right applies to trial and other proceedings such as suppression hearings and jury selection, but not to "purely ministerial or legal issues that do not require the resolution of disputed facts." *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (Div. 2 2010) (quoting *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (Div. 2 2008)). Before closing a proceeding to which the public trial right applies, the court must engage in a balancing test known as a *Bone-Club* analysis. *Ticeson*, slip op. at 4-5. Alleged violations of the public trial right are reviewed de novo. *Id.*

There are several recent cases in which the trial court is deemed to have violated the defendant's public trial right by

conducting voir dire questioning in chambers or in a closed courtroom. *See, e.g.*, *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (Div. 2 2010). This has become a hot topic since the decision of two related state supreme court cases and one U.S. Supreme Court case. *See State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009); *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). What all of these cases have in common is that voir dire questioning, i.e. the eliciting of juror responses that might form the factual basis for a for-cause or peremptory challenge, occurred while the public was excluded from the proceedings. Here, however, we have a much more run-of-the-mill circumstance: based on an agreed set of facts (jury questionnaire answers), counsel conferred with the judge about the legal question of which jurors should be dismissed for cause without the need for any questioning. When the questioning began afterwards, it occurred in open court and no one was excluded from the courtroom.

Division One of the Court of Appeals recently held that no *Bone-Club* analysis was necessary when the trial court discussed evidentiary objections in chambers with counsel, made rulings on them, and then made a record describing the conferences.

Ticeson, slip op. at 9. This sort of purely legal discussion was not an "adversary proceeding" that had to be public. *Id.* The court compared the in-chambers proceeding to a sidebar legal discussion during the course of a trial, which need not be public. *See id.* at 9 n.27, 11 n.38.

Ticeson is squarely on point. Defense counsel, the judge, and the prosecutor had the jury questionnaires in hand. No facts were in dispute; they merely had a legal discussion regarding which jurors met the standard for for-cause excusal. This conversation is indistinguishable from the sidebar counsel typically have at the close of voir dire questioning when they pick the jury, or the numerous sidebars counsel might have during a trial. "The public trial right does not apply to a trial court's conference with counsel on how to resolve a purely legal question." *Sublett*, 156 Wn. App. at 182. No *Bone-Club* analysis was required and no public trial violation occurred.

IV. A defendant has no constitutional right to be present at a private discussion with both counsel regarding purely legal matters and agreed-upon facts.

For reasons nearly identical to those in the previous section, the defendant's constitutional right to be present was not violated

when the court and counsel conducted a sidebar regarding for-cause excusals. Although a defendant has a constitutional right to be present at critical stages of trial, he has no "right to be present during in-chambers or bench conferences between the court and counsel on legal matters . . . [that] do not require a resolution of disputed facts." *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). In *Lord*, the defendant challenged his exclusion from several sidebar conferences and in-chambers proceedings. These proceedings addressed the wording of the jury questionnaire, evidentiary rulings, and the like. The court ruled that Lord had no right to be present at any of the proceedings, which "involved only discussion between the court and counsel on matters of law." *Id.* at 307. Just as in *Lord*, the defendant here had no right to be present at a legal discussion regarding which jurors were excusable for cause based on a jury questionnaire.

V. The trial judge's reasonable limits on cross-examination were neither an abuse of discretion nor a violation of the Confrontation Clause.

A criminal defendant has a constitutional right to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. Art.1, § 22. This right entails a "'full and fair opportunity to probe and expose [the] infirmities'" of the witnesses' testimony through

cross-examination. *State v. Price*, 158 Wn.2d 630, 641, 146 P.3d 1183(2006) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 21-22, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)). However, the right is not absolute. *State v. Classen*, 143 Wn. App. 45, 59, 176 P.3d 582 (Div. 2 2008). The trial court may reasonably limit the scope of cross-examination if concerned about prejudice, relevance, or confusion of the issues. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). These limitations are reviewed for manifest abuse of discretion. *Id.*

A. Defense counsel got in all the impeachment evidence he needed against Schwenk; the remainder was not probative enough to outweigh its extreme prejudice.

One of the witnesses against Slert was a jailhouse informant named Schwenk. Schwenk testified that Slert said he had shot Benson because Benson had come on to him and Slert wanted to see Benson dead. VRP (trial) at 433, 478. Because this testimony flatly contradicted Slert's self-defense account, the defense attempted to discredit Schwenk as an unscrupulous opportunist. Slert's counsel was able to cross-examine Schwenk at length. *Compare id.* at 431-35, 473-79 (12 pages of State's direct and redirect) *with id.* at 435-36, 443-73, 479-82 (36 pages of defense cross and recross). The cross-examination centered on the fact

that Schwenk got a deal in exchange for his testimony. The defense established the charges Schwenk was facing and his high offender score, pointing out that he was subject to as much as 90 additional months in prison, but that as a result of his testimony he received credit for time served. *Id.* at 443-46, 451-52, 468-69. Defense counsel also insinuated that Schwenk waived his speedy trial rights in order to get an attorney who could wheedle him a deal. *Id.* at 453-54. The trial court sustained objections to this line of testimony. *Id.* Later, however, Schwenk brought up speedy trial waivers himself to explain that they were not an attempt to get a deal, and the defense cross-examined him on that statement. *Id.* at 466-73.

There was one line of questioning that the defense could not pursue. The defense attempted to cross-examine Schwenk about his gender and a lawsuit he had filed under a woman's name. *Id.* at 437-443. The lawsuit named Schwenk as a transsexual and stated his claim that a prison guard tried to rape him. *Id.* at 442. The defense wished to cross-examine Schwenk about the lawsuit to imply that he would lie for personal gain. *Id.* The State objected because the questions were unduly prejudicial, irrelevant, and proving the suit's existence would require extrinsic evidence on a

collateral matter. *Id.* at 441, 443. The trial court sustained the objection. *Id.* at 443.

The evidence summarized above shows that the defense had a full and fair opportunity to expose the weaknesses of Schwenk's testimony. The defense portrayed Schwenk as a lifetime convict and con artist who "would make up a story about his own mother if it could save him as much as one week in jail." *Id.* at 946-49. The benefit to Schwenk of testifying and the lengths to which he went to get a deal were obvious to the jury. The only evidence not before the jury was of the lawsuit, which was extremely prejudicial and not relevant to the case. *See* ER 403 (allowing for the exclusion of unduly prejudicial evidence). There was no need to inject hot-button issues such as transsexuality and prison rape into the trial. The judge did not abuse his discretion in determining that the impeachment value of this collateral matter was substantially outweighed by its extreme prejudice. Accordingly, the reasonable limits on Schwenk's cross-examination did not violate Slert's right to confrontation.

B. Limiting cross-examination regarding the (nonexistent) recording of Slert's conversation with McCroskey was within the trial court's discretion.

i. Recapitulation of facts

Former Lewis County Sheriff McCroskey took a small part in the investigation of the campsite where the shooting occurred. VRP (Nov. 18, 2009) at 104-05. Eventually, McCroskey took one of the available police cars and drove Slert to jail, where Slert would wait until the detectives arrived. *Id.* at 105. Slert was in custody at the time; the car McCroskey drove had a cage between the front and back seats. (The car McCroskey usually drove did not have such a cage.) *Id.* at 105, 109. On the long drive back to Chehalis, Slert began conversing with McCroskey. *Id.* at 106, 139-40. The conversation was mutual and on a wide range of topics. *Id.* at 107-08, 127-28. During this time, Slert made unsolicited statements about certain aspects of the case. *Id.* McCroskey admitted that he asked Slert some questions in response. *Id.* at 127-28.

This conversation was the subject of a CrR 3.5 suppression motion for allegedly violating *Miranda* and because the defense alleged that McCroskey had secretly recorded the conversation. At the CrR 3.5 hearing, McCroskey denied that he recorded Slert and denied that any recording of their conversation existed. *Id.* at 109-11, 131-32. He admitted that he had a recording device in the car he usually drove, but he did not drive his usual car. *Id.* McCroskey

also explained that the recording devices were cheap and worked poorly. *Id.* at 109. There was evidence that the recorders were too ineffective to be able to pick up a rear passenger's voice clearly, and Slert was in the back seat. *Id.* at 145-46. No recording was mentioned in McCroskey's initial report, made shortly after he drove Slert to jail, and McCroskey did not remember telling someone he had made a recording. *Id.* at 111, 130-132; VRP (Nov. 20, 2009) at 127.

The defense attempted to impeach McCroskey at the 3.5 hearing through the testimony of David Arcuri, former chief criminal deputy prosecutor in Lewis County. Arcuri testified that he had a conversation with McCroskey and Jeremy Randolph, the elected prosecuting attorney at the time, in which McCroskey said that he had recorded his conversation with Slert. VRP (Nov. 20, 2009) at 90, 92-93. McCroskey testified that he did not say such a thing. VRP (Nov. 18, 2009) at 111, 137-38. Randolph testified that they had a meeting about McCroskey's transporting Slert to jail, but that they had not talked about any recording. *Id.* at 143-45. . The trial court found that the recording did not exist. VRP (Nov. 20, 2009) at 156-59. Based on this ruling and on its *Miranda* ruling, the court

denied the defense motion to suppress Slert's conversation with McCroskey. *Id.* at 159.

At trial, the defense attempted to cross-examine McCroskey regarding whether he recorded the conversation he had with Slert. VRP (trial) at 624. McCroskey denied making any recording. *Id.* The State objected to further questioning on the issue and the trial court, referencing the 3.5 hearing as an offer of proof, sustained the objection. *Id.* at 624-31.

ii. The trial court had discretion to limit Slert's cross-examination of McCroskey to avoid a substantial side-trial that, in the end, pertained solely to one contradictory statement.

The trial court's limitation on McCroskey's cross-examination did not violate Slert's right to confrontation. The alleged recording was the subject of a full evidentiary hearing at which the judge ruled no recording existed. No affirmative evidence established the existence of a recording: the only evidence offered was that McCroskey, who denied the recording's existence, had once said the opposite. Because it was not under oath, this hearsay statement was admissible only for impeachment purposes, not as evidence. *See* ER 801(d)(1)(i). There was therefore no admissible evidence on which the jury could find that the recording existed.

The judge had the power to exclude questions about the recording as irrelevant under ER 104(a)-(b).

The defense hoped to use the inconsistency in McCroskey's statements as impeachment evidence. *See* ER 104(e). However, McCroskey had already denied ever making an inconsistent statement. The defense needed to introduce extrinsic evidence to disprove McCroskey's denial. Under ER 403 and 611, the court has discretion to limit extrinsic evidence to prevent waste of time and confusion of the issues. The trial court's reference to the 3.5 hearing indicates its unwillingness to allow the jury to be pulled into a substantial side trial about whether McCroskey once said something about a recording. This was not an abuse of discretion and did not undermine Slert's full and fair opportunity to cross-examine McCroskey.

Furthermore, the collateral evidence rule prohibits impeachment by extrinsic evidence on a collateral matter. *State v. Petrich*, 101 Wn.2d 566, 574, 683 P.2d 173 (1984). "The test for collateralness is whether evidence is admissible for any purpose independent of contradiction." *Id.* Whether McCroskey had ever told someone he had recorded Slert was irrelevant to Slert's guilt or

innocence because no admissible evidence of a recording existed. The jury *could not* properly find that a recording existed and that McCroskey was attempted to cover it up. Such a finding would have been relevant, but it was not possible on the evidence. Thus, all that the questioning could have uncovered was McCroskey's allegedly contradictory statement, and so the extrinsic evidence was barred by the collateral source rule.

The confrontation clause does not give a defendant carte blanche to cross-examine the State's witnesses about anything and everything. The trial court's limitations on Slert's cross-examination were well-grounded in the rules of evidence and avoided undue prejudice, waste of time, and confusion of the issues. *Cf. Fisher*, 165 Wn.2d at 752. These reasonable limits did not violate Slert's right to confrontation.

VI. No evidence was admitted in violation of the defendant's privilege against self-incrimination.

A defendant may not be forced to incriminate himself. U.S. CONST. amends. V, XIV. Part of this privilege includes the right to *Miranda* warnings before being subjected to custodial interrogation by the police. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345,

347 (2004). Without such warning, the interrogation is coercive and so must be suppressed.

A. The defendant's initial statements to Ranger Nehring occurred out of custody, and once in custody Slert was not interrogated until being Mirandized.

Slert flagged Ranger Nehring down on the 5230 Road to report that he had shot someone and still had the guns in his car. VRP (Nov. 18, 2009) at 18-19. Ranger Nehring told Slert to put his hands outside the window, seized the guns from the front passenger seat, and began speaking to Slert. *Id.* at 26-28. He asked Slert about the shooting and had Slert exit the vehicle. The two continued to talk until two other Rangers arrived as backup. *Id.* at 28-33. By that point, Slert had told Nehring that the shooting occurred at his campsite at the end of the 5230 Road. *Id.* at 34. Nehring placed Slert in protective custody as two other Rangers arrived to transport Slert up to the campsite. *Id.* at 34. The Rangers decided that they would not ask Slert any questions about the shooting, and so they initially did not read Slert his constitutional rights. VRP (Nov. 20, 2009) at 10. On advice from a superior officer, however, the Rangers stopped the car and read Slert his constitutional rights. *Id.* Slert acknowledged the rights and appeared to understand them but did not invoke them. *Id.* at

12-14. Instead, both before and after the rights advisement, Slert spoke to the Rangers about what had happened. *Id.* at 14-15. Slert was not responding to any questioning by the Rangers; they still had resolved not to ask him about anything other than directions to the campsite. *Id.* Once the victim was found and confirmed dead by aid personnel, the Rangers handed the investigation off to other officers. *Id.* at 35-36.

An officer may question a suspect who is detained upon reasonable suspicion of a crime without rending him "in custody" for *Miranda* purposes. *Heritage*, 152 Wn.2d at 218 (defining custody as when "a reasonable person . . . would have felt that his or her freedom was curtailed to the degree associated with a formal arrest"). Ranger Nehring's initial interaction with Slert was a seizure, but not one in which Slert was in custody. Rather, Slert was in or near his own vehicle, in public, while talking to Nehring for initial investigative purposes. It was not until the other Rangers arrived and Slert was put into protective custody that his freedom was sufficiently curtailed for *Miranda* to take effect. There is no constitutional problem with the conversation before that point, which was not a custodial interrogation. *See id.* (refusing to suppress unwarned admissions from a noncustodial interrogation).

After Slert was placed into custody, the Rangers declined to ask him any questions regarding the case. The Rangers planned at some point to ask Slert about directions to his campsite, but they already knew it was at the end of the 5230 Road. Before reaching the end of the road, the Rangers stopped and Mirandized Slert. Any questions they asked regarding directions to his campsite were therefore preceded by a full advisement of rights, which Slert did not invoke. Indeed, Slert cooperated fully with the Rangers, offering several unsolicited statements about the shooting both before and after being read his rights. These statements were not the product of any interrogation, since they were spontaneous rather than in response to questions. *See State v. Miner*, 22 Wn. App. 480, 591 P.2d 812 (Div. 2, 1979) (exempting spontaneous statements from the *Miranda* requirement), *review denied*, 92 Wn.2d 1011. Thus, Slert made no unwarned statements to the Rangers in response to custodial interrogation. The trial court had no reason to suppress any of his initial interaction with the Rangers.

Finally, in making a 3.5 motion to suppress statements Slert made later at the crime scene, defense counsel noted that Slert had been fully Mirandized by the Forest Service personnel. VRP (Nov. 20, 2009) at 132. Thus, not only did Slert fail to challenge the

propriety of admitting his conversation with the Rangers, he affirmatively admitted that there was no *Miranda* problem with those statements. Under the circumstances, admitting this evidence cannot be a manifest error affecting a constitutional right. RAP 2.5.

B. The officers repeatedly warned the defendant of his constitutional rights and scrupulously honored those rights during the investigation.

Defense counsel challenged the admission of Slert's later statements because of an alleged failure to "scrupulously honor" Slert's Fifth Amendment rights. The allegation was the subject of a CrR 3.5 hearing at the first trial and again during this third trial. But, the facts reveal that officers advised Slert of his constitutional rights again and again. Slert voluntarily spoke to them because he wanted to tell his side of the story.

i. Recapitulation of Facts

It is undisputed that Slert was read his constitutional rights by three different officers during the initial investigation of the crime scene. VRP (Nov. 20, 2009) at 132. The Rangers read Slert his rights on the way to the campsite. *Id.* at 10. When Deputy Shannon arrived to investigate, she reread Slert his rights before questioning him. VRP (trial) at 264. The same was true when

Detective Wetzold arrived. *Id.* at 491. Through all this time, Slert continued to cooperate with law enforcement and to speak with them. He offered several unsolicited Statements to the Rangers on the way to the scene. VRP (Nov. 20, 2009) at 14-15. Once there, Slert was so forthcoming that Dep. Shannon actually had to tell him to stop talking to her and to wait for Det. Wetzold to show up. VRP (trial) at 265-66.

After speaking with Slert regarding the incident, Wetzold asked Slert to provide a taped statement. VRP (Nov. 18, 2009) at 197-98. On the tape, Wetzold advised Slert of his constitutional rights for a fourth time. *Id.* at 198. Slert asked Wetzold whether it would be better for him to say nothing, and Wetzold told Slert he couldn't give him any legal advice. *Id.* at 199-200. At that point, Slert said, "Why don't we just leave it at that and then, uh, I won't say anymore." *Id.* at 200. Wetzold interpreted this as a refusal to give a taped statement rather than as an invocation of the right to remain silent. Later, Wetzold returned to tell Slert that the physical evidence at the scene was inconsistent with what Slert had told him. *Id.* at 204-05. Two other law enforcement officers asked Slert at the scene if he sustained any injuries. VRP (Nov. 20, 2009) at 135-36.

Then, Sheriff McCroskey drove Slert to jail. VRP (Nov. 18, 2009) at 105. As Slert had done with the Rangers beforehand, Slert struck up a conversation during the long drive. *Id.* at 106, 139-40. The conversation was mutual and touched on a wide variety of topics; Slert brought up his own case at times. *Id.* at 107-08, 127-28. McCroskey asked some questions in response, but only if Slert brought the case up. *Id.*

When they arrived at the jail, Slert was placed in a holding cell. VRP (trial) at 622-23. A few hours later, Detectives Brown and Wetzold returned from the crime scene and contacted Slert. VRP (Nov. 18, 2009) at 176-77. Brown's report indicated that Wetzold reminded Slert that his constitutional rights were still in effect. VRP (Nov. 20, 2009) at 48-49, 74. Nine years later, Wetzold could not recall that he had done so; he remembered Brown readvising Slert of his rights. VRP (Nov. 18, 2009) at 177, 211. After the interview, Slert agreed to provide a taped statement, during which time Brown fully readvised Slert of his rights. VRP (Nov. 20, 2009) at 50. Slert also submitted to a polygraph, before which he was fully Mirandized. *Id.* at 115. Then, Slert was released without charges. VRP (Nov. 18, 2009) at 178. He periodically called Wetzold to inquire about his car and the case.

See id. at 178-87. He was not in custody during these conversations, but at one point requested an attorney. *Id.*

At the first trial, the parties litigated the admissibility of almost all of the statements described in this section. *See State v. Slert (Slert I)*, No. 31876-8-II, 2005 WL 1870661 at *1-2, *5. (Aug. 9, 2005). The first trial court held that Slert's "Why don't we just leave it at that" statement to Wetzold was a *Miranda* invocation, and so suppressed all of Slert's subsequent statements at the scene. *See id.* at *5 n.6. However, it did not suppress Slert's conversation with McCroskey while driving to jail because McCroskey did not actively elicit Slert's statements. That court also denied the motion to suppress Slert's statements made at the jail because he was readvised of his rights beforehand. This ruling was affirmed upon appeal. *Id.* at *5-6.

The defense reraised the issue during the third trial. The State attempted to preclude relitigation of the issue based on the law of the case, but nevertheless had to do so. At the end of the hearing, the court came to essentially the same decision as in the first trial. VRP (Nov. 20, 2009) at 155-62 (oral ruling). Slert's statements at the scene were admissible until the point that he

invoked his rights to Wetzold, after which they were suppressed. The conversation with McCroskey was admissible because Slert initiated the conversation and McCroskey did not encourage him to talk about the case. The statements at the jail and during the polygraph examination [6] were admissible because Slert was reminded or readvised of his rights before them. After Slert's release without charges, the statements from the telephone calls he made to Wetzold were admissible until he asked for an attorney, after which they were suppressed. *Id.*

ii. To the extent that any violations of the defendant's rights occurred, the trial court correctly suppressed evidence and followed the law of the case.

Slert's statements at the scene, his conversation with McCroskey while driving to jail, and his statements made at the jail are all clearly covered by the law of the case doctrine. This exact issue was fully litigated during the first trial and its resolution was affirmed on appeal. This court should not allow Slert to relitigate the matter. *See State v. Roy*, 147 Wn. App. 309, 314, 195 P.3d 967 (Div. 3 2008) ("[O]nce there is an appellate court ruling, its

[6] The parties agreed that that the polygraph itself was inadmissible. This ruling concerned whether Slert's statements made during the polygraph would be admissible. VRP (Nov. 20, 2009) at 162.

holding must be followed in all of the subsequent stages of the same litigation.").

Even if the court decides that it should consider the merits regarding these statements, the prior courts' holdings were sound. Those courts were right to suppress all evidence obtained after Slert invoked his rights at the scene. But, then Slert changed his mind. He engaged McCroskey in casual conversation as they drove, and he brought up his own case. This was no interrogation; it was a conversation on wide-ranging topics. *Cf. Miner*, 22 Wn. App. 480. "It would be inconsistent with our scheme of constitutional protection for individual liberty to conclude that an individual can be deprived of the right to change his mind and submit voluntarily to questioning." *State v. Pierce*, 94 Wn.2d 345, 350-51, 618 P.2d 62 (1980), *overruled on other grounds*, *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 1883, 68 L. Ed. 2d 378 (1981). At the jail, Slert was reminded of his rights and readvised of them. It didn't matter: Slert wanted to cooperate. As in the previous appeal, "nothing in the record contradicts the court's finding that [Slert's] statements were voluntary." *Slert I*, 2005 WL 1870661 at *5.

The 3.5 motion and hearing in this trial addressed a few more statements than *Slert I* did. The parties also addressed the admissibility of Slert's statements made during the polygraph, and the admissibility of Slert's statements when he telephoned Wetzold. These items are not directly addressed by the *Slert I* ruling but are easily disposed of under its logic. The polygraph examination was voluntary and preceded by a full readvisement of rights, like Slert's taped statement at the jail. Since the taped statement was admissible, statements made during the polygraph were also admissible. The telephone calls to Wetzold occurred much later, while Slert was out of custody, and so do not implicate *Miranda*. *Heritage*, 152 Wn.2d at 218. Nevertheless, the trial court suppressed portions of the calls because Slert requested an attorney, to which he was entitled under CrR 3.1. These rulings were correct and should be upheld.

Slert was able to conduct a full-blown 3.5 hearing in this third trial despite having fully litigated most of the issues in the first trial and on appeal. Enough is enough. This court should refuse to reconsider its prior decision.

VII. The trial judge in no way undermined the defendant's right to a jury trial.

A. Recapitulation of facts

Juror 24 was very candid during voir dire. On his questionnaire, he indicated that he had heard something about the case before. VRP (trial) at 41. During individual voir dire in open court, he said he heard about the case because he worked for the Forest Service at the time. He did not remember any details of the case at all. *Id.* When asked if he had any discussion of the incident with other Forest Service employees, he responded, "I [am] wracking my brain. I don't remember. I could have, but I couldn't honestly say one way or the other. I just don't remember for sure." He learned whatever information he once knew "through the grapevine" or perhaps in the newspaper, but "didn't remember a lot of details about it." *Id.* at 42. Juror 24 worked as a civil culturist, and had no contact with law enforcement at the time. *Id.* He later came to know Bob Tokach, who was connected to the case but would not be testifying at trial. *Id.* at 46-49.

When asked if anything had caused him to form an opinion about the case, Juror 24 replied that he didn't think so. Juror 24 was concerned that his memory might be triggered if he heard

more about the case, but said that at present he did not remember anything. *Id.* at 43. The defense reelicited that Juror 24 was worried that if he heard the trial evidence, he might remember more things. *Id.* at 45. However, Juror 24 did not remember "reading or listening o hearing or talking to anybody about the case" since perhaps hearing about it when it occurred. *Id.* at 46. When the defense attorney asked him, "based on what information you may have or that may be triggered," whether it would be fair for him to sit on the panel, Juror 24 said, "In all honesty, I don't think so. . . . Sorry I can't be more help." *Id.* at 47.

The defense "very reluctantly" moved to excuse Juror 24 for cause based on his connection to Tokach and his indication that his memory might be triggered by the evidence. *Id.* at 48. The State clarified that Tokach would not be called as a witness. The trial court then denied the motion because Juror 24 did not remember any details and had only heard about the case in vague way many years before. *Id.* at 49. The defense peremptorily struck Juror 24. *See id.* at 124 (indicating that Juror 24 was not on the final panel).

B. The trial court's decision to keep Juror 24 on the panel did not violate Slert's right to an impartial jury.

The purpose of voir dire is to secure an impartial jury, which is one aspect of the constitutional right to a jury trial. *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). "Voir dire is not a topic that lends itself to appellate review because of the nuances and subtleties presented by each jury case." *Lopez-Stayer ex rel. Stayer v. Pitts*, 122 Wn. App. 45, 50-51, 93 P.3d 904 (Div. 3 2004). A great deal of the process must therefore be left to the trial court's discretion. *Davis*, 141 Wn.2d at 825-26. This discretion is "limited only when the record reveals that the court abused its discretion and thus prejudiced the defendant's right to a fair trial." *Id.*

A juror should be excused for cause if his or her views will substantially impair performance of the duties under the jury instructions and oath. *State v. David*, 118 Wn. App. 61, 68-69, 74 P.3d 686 (2003), *overruled on other grounds*, 154 Wn.2d 1032 (2005), 160 Wn.2d 1001, 156 P.3d 903 (2007). The party challenging the juror bears the burden of demonstrating the facts necessary to the challenge. *State v. Wilson*, 141 Wn. App. 597, 606, 171 P.3d 501 (Div. 3 2007). The court's decision not to strike a juror for cause deserves considerable deference. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 309, 868 P.2d 835 (1994).

The trial court was correct not to strike Juror 24. Juror 24 freely disclosed his familiarity with the case. He knew someone partially involved in the investigation who would not testify at trial. He heard about the case nearly ten years before, but couldn't remember any details. Juror 24's discomfort came from his fear that he might remember something later, despite him not remembering anything presently. In other words, Juror 24 was afraid there was a possibility that he might be impartial at some point and in some undefined way. But, his attitude, character, candor, and memory were such that he could be impartial. The trial judge is best situated to consider these variables. *David*, 118 Wn. App. at 69. The court did not "manifestly abuse its discretion" in determining that Juror 24 would faithfully and impartially discharge his duties if seated on the panel. *State v. Yates*, 161 Wn.2d 714, 743, 168 P.3d 359 (2007).

Even if the trial court erred in refusing to excuse Juror 24, Slert cured the error with a peremptory challenge. The defense's peremptory challenge of a juror who should have been excused for cause eliminates the constitutional violation because no impartial juror is seated on the panel. *Yates* 161 Wn.2d at 746-47. In *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001), our supreme court

extensively examined state and federal case law regarding whether the forced use of a peremptory challenge violates the defendant's right to a fair trial. The court concluded that the Washington constitution provided no greater protection that the federal constitution in the matter, and therefore no violation occurred unless a biased juror was actually seated on the jury. *See id.* at 163-64 (opinion of Bridge, J.). The crucial fifth vote for this holding came from Justice Alexander, who concluded that the forced use of a defendant's last peremptory was reversible error under state common law; however, this was a common law rule and not a constitutional right. *See* id. at 165-66 (Alexander, J., concurring). Justice Alexander opined that the common law rule should be abandoned in favor of the constitutional rule enunciated by the U.S. Supreme Court, which Justice Bridge's opinion followed. *Id.* at 166-68. Justice Alexander therefore signed the majority opinion in addition to his separate concurrence. *See id.* Thus, *Fire* holds that, as to this constitutional issue, the State constitution confers no greater right than the federal constitution: the use of a peremptory to remove a juror cures any error from the failure to dismiss the juror for cause. Without a showing that a biased juror was in fact

seated on the jury, the defense cannot demonstrate a constitutional violation.

Slert argues that because *Fire* did not engage in a *Gunwall* analysis, its holding doesn't count. This argument ignores *Fire*'s plain language, which indicates that the court examined state and federal constitutional law before rendering its decision. *See id.* at 163. A separate paragraph discusses Fire's failure to provide a *Gunwall* analysis as an independent ground upon which to deny his claim. *See id.* at 163-64 ("*Furthermore*, Fire neither argues that the Washington State Constitution provides more protection than the federal constitution nor addresses the criteria identified in *State v. Gunwall* . . . . *On this basis as well*, ... Fire's claim that he suffered prejudice fails." (emphasis added)). *Fire*'s holding has been recognized in subsequent a supreme court case, *Yates* 161 Wn.2d at 746-47 (relying on *Fire)*, and in unpublished decisions of this court, which cannot be cited here as authority. *See* GR 14.1. There is no dispute among the courts regarding *Fire*'s holding: it controls this issue.

Because the trial court properly exercised its discretion to keep Juror 24 on the panel, and because Slert cured any error by

peremptorily challenging Juror 24, no violation of Slert's right to an impartial jury occurred.

CONCLUSION

Slert has been convicted by the third jury to hear his case, after his third trial on the same facts. A defendant is entitled to a fair trial, but not a perfect one. *In re Pers. Restraint of Crace*, 157 Wn. App. 81, 98, 236 P.3d 914 (Div. 2, 2010). The trial below was eminently fair. Slert had the opportunity to relitigate issues he had previously raised, and his diligent counsel was able to exclude all of the evidence that ought to have been excluded. Slert had the opportunity to present his self-defense claim as he wished to present it and to cross-examine the State's witnesses on all reasonable grounds to undermine their testimony. Nevertheless, the jury convicted him of murder. Although this outcome is not the one Slert believes is just, at some point litigation must end. This court should affirm the trial court's rulings below and uphold his conviction and sentence.

RESPECTFULLY SUBMITTED this 26 day of January, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

BY: _____
J. BRADLEY MEAGHER, WSBA18685
Chief Criminal Deputy Prosecuting Attorney

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY ____ DEPUTY

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent,	)	No. 40333-1 II
vs.	)	
KENNETH SLERT, Appellant.	)	DECLARATION OF MAILING

Ms. Casey Cutler, paralegal for Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 26, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 26th day of January 2011, at Chehalis, Washington.

Casey L. Cutler, Paralegal
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