

75277-4

No. 95920-0

75277-4

NO. 75277-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TOMAS M. BERHE,

Appellant.

FILED

Mar 14, 2017

Court of Appeals

Division I

State of Washington

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS

Attorney for Appellant

WASHINGTON APPELLATE PROJECT

1511 Third Avenue, Suite 701

Seattle, WA 98101

(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE 5

E. ARGUMENT 11

1. The court’s failure to investigate a facially valid claim that racial bias infected deliberations and led to the guilty verdict requires a new trial..... 11

 a. Behre has the right to an impartial jury, free from racial animus 11

 b. A court must hold an evidentiary hearing where there is prima facie evidence of racial animus among deliberating jurors 13

 c. There is prima facie evidence that Juror 6 was treated with racial animus as the only African-American juror in the trial of an African-American defendant..... 15

 d. This prima facie evidence of race-based decision-making and racially offensive behavior during deliberations requires a new trial..... 19

 e. If an evidentiary hearing is conducted, the court should explore other behavior that casts doubt on deliberations... 20

2. The court admitted unreliable and scientifically dubious opinion testimony that the firearm from Berhe’s car matched the bullets and shell casings at the scene..... 20

a.	The court’s role includes excluding demonstrably unreliable scientific evidence.....	21
b.	A forensic scientist’s opinion of certainty that a firearm fired a particular bullet is unreliable, not validated, and unduly confusing to the jury	23
c.	The court improperly refused to limit misleading testimony about the absolute match between a gun and bullets, which is contrary to the underlying science.....	28
d.	The improperly admitted ballistics opinion evidence substantially impacted the outcome of the case	31
3.	The court admitted irrelevant and highly prejudicial claims about Berhe’s lack of cooperation during custodial interrogation, even after he plainly stated he did not want to talk to police	32
a.	Berhe unequivocally invoked his right to remain silent during custodial interrogation when he repeated three times, “I don’t even want to talk to you.”	32
b.	The improperly admitted statements after Berhe invoked his right to cut off questioning painted Berhe as volatile, dangerous, and disrespectful	36
c.	The video showing Berhe’s custodial interrogation was irrelevant, unduly prejudicial, and its improper admission requires reversal	37
4.	The prosecution’s misconduct throughout the trial caused the jury to base its verdict on improper considerations	42
a.	The prosecution may not use improper tactics to deny an accused person a fair trial.....	42
b.	The prosecution shifted the burden of proof to the defense and misrepresented its burden.....	43

c.	The prosecutor vouched for his witnesses and injected his own opinion into the case.....	47
d.	The prosecution misled the jury about the law governing missing evidence	50
e.	The prosecution asked for a verdict based on what feels right	52
f.	The prosecution misrepresented facts not in evidence	52
g.	The prosecution improperly elicited opinion testimony about a surveillance video.....	56
h.	The multiple instances of misconduct denied Berhe a fair trial	58
5.	The cumulative harm from numerous errors requires a new trial	59
6.	The court misunderstood its sentencing discretion to craft an exceptional term below the standard range.....	60
a.	The court abuses its discretion when it misunderstands its sentencing authority	60
b.	The court’s authority to impose an exceptional sentence extends to firearm enhancements	61
c.	The remedy is a new sentencing hearing	64
F.	CONCLUSION	65
	APPENDIX A CrR 3.5 Findings of Fact and Conclusions of Law	665

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>Ashley v. Hall</i> , 138 Wn.2d 151, 978 P.2d 1055 (1999)	56
<i>In re Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	34- 35
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	50
<i>In re Mulholland</i> , 161 Wn.2d 322, 166 P.3d 677 (2007) ...	60, 61, 62, 64
<i>In re Zufelt</i> , 112 Wn.2d 906, 774 P.2d 1223 (1989).....	13
<i>N. Fiorito Co. v. State</i> , 69 Wn.2d 586, 419 P.2d 586 (1966).	13
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583, 587 (2010)	31
<i>State v. Allen</i> , 182 Wn.2d 364, 341 P.3d 268 (2015)	50
<i>State v. Bartholomew</i> , 101 Wn.2d 631, 683 P.3d (1984)	21
<i>State v. Buckner</i> , 133 Wn.2d 63, 941 P.2d 667 (1997).....	22
<i>State v. Case</i> , 49 Wn.2d 66, 298 P.2d 500 (1956).....	59
<i>State v. Cauthron</i> , 120 Wn.2d 879, 846 P.2d 502 (1993).....	22
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	21
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	50, 58
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002)	36
<i>State v. Frost</i> , 160 Wn.2d 765, 161 P.3d 361 (2007)	51
<i>State v. Garcia</i> , 179 Wn.2d 828, 318 P.3d 266 (2014).....	31
<i>State v. Grayson</i> , 154 Wn.2d 333, 111P.3d 1183 (2005)	60

<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014)	43, 50
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	16, 43, 59
<i>State v. Piatnitsky</i> , _ Wn.2d _, 325 P.3d 167 (2014).....	32, 33
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	31

Washington Court of Appeals Decisions

<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 260 P.3d 857 (2011).....	22
<i>In re Det. of Gaff</i> , 90 Wn.App. 834, 954 P.2d 943 (1998).	52
<i>State v. Freeburg</i> , 105 Wn.App. 492, 20 P.3d 984 (2001)	39, 41
<i>State v. Fuller</i> , 169 Wn.App. 797, 805, 282 P.3d 126 (2012) ..	38, 39, 41
<i>State v. George</i> , 150 Wn.App. 110, 206 P.3d 697, <i>rev. denied</i> , 166 Wn.2d 1037 (2009)	56
<i>State v. Greene</i> , 139 Wn.2d 64, 984 P.2d 1024 (1999)	22
<i>State v. Jackson</i> , 75 Wn.App. 537, 7879 P.2d 307 (1994) 11, 13, 14, 15, 17, 19	
<i>State v. King Cty. Dist. Court W. Div.</i> , 175 Wn.App. 630, 307 P.3d 765 (2013).....	22
<i>State v. McDaniel</i> , 155 Wn.App. 829, 230 P.3d 245 (2010).....	39
<i>State v. Miles</i> , 139 Wn.App. 879, 162 P.3d 1169 (2007)	43
<i>State v. Nysta</i> , 168 Wn. App. 30, 275 P.3d 1162, 1168 (2012), <i>rev.</i> <i>denied</i> , 177 Wn.2d 1008 (2013)	35, 36

<i>State v. Perez-Mejia</i> , 134 Wn.App. 907, 143 P.3d 838 (2006).....	54
<i>State v. Thierry</i> , 190 Wn.App. 680, 360 P.3d 940 (2015)	44
<i>Turner v. Stime</i> , 153 Wn.App. 581, 222 P.3d 1243 (2009)	12

United States Supreme Court Decisions

<i>Berger v. United States</i> , 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).....	43
<i>Berghuis v. Thompkins</i> , 560 U.S. 370,130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).....	33
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973).....	21
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).....	43
<i>Georgia v. McCollum</i> , 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).....	12
<i>Hoffman v. United States</i> , 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).....	54
<i>McDonough Power Equip., Inc. v. Greenwood</i> , 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).....	16
<i>Michigan v. Mosley</i> , 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)	33
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	32, 33, 38
<i>Pena-Rodriguez v. Colorado</i> , 580 U.S. __, 2017 WL 855760, S.Ct. No. 15-606 (Mar. 6, 2017).....	12, 16

<i>Smith v. Illinois</i> , 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) .	35
<i>United States v. Blue</i> , 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966).....	36
<i>United States v. Young</i> , 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).....	47, 48
<i>Wheat v. United States</i> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).....	42

Federal Court Decisions

<i>Bruno v. Rushen</i> , 721 F.2d 1193 (9th Cir.1983).....	52
<i>Dyer v. Calderon</i> , 151 F.3d 970 (9th Cir.1998)	12
<i>Hurd v. Terhune</i> , 619 F.3d 1080 (9 th Cir. 2010).....	39
<i>United States v. Bess</i> , 593 F.2d 749 (6 th Cir. 2000).....	48
<i>United States v. Brooks</i> , 508 F.3d 1205 (9 th Cir. 2007).....	47, 54
<i>United States v. Green</i> , 405 F.Supp.2d 104 (D. Mass. 2005)...	22, 26, 30
<i>United States v. Henley</i> , 238 F.3d 1111 (9th Cir. 2001),.....	12
<i>United States v. LaPierre</i> , 998 F.2d 1460 (9 th Cir. 1993).....	57
<i>United States v. Lara-Ramirez</i> , 519 F.3d 76 (1st Cir. 2008).	18
<i>United States v. Monteiro</i> , 407 F.Supp.2d 351 (D. Mass. 2006).....	23
<i>United States v. Santistevan</i> , 701 F.3d 1289 (10 th Cir. 2012).....	33
<i>United States v. Splain</i> , 545 F.2d 1131 (8 th Cir. 1976).....	48
<i>United States v. Younger</i> , 398 F.3d 1179 (9th Cir. 2005).	48

United States Constitution

Fifth Amendment 32, 54
Fourteenth Amendment 21, 43, 59
Sixth Amendment 11, 12, 21

Washington Constitution

Article I, section 3..... 21, 59
Article I, section 9..... 32
Article I, section 21..... 21
Article I, section 22..... 11, 21, 43

Statutes

RCW 9.94A.533 62, 63
RCW 9.94A.535 60, 61, 62, 63
RCW 9.94A.589 61, 62

Court Rules

ER 701 56
ER 704 56
National Research Council of the National Academy of Sciences,
*Strengthening Forensic Science in the United States: A Path
Forward* (2009)..... 24

Other Authorities

Brandon L. Garrett & Peter J. Neufeld, <i>Invalid Forensic Science Testimony and Wrongful Convictions</i> , 95 Va. L. Rev. 1 (2009).....	22
<i>Com. v. Pytou Heang</i> , 942 N.E.2d 927 (Mass. 2011).....	24, 27
<i>Fleming v. State</i> , 1 A.3d 572 (Md. 2010).	23
<i>Gardner v. United States</i> , 140 A.3d 1172 (D.C. 2016)	24
<i>Motorola Inc., v. Murray</i> , 147 A.2d 751 (D.C. 2016)	24
National Research Council of the National Academy of Sciences, <i>Strengthening Forensic Science in the United States: A Path Forward</i> (2009).....	24, 25
President’s Council of Advisors on Science and Technology, <i>Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods</i> (2016)	24, 25, 27
Questlove, Does Black Culture Need to Care about What Happens to Hip-Hop?, May 27, 2014	17
Sarah Lucy Cooper, <i>Judicial Responses to Challenges to Firearms-Identification Evidence: A Need for New Judicial Perspectives on Finality</i> , 31 W. Mich. U.T.M. Cooley L. Rev. 457 (2014).....	26
<i>State v. Mayhorn</i> , 720 N.W.2d 776 (Minn. 2006).....	50
<i>United States v. Ashburn</i> , 88 F. Supp.3d 239 (E.D.N.Y. 2015)	27
<i>United States v. Glynn</i> , 578 F.Supp.2d 567 (S.D.N.Y. 2008)	26, 29
<i>United States v. Willock</i> , 696 F.Supp.2d 536 (D. Md. 2010)	27, 30
<i>Willie v. State</i> , 204 So. 3d 1268 (Miss. 2016)	27

A. INTRODUCTION.

Juror 6 was the sole African-American juror and one of several undecided jurors determining whether an African-American man, Tomas Berhe, was the person who fired shots at Everett Williams in a dark alley. Berhe had no clear motive while other acquaintances of the victim had reason to shift blame to Berhe.

Struggling to come to a decision, Juror 6 perceived undue race-based hostility from other jurors. After many days of deliberations, she voted to convict Berhe. But immediately after the verdict she contacted defense counsel and complained of racial animus among the jurors. Defense counsel presented the juror's declaration in a motion for a new trial, but the prosecution countered with declarations from other jurors denying they acted with racial hostility. The court prohibited the attorneys from initiating contact with any jurors to investigate Juror 6's claims, refused to hold an evidentiary hearing, and dismissed Juror 6's concerns as routine emotions during deliberations.

The court's summary dismissal of a juror's claim of racial discrimination in the jury room was coupled with an array of prosecutorial misconduct in a case with tenuous evidence of Berhe's culpability. Multiple trial errors require reversal.

B. ASSIGNMENTS OF ERROR.

1. The court improperly restricted Berhe from researching juror misconduct, refused to conduct a necessary evidentiary hearing, and denied his request for a new trial.

2. Berhe was denied a fair trial by an impartial jury based on evidence of racial discrimination among deliberating jurors.

3. The court impermissibly allowed the prosecution to rely upon unreliable and misleading opinion evidence that the fired bullets were definitively from the recovered firearm, denying Berhe a fair trial.

4. The prosecution's use of Berhe's custodial statements violated the Fifth Amendment and article I, section 9 because Berhe had invoked his right to remain silent,.

5. The court erroneously ruled Berhe did not invoke his right to remain silent when he said, "I don't want to talk to you." CP 287 (CrR 3.5 Conclusions as to Disputed Facts 3(1); CP 388 (Conclusion of Law 4(a)(3)).

6. The court should not have admitted the videotape of Berhe's custodial interrogation because it was irrelevant to the incident, unfairly prejudicial, and violated his right to remain silent.

7. The prosecution denied Berhe a fair trial by jury as guaranteed by the Fourteenth Amendment and article I, sections 3, 21, and 22 by repeatedly encouraging the jury to convict Berhe for improper reasons.

8. The cumulative effect of numerous trial errors deprived Berhe of a fair trial.

9. The court misunderstood its discretion to impose a sentence below the standard range.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When a court receives prima facie evidence that jurors exhibited racial bias during deliberations, the court must either hold an evidentiary hearing or order a new trial. An African-American juror informed the court that jurors treated her with racial hostility and displayed racial discrimination toward her because her race was the same as Berhe's. Did the court improperly bar the parties from independently investigating these allegations, refuse to order an evidentiary hearing, and deny the defense request for a new trial?

2. Based on recent government-sponsored forensic studies criticizing the accuracy and reliability of firearm examiners' claims of scientific proof that a certain gun fired a specific bullet, Berhe asked to

prohibit the prosecution from misleading the jury by offering opinion testimony of a ballistics match between a recovered gun and the bullets fired. The court refused, despite courts throughout the country placing these restrictions in similar cases. Did the court err by permitting the prosecution to mislead the jury about the scientific basis of its claim that Berhe possessed the gun that fired the fatal bullets?

3. A person invokes the right to remain silent when he says to police, "I don't even want to talk to you." Did the court erroneously rule that Berhe did not invoke his right to cut off questioning by repeating three times that he did not "want to talk" to the police?

4. Did the court's admission of the videotape of Berhe's custodial interrogation, where he refused to answer questions, cursed at the police, and complained that he knew how these officers played "sick games" due to his "past history" with them unfairly prejudice Berhe and permit the jurors to draw negative inferences from his right to remain silent?

5. The prosecution deprives an accused person of a fair trial when it urges the jury to convict the defendant for improper reasons. Such misconduct includes denigrating the defense, shifting the burden of proof, vouching for witnesses, injecting the prosecutor's personal

opinion into the case, and misrepresenting the law. By engaging in this objected-to misconduct, did the prosecution deprive Berhe of a fair trial?

6. A court's statutory sentencing authority includes the power to impose a sentence below the standard range if a mitigating factor offers substantial and compelling reasons for a lower sentence. The court imposed a sentence below the standard range, but believed its authority to decrease Berhe's sentence did not allow it to impose a concurrent sentence for a firearm enhancement. Did the court misunderstand its authority to impose an exceptional sentence?

D. STATEMENT OF THE CASE.

Shortly after midnight on July 22, 2013, someone fired several shots through the closed passenger window of Mike Stukenberg's parked car, where Everett Williams sat. 2/2RP 1425-26.¹ Williams died immediately; Stukenberg received a superficial wound to his arm. *Id.* at 1441-42; 2/17RP 2821.

Stukenberg gave many different versions of the shooting: he saw three unknown perpetrators, including a white male wearing a mask; he

only saw a shadow; he could not see what happened because his vision problems were exacerbated by the blinding flash of the gun; he did not believe Tomas Berhe was the shooter; Berhe was there but he did not see him pull the trigger; Berhe was the shooter but he only said this because he was worn down by police after he knew Berhe had been arrested. 2/2RP 1448-49, 1454; 2/3RP 1552, 1560, 1583. After the shooting, Stukenberg wiped his phone clean and only reluctantly spoke to police. 2/3 RP 1555; 2/11RP 2302-3, 2333.

The shooting occurred in an alley behind Eastlake Market. The alley abutted a parking lot that used lights with an orange hue, making it hard to discern colors, and the alley was dark. 1/27RP 775-76, 808; 1/28RP 939. People in nearby apartments looked out when they heard shots, and called 911, but did not see the shooting. *See* 1/27RP 731; 1/28 885, 911, 951, 976-79; 2/20RP 3063; 3/22RP 3152-53. They gave different descriptions of a nearby person who could have been involved. 2/28RP 839-40 (person in white t-shirt), 979-80 (average height male in long-sleeved shirt and dark colored clothing); 2/22RP 3022-23 (6' tall white male in red coat); 2/22RP 3070 (person in light

¹ The verbatim report of proceedings consists of 27 volumes, most of which are consecutively paginated. They are referred to by the month and date of

clothes).² Several neighbors saw two cars leaving the scene, including a dark sedan and a green Volkswagen. 2/1RP 1165, 1196, 1216.

Williams was part of a large social group of people in their late teens or early 20s who gathered for parties where they would “drink and do drugs,” as they had that day. 2/2RP 1313, 1368; 2/3RP 1853; 2/4RP 1759, 1811; 2/10RP 1980, 1991, 1993. On the night of the incident, they were coming or going from their friend Justin Guidy’s nearby party, and most had taken a substantial amount of drugs or alcohol, or both. 2/2RP 1306, 1383; 2/4RP 1780-83, 1831, 1867.

Trying to find Guidy’s party, Elijah Washington drove Berhe, Lucci Cascioppo, and Claire Villiot to the parking lot behind Eastlake Market. 2/4RP 1825; 2/10RP 1999-2001. Berhe barely knew Cascioppo or Villiot, and was a recent addition to this social group. 2/2RP 1297; 2/4RP 1757. They were following Kevin Simmons’s green Volkswagen, which held Dominic Oliveri and others. 2/4/RP 1867; 2/10RP 2005, 2090. Stukenberg had arrived at Guidy’s party earlier, and left with Williams, although they rarely hung out together. 2/2RP

the proceeding. All proceedings occurred in 2016.

² Berhe is 5’7” tall. 2/16RP 2473. He wore a dark t-shirt and long denim shorts on the night of the incident. Ex. 58, p. 10.

1321, 1405; 2/4RP 1521. Stukenberg said he and Williams were heading to a bar. 2/4RP 1532.

Days before Williams was shot, Dominic Oliveri accused Williams of stealing a bag of pills from him, and Williams had a bag of cocaine and oxycodone with him that night. 2/2RP 1345; 2/3RP 1530-31; 2/10RP 2102. Williams asked his friend Emily Schlackman if she thought Oliveri would kill him, but she laughed and said Oliveri was not the type. 2/22RP 3052, 3054.

Oliveri was at the parking lot at the time of the shooting and “disappeared” within days after. 2/2RP 1331; 2/10/RP 2095. His close friends had not seen him since. 2/2RP 1331; 2/3RP 1563; 2/4RP 1796, 1883. Oliveri retained a lawyer and said he would assert his right to remain silent if called to testify, although the jury was not told this was the reason he was not called as a witness. 2/11RP 2379.

Cascioppo was in the parking lot when the shooting occurred, with his girlfriend Villiot. Villiot claimed she was “totally gone” from taking Xanax mixed with alcohol and had no memory of the evening. 2/4RP 1766-67, 1780-81. Cascioppo suffered from memory loss due to long-term drug use. *Id.* at 1859. Despite mixing Xanax, cocaine and beer shortly before the incident, and his claim of memory loss,

Cascioppo said Berhe shot Williams. *Id.* at 1878. Even though he loved Williams “like a brother almost,” Cascioppo immediately fled to his mother’s house. 2/4RP 1815, 1856. He called Oliveri and told him to meet him there. 2/4RP 1880. They did not call for aid. 2/4RP 1880. Stukenberg and Cascioppo considered Oliveri their closest or oldest friend. 2/2RP 1562-63; 2/4RP 1854.

Several miles from the shooting, police stopped Berhe in a dark sedan that matched the description of one of the cars leaving the scene. 1/28RP 1096. Washington was driving. 2/1RP 1251. Under Washington’s seat, the police found a gun. 2/4RP 1931. Forensic scientist Kathy Geil test-fired this gun, compared bullets and shell casings, and concluded this firearm fired the bullets used in the shooting. 2/17RP 2698, 2704.

Berhe was charged with first degree murder with a firearm enhancement and first degree assault with a firearm enhancement for the ricochet bullet that hit Stukenberg. CP 1-2. Washington testified for the prosecution after receiving a grant of immunity. Ex. 50; 2/10RP 2075. He did not see the shooting but claimed Berhe told him that he shot Williams and accidentally shot Stukenberg. 2/10RP 2013, 2035.

Washington admitted he lied to police multiple times and gave various stories of events. 2/10RP 2059, 2061, 2063, 2073, 2075, 2079, 2090.

After arresting Berhe, the police did not follow up with most of the 911 callers who lived in the neighborhood until shortly before the trial, more than two years after the shooting. *See, e.g.*, 1/27RP 773; 1/28RP 936. They did not interview many witnesses in Williams' social group. 2/16RP 2450-58. Berhe criticized the lack of investigation. 2/16RP 2459-67, 2470-2471; 2/24RP 3285, 3293, 3322-24.

Berhe objected to the prosecution's claim that the firearm found in his car was the same gun that fired the fatal bullets based on evidence and case law casting doubt on the science underlying toolmark comparisons, but the court overruled his objection. 1/19RP 57-60; CP 37-38.

After the jury convicted Berhe of the charged offenses, one juror complained of racial harassment in the jury room. CP 474-78; 4/6RP 90, 105, 110. The court barred the attorneys from contacting other jurors to investigate and instead sent all jurors a letter saying they could contact the attorneys if they wished. 3/10RP 11; CP 292. Five jurors told the prosecution they had not acted with racial hostility. CP 322-28. The court refused to hold an evidentiary hearing. 4/26RP 110-11.

At sentencing, the judge agreed to impose a mitigated sentence of concurrent time for the first degree assault conviction because Stukenberg was shot by accident and he was suspected of playing a role in arranging this shooting. 5/26RP 172. The court believed it lacked discretion to impose the firearm enhancement concurrently and therefore imposed two consecutive firearm enhancements. *Id.*

E. ARGUMENT.

1. The court’s failure to investigate a facially valid claim that racial bias infected deliberations and led to the guilty verdict requires a new trial.

a. Behre has the right to an impartial jury, free from racial animus.

The Sixth Amendment and article I, section 22 guarantee accused persons the right to a trial by “an impartial jury.” U.S. Const. amend. 6; Const. art. I, § 22; *see also* Const. art. I, §21 (inviolate jury right). Jurors must “try a case impartially and without prejudice to a party.” *State v. Jackson*, 75 Wn.App. 537, 542, 7879 P.2d 307 (1994).

When a juror holds discriminatory views about the defendant’s racial group, these generalizations presumptively affect the juror’s ability to decide the case fairly and impartially. *Id.* at 543. Jurors who view the accused with racial animus “distort[] our system of criminal

justice.” *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

It is an “unmistakable principle” that “discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’” *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 2017 WL 855760, S.Ct. No. 15-606 Slip. op. at 15 (Mar. 6, 2017), quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). In *Pena-Rodriguez*, the Supreme Court held that evidence a deliberating juror “relied on racial stereotypes or animus” to convict a person violates the jury trial guarantee of the Sixth Amendment. *Id.* at 17. This Court has similarly ruled:

The right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitution[al] trial.

Turner v. Stime, 153 Wn.App. 581, 587, 222 P.3d 1243 (2009).

Prejudice need not have “pervaded the jury room” to establish a constitutional violation, because “the Sixth Amendment is violated by ‘the bias or prejudice of even a single juror.’” *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001), quoting *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.1998).

b. A court must hold an evidentiary hearing where there is prima facie evidence of racial animus among deliberating jurors.

When there is prima facie evidence of bias during jury deliberations, an evidentiary hearing “is the preferred course of action.” *Jackson*, 75 Wn.App. at 543-44. Prima facie evidence means the court must “accept[] the allegations as true.” *In re Zufelt*, 112 Wn.2d 906, 911, 774 P.2d 1223 (1989). The court “adopts factually as true all evidence and permissible inferences favorable” to the moving party’s case, without weighing competing evidence. *N. Fiorito Co. v. State*, 69 Wn.2d 586, 620, 419 P.2d 586 (1966).

In *Jackson*, after the verdict was entered, an African-American juror told defense counsel she overheard “Juror “X” speak negatively of African-Americans he encountered on a recent trip home. 75 Wn.App. at 539-40. The defendant was African-American. *Id.* Juror X made these remarks in a side conversation with another juror, not during deliberations. *Id.* The juror overheard Juror X say there are “more coloreds” than there used to be in his home town and the worst part of a reunion he attended was “socializ[ing] with the coloreds.” *Id.* at 540.

The judge reviewed the juror’s affidavit and decided it did not show Juror X voted to convict the defendant because of his race. *Id.* at

541-42. This Court “disagree[d] with the trial court’s conclusion,” holding that “as a matter of due process, the trial court should have conducted an evidentiary hearing before ruling on Jackson’s motion for a new trial.” *Id.* at 543.

Even though Juror X did not display overt racial animus in the context of deciding the case, this Court reasoned that his remarks created an “inference of racial bias.” *Id.* at 543. His comments reflected “a predisposition toward making generalizations about African-Americans as a group.” *Id.* When confronted with evidence indicating a juror harbored bias against African-Americans, the court should let the parties examine the jurors about their abilities to decide the case fairly and impartially. *Id.* at 544.

Once there is a “prima facie showing of racial bias,” an evidentiary hearing is required. *Id.* In *Jackson*, the juror’s racially derogatory comments arose in a case with an African-American defendant, where the jury was called upon to assess the credibility of African-American witnesses, and the outcome depended on the credibility of these various witnesses. *Id.* Having failed to hold a timely evidentiary hearing, a belated evidentiary hearing was an inadequate remedy due to the passage of time and difficulty of accurately relating

what occurred during deliberations made. *Id.* at 544-45. The Court reversed the conviction and ordered a new trial based on the prima facie evidence of a juror who harbored racial bias. *Id.*

c. There is prima facie evidence that Juror 6 was treated with racial animus as the only African-American juror in the trial of an African-American defendant.

Similarly to *Jackson*, an African-American juror complained of racial animus among the deliberating jury, in a case involving an African-American defendant. Juror 6's declaration said that other jurors treated her as aligned with Berhe merely because of their shared race. CP 474-77. She was "repeatedly accused of being 'partial' [to the defense] because I was the only African-American on the panel with an African-American defendant" and felt "implicit racial bias" and "race-based derision from other jurors." CP 475-76.

She was treated with hostility for being undecided, yet other undecided jurors were not treated that way. *Id.* She was "mocked" when she explained that Behre, as an African-American male, would need to behave carefully around the police. CP 475-76.

This racial hostility arose in the context of a case that depended on assessing the credibility and behavior of African-American participants (Berhe, Washington, and Williams) and Caucasian

observers or accusers. Ex. 20 (pictures of Berhe, Washington, Williams, Stukenberg, Villiott, Cascioppo, and others in social group).

The prosecution obtained counter-declarations from five jurors who denied their racial animosity. CP 322-28. However, jurors are unlikely to readily admit their own racial biases. “The stigma that attends to racial bias” my makes it hard for a juror to admit racial bias or accuse another of being “a bigot.” *Pena-Rodriguez*, Slip op. at 16.

Jurors may not even understand their conduct is predicated on impermissible racist stereotypes. *See, e.g., McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (Brennan, J., concurring) (observing that the bias of a juror will rarely be admitted by the juror himself and the juror “may be unaware of” own bias); *Williams v. Pennsylvania*, U.S. , 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016) (bias is “difficult to discern in oneself”); *Com. v. McCowen*, 458 Mass. 461, 501, 939 N.E.2d 735, 769 (2010) (Ireland, J., concurring) (“societal norm” that people will not “overtly express racially biased attitudes”). Appeals to racial prejudice are often not blatant. *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011). Subtle appeals to racial prejudice are “[p]erhaps more

effective Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." *Id.*

One juror's declaration, submitted by the prosecution in an effort to deny racial discrimination, concedes treating Juror 6 as a representative of African-Americans generally. Juror 11 said he "appreciated" Juror 6 for explaining "the norm in hip-hop culture" of wearing baggy pants without a belt, which was "a norm" unknown to some jurors. CP 326. "Hip hop culture" is synonymous with African-American youth. *See* Questlove, Does Black Culture Need to Care about What Happens to Hip-Hop?, May 27, 2014 ("Hip-hop is inseparable from black America and black Americans, who are either creators or consumers or subject matter, or sometimes all three.").³ This comment may not show overt racial bias, but it indicates "a predisposition toward making generalizations about African-Americans as a group" and treating people differently based on their race. *Jackson*, 75 Wn.App. at 543-44. Further inquiry should have occurred.

Juror 6's complaint was not simply that she was treated differently as the sole African-American in the jury room, but that she

³ Available at: <http://www.vulture.com/2014/05/questlove-part-6-does-black-culture-need-to-care-about-hip-hop.html>, last viewed Feb. 3, 2017.

was mistreated, mocked, and marginalized during deliberations for the specific reason that she was a member of the same racial minority as Berhe, and by treating her opinions differently because she was African-American, they demonstrated a potential for racially biased decision-making. CP 475-76.

At the prosecution's insistence, the court prohibited the parties from contacting the jurors to further investigate, thus precluding the defense from determining the extent of the problem. CP 293-97; 3/10RP 10-1. The court sent a letter to the jurors and directed counsel that they could only speak with those jurors who contacted them. CP 292. Five jurors supplied the prosecution with declarations to the State affirming their belief they were not racist toward Juror 6. CP 322-28. But the defense was not permitted to question these or other jurors to adequately investigate the claims Juror 6 raised.

A "judge does not have discretion to refuse to conduct any inquiry at all regarding the magnitude of the taint-producing event and the extent of the resulting prejudice" *United States v. Lara-Ramirez*, 519 F.3d 76, 87 (1st Cir. 2008).

The court discounted Juror 6's declaration without an evidentiary hearing because it believed animosity commonly arises

during jury deliberations. 4/26RP 110-11. However, Juror 6 alleged more than a disagreement about evidence. She claimed she was mocked and accused of improperly favoring Berhe simply because they were both African-American. CP 475-76. She alleged “race-based derision” and “racial bias.” *Id.* Her allegations that racial animus was part of the jurors’ verdict undermines the fairness and appearance of fairness essential to the criminal justice system.

In *Jackson*, one juror overheard racially prejudiced remarks outside of jury deliberations and unrelated to the case. This Court presumed that the overheard comment tainted the verdict. Juror 6 alleged racial hostility during deliberations that directly affected the verdict, which required further inquiry and a new trial.

d. This prima facie evidence of race-based decision-making and racially offensive behavior during deliberations requires a new trial.

The failure to inquire into racial animus in the jury room requires a new trial. *Jackson*, 75 Wn.App. at 544-45. Given that people are unlikely to accurately recall, admit, or understand their own racial bias, a belated evidentiary hearing is unlikely to yield forthright discussion. Juror 6 documented the impact of palpable racial hostility on her deliberations. She was an African American juror who was

undecided about the prosecution's case where jurors had to assess evidence against an African American defendant who was accused by white witnesses of being the assailant. Juror 6 would have voted differently but for the racial hostility she perceived, which requires a new trial. CP 475-76.

e. If an evidentiary hearing is conducted, the court should explore other behavior that casts doubt on deliberations.

Juror 6 also alleged experimentation occurred in the jury room and other witnesses to the trial claimed the prosecution sent silent messages to the jury by body language or whispers impugning the defense. CP 459-73, 476-77. Should an evidentiary hearing occur, the court should further investigate these allegations.

2. The court admitted unreliable and scientifically dubious opinion testimony that the firearm from Berhe's car matched the bullets and shell casings at the scene.

Due to documented flaws in the forensic predicate for ballistics comparisons, Berhe moved to bar the prosecution's ballistics examiner from testifying that she scientifically determined the firearm found under Washington's seat was the same gun that fired the bullets that killed Williams. 1/19RP 57-60; CP 37-38. He asked to limit this ballistic examiner's opinion to describing similarities in ballistics

markings to ensure the jury did not place unwarranted faith in the questionable scientific underpinnings of firearms matching evidence.

Id.

The court ignored the doubt cast on the scientific basis of the expert's opinion. It ruled this type of toolmark comparison is "not new science" and it would be admissible as a "jury question." 1/19RP 59-60.

a. The court's role includes excluding demonstrably unreliable scientific evidence.

The integrity of the fact-finding process is at the heart of the right to a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22. Courts zealously guard against evidentiary rules or governmental actions that impact the fairness of the accused's ability to defend against the State's charges. *Darden*, 145 Wn.2d at 620; *see State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.3d (1984) ("We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability").

The court "perform[s] an important gate keeping function when determining the admissibility of evidence." *Anderson v. Akzo Nobel*

Coatings, Inc., 172 Wn.2d 593, 600-01, 260 P.3d 857 (2011). In this role, the court may exclude “otherwise admissible scientific evidence” if it is not sufficiently helpful to the jury. *State v. King Cty. Dist. Court W. Div.*, 175 Wn.App. 630, 638, 307 P.3d 765 (2013). “Unreliable evidence is not helpful to the jury.” *Anderson*, 172 Wn.2d at 600.

In addition, “courts recognize that jurors place special trust in expert witnesses to explain applicable scientific principles,” and therefore regulate the matters upon which they may testify. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 32 (2009).

[A] certain patina attaches to [expert] testimony, running the risk that the jury, labeling it ‘scientific,’ will give it more credence than it deserves.

United States v. Green, 405 F.Supp.2d 104, 117 (D. Mass. 2005).

Even for scientific evidence considered generally reliable, like DNA evidence, courts prohibit experts from overstating the scientific basis of the inculpatory evidence. Rather than claim DNA matches the suspect, DNA examiners must offer the statistical probability of a match, such as the likelihood that this particular DNA would recur in the population. *State v. Cauthron*, 120 Wn.2d 879, 907, 846 P.2d 502 (1993); see *State v. Buckner*, 133 Wn.2d 63, 66, 941 P.2d 667 (1997)

(only with probability estimate may expert testify particular DNA is unique). No such probability even exists for firearm comparisons.

b. A forensic scientist's opinion of certainty that a firearm fired a particular bullet is unreliable, not validated, and unduly confusing to the jury.

A fired gun may leave three types of markings on a bullet or shell casing: class, subclass, or individual characteristics. Class characteristics are not individual to a particular gun: “all weapons of the make and model” will leave them. *United States v. Monteiro*, 407 F.Supp.2d 351, 360 (D. Mass. 2006). Subclass characteristics are also not unique to a certain gun. *Id.* These markings occur from a machine making batches of guns, a manufacturing technique, or a flaw in the manufacturing. *Fleming v. State*, 1 A.3d 572, 587-88 (Md. 2010).

Individual characteristics are unique to the weapon that fired the ammunition. *Monteiro*, 407 F.Supp.2d at 360. They may exist due to random, microscopic variations during manufacturing or from a gun's corrosion or damage over time. *Id.* A toolmark examiner seeks to locate a sufficient number of individual characteristics to identify a particular gun responsible for firing certain bullets.

But this type of firearm identification has come under increasing scrutiny. *See Gardner v. United States*, 140 A.3d 1172, 1183-84 (D.C.

2016) (explaining recent criticism of ballistics-match opinion evidence). “[M]any courts” have “reexamine[d] the admissibility of” forensic ballistics evidence. *Com. v. Pytou Heang*, 942 N.E.2d 927, 938 (Mass. 2011) (collecting cases where courts expressed “concerns” about scientific reliability and subjective nature of forensic ballistics comparisons).

Two “landmark reports” examining the scientific underpinnings of various forensic disciplines found “considerable doubt” that ballistics matching is a valid and reliable source of evidence. *See Motorola Inc., v. Murray*, 147 A.2d 751, 759 (D.C. 2016) (Easterly, J., concurring), citing President’s Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, at 63-65 (2016) (hereafter Council Report)⁴; National Research Council of the National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 154 (2009) (hereafter NAS Report).⁵

⁴ Because the internet link to the Council Report on the White House website is not presently working, a copy of the report will be submitted as an appendix.

⁵ Available at www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (last viewed 2/7/17).

The 2016 Council Report concluded there was insufficient evidence of validity in ballistics comparisons, criticized the subjective methodology, and cautioned about the risk of false positives. Council Report at 63-65. It followed an extensive survey of forensic science by the National Academy of Sciences, which condemned toolmark opinion testimony as fundamentally flawed due to the lack of regulation, standards, and reliability. NAS Report at 154.

Examiners rely on “unarticulated” standards without a “statistical foundation for estimation of error rates.” NAS Report at 153-54. There is no adequate definition of when a “match” occurs and there are no known valid studies determining “variability, reliability, repeatability, or the number of correlations needed to achieve a given degree of confidence.” *Id.* at 154.

Because there is no known estimate of accuracy, an examiner’s claim that two samples are similar, or even identical, “is scientifically meaningless: it has no probative value, and considerable potential for prejudicial impact.” Council Report at 46. Without an empirically measured error rate, it is impossible to determine whether ballistics matching is valid. *Id.* at 63.

Yet jurors place special trust in scientific evidence. Sarah Lucy Cooper, *Judicial Responses to Challenges to Firearms-Identification Evidence: A Need for New Judicial Perspectives on Finality*, 31 W. Mich. U.T.M. Cooley L. Rev. 457, 463 (2014) (“studies show jurors rate firearms examiners among the most honest, competent, and influential experts.”). Due to the jurors’ faith in forensic science, some courts have limited evidence overstating its value.

In *Green*, the court allowed the ballistics examiner to describe comparable markings but barred testimony that the shell casings came from a specific pistol to the exclusion of every other firearm: “That conclusion--that there is a definitive match-- stretches well beyond [the expert’s] data and methodology.” *Green*, 405 F.Supp.2d at 109.

In *United States v. Glynn*, 578 F.Supp.2d 567, 570 (S.D.N.Y. 2008), the court similarly ruled that recent evidence casts doubt on the scientific “rigor” of ballistics identification testimony. It concluded that it would “seriously mislead the jury as to the nature of the expertise involved,” if the examiner testified he matched ammunition to a particular gun. *Id.* at 571. The court limited the expert to saying a firearms match was “more likely than not;” without claiming any degree of certainty. *Id.* at 575; *see also United States v. Ashburn*, 88 F.

Supp. 3d 239, 249 (E.D.N.Y. 2015) (barring expert from claiming certainty in match of firearms and bullets and cautioning against referring to comparison as “science”).

In *United States v. Willock*, 696 F.Supp.2d 536, 547, 570 (D. Md. 2010), the court barred the prosecution’s examiner from making the “outlandish” claim of certainty when comparing firearm markings. Massachusetts likewise directed toolmark examiners to avoid giving the jury the impression of certainty based on the lack of scientific support. *Pytou Heang*, 942 N.E.2d at 946; *see also Willie v. State*, 204 So. 3d 1268, 1288 (Miss. 2016) (Kitchens, J., concurring) (defense attorney’s failure to object to firearms matching testimony was ineffective assistance because “an expert cannot reliably testify in absolute terms that a bullet was fired from a specific firearm”).

Opinions of certainty in ballistics matching are “not scientifically defensible.” Council Report at 29. “[U]sing markings on a bullet to attribute it to a specific weapon ‘to the exclusion of every other firearm in the world’ [is] an assertion that is not supportable by the relevant science.” *Id.* at 30. Berhe sought limits on the certainty of the firearms comparison expert but the court refused. CP 37-38.

c. The court improperly refused to limit misleading testimony about the absolute match between a gun and bullets, which is contrary to the underlying science.

Kathy Geil, a forensic scientist in firearm and tool mark examination, compared the firearm she received from police and bullets and shell casings from the shooting. 2/17RP 2645. She testified this firearm was the very same gun that fired these bullets and casings. *Id.* at 2698, 2704. When asked if it was possible that another gun made these markings, she said it would be so remote that it would occur only “if worlds collide.” *Id.* at 2742.

The prosecution bolstered Geil’s testimony by repeatedly characterizing her opinion as based on “science” that is long-established, widely used, and never debunked by any studies. *Id.* at 2695, 2742; *see also* 2658, 2694, 2969, 2698, 2702, 2730 (prosecution and examiner repeatedly refer to ballistic comparison as “science,” generally accepted in the scientific community). Geil’s testimony and prosecution’s insistence on the unassailable certainty of a ballistics match is not supported by the underlying science and misled the jury.

One reason courts limit expert opinions regarding the certainty of ballistics matching is that when receiving scientific testimony, “cross-examination is inherently handicapped by the jury’s own lack of

background knowledge.” *Glynn*, 578 F.Supp.2d at 574. This requires the court to “play a greater role, not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented.” *Id.*

Geil insisted the science underlying her conclusion did not require a certain number of points of agreement between the various compared bullets and firearm because “we don’t denote that. There is nothing to count.” 2/17RP 2728. The examiner explained that the visual “pattern matching” involved in comparing toolmarks “looking at the whole thing to see whether or not all those markings are consistent from, say, a cartridge case to a cartridge case.” 2/17RP 2729.

When asked if there was a standard operating procedure to identify cartridges or bullets from a certain gun, the examiner said, “I myself trained myself on how to look at these and know where that -- where that threshold is” to declare a match. *Id.* at 2730. While conceding there is “subjectivity” in ballistic comparisons, Geil simultaneously insisted, “It’s an objective science in that tools interacting with other tools will leave marks and it’s been shown time and time again.” *Id.*

The prosecution bolstered Geil’s testimony by asking her whether any studies ever conducted “debunk[ed] the science you testified about today?” *Id.* at 2742. Geil did not know of any such studies. *Id.* at 2743.

In closing argument, the prosecution underscored the definitive scientific proof contained in the firearm comparison. The prosecutor argued these casings found at the scene were proved to be “fired from this particular gun, as explained by Kathy Geil, the forensic scientist.” 2/24RP 3261; *see also Id.* at 3342 (“the Washington State Patrol . . . compare[d] firearms, [and] that . . . also comes back that that gun is a murder weapon”).

This type of evidence, repeatedly presented as definitive science by the prosecution through its questions and argument, is misleading and likely to be given outsized importance by the jurors. It is unhelpful to jurors and unfair to defendants to portray a critical piece of evidence as an absolute and scientifically determined match between weapon and bullet, which courts have characterized as an “outlandish” overstatement, *Willcock*, 696 F.Supp.2d at 570, that “stretches well beyond [the expert’s] data and methodology.” *Green*, 405 F.Supp.2d at 109.

d. The improperly admitted ballistics opinion evidence substantially impacted the outcome of the case.

When a judge erroneously admits evidence, a new trial is necessary “where there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence.’” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). Said another way, “[a]n error in admitting evidence is ground for reversal if it is prejudicial.” *State v. Garcia*, 179 Wn.2d 828, 848, 318 P.3d 266 (2014).

The ballistics examiner’s certainty that Berhe’s firearm was the gun that shot and killed Williams was key evidence in the prosecution’s case. Without this definitive conclusion, the jurors had to rely on the ambiguous identification evidence offered by either well-meaning neighbors with limited opportunity to observe an unexpected shooting or friends of the participants who seemed like they were covering for someone else, suspiciously fled the scene, and lied to police.

The examiner’s declaration that the gun was the one that fired the fatal shots was a veil that cross-examination could not pierce. Jurors had little reason to discount it because they were repeatedly reminded it

was a “science” that is generally accepted in the scientific community, widely used, and never debunked. The prosecutor made sure the jury left with an inflated and inaccurate depiction of the science underlying ballistics comparisons.

By permitting the jury to hear the ballistic examiner’s scientific conclusion that the firearm was the weapon used to kill Williams, without qualification, the court let the State mislead jurors about the sole forensic evidence used to claim a scientific link between Berhe and the shooting. Given the clear risk of prejudice following this testimony, its admission and reliance by the prosecution requires a new trial.

3. The court admitted irrelevant and highly prejudicial claims about Berhe’s lack of cooperation during custodial interrogation, even after he plainly stated he did not want to talk to police.

a. Berhe unequivocally invoked his right to remain silent during custodial interrogation when he repeated three times, “I don’t even want to talk to you.”

When a person expresses “an objective intent to cease communication with interrogating officers,” questioning must cease. *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167, 170 (2014); *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); U.S. Const. amend. 5; Const. art. I, § 9. Even if a person

initially waives his right to silence, he may invoke his “right to cut off questioning” at any time. *Miranda*, 384 U.S. at 474.

An invocation of *Miranda* rights is unequivocal if a “reasonable police officer in the circumstances” would understand it to be an assertion of the suspect's rights. *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

Suspects naturally feel “pressures inherent to custodial interrogation” that “push” and “encourage” them to waive their constitutional right to remain silent. *Miranda*, 384 U.S. at 457-58. For this reason, police must scrupulously honor an invocation of the right to remain silent. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). If an individual’s right to cut off questioning is not “scrupulously honored,” statements obtained after the suspect invoked his right to silence must be suppressed at trial. *Mosley*, 423 U.S. at 104.

“[T]his inquiry is objective” and it is reviewed *de novo*. *Piatnitsky*, 325 P.3d at 170; *United States v. Santistevan*, 701 F.3d 1289, 1293 (10th Cir. 2012).

A suspect’s statement “that he did not want to talk with police,” invoked the “right to cut off questioning.” *Berghuis v. Thompkins*, 560 U.S. 370, 382, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). When a

suspect says, “I don't want to talk about it,” there “is nothing equivocal or ambiguous about this statement. Indeed, it is difficult to imagine a clearer refusal.” *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 684, 327 P.3d 660 (2014).

In *Piatnitsky*, the suspect similarly said, “I don’t want to talk right now, man.” 180 Wn.2d at 410. However, just before making this comment, he told police he just wanted “to write it down.” *Id.* In this context, a slim majority concluded Piatnitsky’s statement was equivocal because he seemed to want to write a statement rather than end the interrogation. *Id.* at 414. Four justices disagreed, explaining “there is nothing equivocal or ambiguous about this statement,” of “I don’t want to talk right now.” *Id.* at 419 (Wiggins, J., dissenting).

As Berhe was being questioned by two detectives in a small interview room, one detective asked him to explain what he was doing the night of the incident. CP 153. Berhe said:

I don’t even want to talk to you, dog. I don’t even want to talk to you. I don’t even want to talk to you or you.

Id. As *Cross* explains, it is “objectively unreasonable” to conclude the declaration, “I don’t want to talk” is equivocal. 180 Wn.2d at 684. By

saying “I don’t want to talk” three times, there was nothing ambiguous about Berhe’s desire to cut off questioning.

But rather than stop the interrogation, the detective asked Berhe, “Why are you so ticked off?” to continue the conversation. *Id.*

Once the right to remain silent is invoked, “all questioning must cease.” *State v. Nysta*, 168 Wn. App. 30, 42, 275 P.3d 1162, 1168 (2012). “If the interrogator does continue, the suspect’s post request responses ‘may not be used to cast retrospective doubt on the clarity of the initial request itself.’” *Id.* (quoting *Smith v. Illinois*, 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984)). Once Berhe said he did not want to talk to the police, custodial interrogation should have ended. It is “irrelevant” that he continued to speak with the detective after invoking his right to remain silent. *Cross*, 180 Wn.2d at 684.

The court erroneously ruled Berhe did not clearly enough ask to cut off questioning until he later said, “Please stop. Stop. Stop.” 1/20RP 336; CP 387 (Conclusions as to Disputed Facts 3(1); CP 388 (Conclusion of Law 4(a)(3)). The court agreed saying “stop” invoked his right to silence. *Id.* The detectives did not “stop” and continued questioning Berhe for far longer. CP 154-187 (interview started at 10:12 am, ended at 3:42 pm, with break from 11:19 am until 3:27 pm).

Berhe's statements to police after he asserted his right to cut off questioning were inadmissible under article I, section 9 and the Fifth Amendment. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002); *United States v. Blue*, 384 U.S. 251, 255, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510 (1966) (where government acquired incriminating evidence in violation of the Fifth Amendment, defendant "entitled to suppress the evidence and its fruits" at trial).

b. The improperly admitted statements after Berhe invoked his right to cut off questioning painted Berhe as volatile, dangerous, and disrespectful.

Admitting an accused person's statements obtained in violation of an invocation of the right to remain silent is "presumed to be prejudicial." *Nysta*, 168 Wn. App. at 42. The prosecution must prove the error is harmless beyond a reasonable doubt. *Id.*

Despite Berhe's objection, the court admitted several statements Berhe made after he invoked his right to stop the interrogation and remain silent. *See* CP 152-53; Ex. 63RP 11-12.⁶ These statements highlighted Berhe's extreme disrespect for the police and made him appear dangerous and hostile. These personality traits would enable the

⁶ Ex. 63RP refers to the transcript of the videotaped recording played for the jury.

prosecution to convince the jury Berhe was the type of person to shoot someone in a dark alley without provocation, despite the unclear testimony of uninvolved observers and mixed motives of those who knew Berhe.

For example, in response to the detective's question about why he was "ticked off," Berhe said, "Because I don't like that fucking smirk you got on your face looking at me like that. I know you are up to some fucking fucked-up ass games." CP 153; Ex. 63RP 11.

Berhe kept criticizing the police in an angry tone, saying "You're not telling me what I'm here for. Those officers didn't tell me what the fuck I'm here for. But you're just going to come in here and question me and try to role play me along." CP 153; Ex. 63RP 12. He continued, "I would like you not to talk to me about shit and tell me what the fuck I'm here for." *Id.*

At this point, the video ended. Ex. 63. These improperly admitted statements, after Berhe said he did not want to talk, are presumptively prejudicial. The prejudicial statements must be viewed with the remainder of the interview admitted over defense objection.

c. The video showing Berhe's custodial interrogation was irrelevant, unduly prejudicial, and its improper admission requires reversal.

Berhe asked to exclude the video of his custodial interrogation. 1/20RP 325; 2/11RP 2325. It contained no information about the incident; the shooting was never discussed before he invoked his right to remain silent. Instead of probing the incident, the video showed Berhe refusing to respond to detectives' questions about who he was with when arrested and acting in an aggressive, obstructionist, foul-mouthed, and anti-police manner. Ex. 63. The prosecution insisted his "combative" behavior "rebutts" his innocence. 1/20RP 340. The court ordered some redactions but admitted the video into evidence and the prosecution played it for the jury. 2/11RP 2403; Ex. 63.

Evidence denying participation in an offense is irrelevant, inadmissible, and not helpful to proving the charged offense. *State v. Fuller*, 169 Wn.App. 797, 805, 832, 282 P.3d 126 (2012). Even after *Miranda* warnings, a suspect retains the right to selectively refuse to answer questions and no negative inference may follow. *Id.* at 810. When a suspect does not answer police questions in a post-*Miranda* interview, this response is not inculpatory – on the contrary, it is "inherently ambiguous" because the suspect may be relying on the right to silence. *Id.* at 815, quoting *Hurd v. Terhune*, 619 F.3d 1080, 1088

(9th Cir. 2010). Evidence of conduct indicating a person evades police is also only “marginally probative” of guilt because it is highly speculative whether it relates to the charged incident. *State v. Freeburg*, 105 Wn.App. 492, 498, 20 P.3d 984 (2001).

As *Fuller* dictates, a suspect’s “inherently ambiguous” lack of cooperation during custodial interrogation may not be used as substantive proof of guilt. 169 Wn.App. at 185. Courts “will not accept pyramiding vague inference[s]” to infer that a person’s behavior at the time of arrest resulted from “consciousness of guilt” of the particular charged offense. *State v. McDaniel*, 155 Wn.App. 829, 854, 230 P.3d 245 (2010).

Here, Berhe waited over seven hours alone in a small barren interview room following his arrest before the interrogation started. Ex. 63; 2/11RP 2263, 2289. He was immediately hostile to the detectives. Ex. 63. He refused to answer basic questions, was annoyed when asked to spell his name, and claimed not to know the name of the person he was with when arrested. Ex. 63RP 2-6, 8, 9.

The reason for his hostility becomes apparent when Berhe says, “I already got a bad history with you guys.” CP 150; Ex. 63RP 8-9. The prosecution had said it would omit this statement from the video, but

did not and his “bad history” with the detectives was presented. 1/20RP 344; Ex. 63RP 8-9.

The court took out Berhe’s statement, “I already know how you guys do this shit,” but refused to redact his next words: “I’m not going to play this sick game with you guys anymore.” CP 150; Ex. 63RP 8. This latter comment showed Berhe’s hostility toward the police for no apparent reason. It left the jury to speculate about what he meant by not playing a sick game “anymore,” implying prior contacts with police, which was irrelevant and unduly prejudicial.

During this conversation, the detective repeatedly expressed annoyance with Berhe’s failure to answer questions cooperatively. For example, the detective berated Berhe, asking “How can we . . . figure out what’s going on to your satisfaction unless you’re going to talk to me?” CP 150; Ex. 63RP 8. The detective also told Berhe, “the sooner we get through this, the sooner it will conclude. And you’ll just help yourself out if you just, you know, cooperate and answer some questions.” CP 149; Ex. 63RP 7. These interactions highlighted Berhe’s “inherently ambiguous” reluctance to cooperate with police, and it was presented as substantive evidence from which the jury could infer guilt despite its lack of probative value.

In the video, Berhe also complains he is being “treated like shit,” and asks, “So why the fuck should I be treating anybody else any better?” Ex. 63RP 6. He curses at the detectives many times. *Id.* at 5, 6, 7, 8, 11, 12. He repeatedly accuses the police of “playing fucking games” with him. *Id.* at 11-12 (“I don’t know what the fuck you’re trying to set me up to go along your little fucking game.”; “I know you’re up to some fucking fucked-up ass games”); *Id.* at 8 (“I’m not going to play this sick game with you guys anymore.”).

In sum, the video contained no explanations indicating Berhe’s knowledge of the offense, while his failure to answer questions invited the jury to hold his silence against him. *Fuller*, 169 Wn.App. at 816, 818. His hostile, non-responsive reaction to the detectives made him seem dangerous and volatile. His acknowledged past history with these homicide detectives showed he was the type of person to be involved in this crime, even though he said nothing about it. *See Freeburg*, 105 Wn.App. at 500 (possession of gun when arrested years after incident had ambiguous probative value but was “brutally prejudicial”).

Berhe did not testify, so none of his statements would be admissible to impeach him. *Fuller*, 169 Wn.App. at 818. But because the video was the jury’s only opportunity to see and hear Berhe

responding to questions about the incident, it is the type of evidence to which jurors would give great weight. Seeing Berhe acting aggressively to police while refusing to answer basic questions gave the jury improper reasons to credit the weak identification evidence or the suspicious allegations from witnesses who gave conflicting statements to police.

In a case where the evidence incriminating Berhe rested on tenuous eyewitness identifications or allegations from witnesses who admitted lying to police multiple times, this improperly admitted video of custodial interrogation is substantially likely to have affected the jurors. In combination with the presumptively prejudicial hostile statements Berhe made after he invoked his right to remain silent, the error is not harmless and requires a new trial.

4. The prosecution's misconduct throughout the trial caused the jury to base its verdict on improper considerations.

a. The prosecution may not use improper tactics to deny an accused person a fair trial.

Trial proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Prosecutorial misconduct

violates the “fundamental fairness essential to the very concept of justice.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); U.S. Const. amend. 14; Const. art. I, §§ 3, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. *Monday*, 171 Wn.2d at 676. A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

A prosecutor’s closing arguments impermissibly taint the jury’s deliberations when the comments made “were improper and prejudicial.” *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

b. The prosecution shifted the burden of proof to the defense and misrepresented its burden.

It is “flagrant misconduct” for the prosecution “to shift the burden of proof to the defendant.” *State v. Miles*, 139 Wn.App. 879, 890, 162 P.3d 1169 (2007). Improper burden shifting occurs when the prosecution presents the jurors with a “false choice” in what is required to acquit the defendant, such as claiming the jurors must believe the defense’s evidence in order to acquit. *Id.*

It is also misconduct for the prosecution to mischaracterize the defense theory in rebuttal and improperly create a “straw man” that the prosecution may easily destroy. *State v. Thierry*, 190 Wn.App. 680, 694, 360 P.3d 940 (2015). This type of argument violates the prosecution’s “duty to seek convictions based only on probative evidence and sound reason.” *Id.* “Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor’s] improper insinuations or suggestions are apt to carry more weight against a defendant.” *Id.*

In *Thierry*, the prosecution’s rebuttal misrepresented the defense’s argument by claiming the defense was saying the complainant could not be believed because she was a child. Having created this incorrect portrayal of the defense argument, the prosecution criticized the defense for saying no prosecutions could ever occur for crimes against children. *Id.* In fact, the defense argued the complainant should not be believed because of her inconsistencies. *Id.* The *Thierry* Court ruled the prosecution’s mischaracterization of the defense in rebuttal unfairly denied the defendant his right to present a defense. *Id.*

Here, the prosecution wildly exaggerated the defense's argument in rebuttal, repeatedly insisting the jury must "buy off" on several far-fetched theories for the defense to succeed. The prosecutor argued,

The defense argument here can be really boiled down to this: It requires you to buy off on three principles.

One is that there is a deep conspiracy to hide the true identity of the true killer.

Two, there is a deep conspiracy to frame Berhe, the innocent patsy.

And three, that Berhe is the unluckiest man in the world.

You have to -- their argument is that you have to buy off on all three of those theories because if one of them collapses, the whole defense argument collapses.

2/24RP 3331-2.

The prosecution then repeatedly asked "where is the evidence of this conspiracy theory." *Id.* at 3331-32. Several times, the defense objected to burden shifting but the court overruled these objections. *Id.* at 3332, 3340. The defense again objected when the prosecution asserted, "the defense requires you to buy off on all three," because this "requirement argument" shifted the burden of proof but the court overruled the objection. *Id.* at 3343.

Contrary to the prosecution's characterization, the defense had not argued there was a conspiracy or collusion among the prosecution's

witnesses. Instead, it presented reasons to disbelieve the prosecution's witnesses, who gave inconsistent stories to police or were unreliable, to show the prosecution did not meet its burden of proof. *See* 2/24RP 3285-86, 3321-24. But the prosecution misrepresented this argument as one that "required" the jury find a full-fledged joint "conspiracy" by the prosecution's witnesses to frame Berhe.

The prosecution then denigrated its exaggerated version of the defense by claiming the defense's "conspiracy" argument was so crazy that even "the wackiest conspiracy website" would not "give time to" it. *Id.* at 3343. It also insisted that under the defense theory, the jury "need[s]" to find and "their argument is that you have to find," that Elijah Washington "is a complete sociopath; he has absolutely no conscience whatsoever. Their argument relies on that." *Id.* at 3341. It contended this "complete sociopath" theory was "a fundamental foundation of [the defense] argument." *Id.* at 3341-42. This again mischaracterized the defense and presented the jury with a false choice, because the defense argued the prosecution's witnesses were not reliable and were covering for someone else. The jurors could disbelieve Washington, who admitted to telling multiple false stories, without deeming him a complete sociopath.

The prosecution further insisted that the jurors must conclude Berhe was “the unluckiest man in the world” and “an innocent patsy” if they “buy into” the defense argument. *Id.* at 3331, 3342-43. But again, the jurors did not need to find Berhe to be a patsy, and the defense never argued he was.

This extreme version of the defense impugned their integrity, presented the jury with a false choice, and eroded the prosecution’s burden of proof by misrepresenting to the jury what it needed to find to decide the prosecution had not met its burden of proof. By raising these arguments during rebuttal, it increased “their prejudicial effect.”

Lindsay, 180 Wn.2d at 443.

c. The prosecutor vouched for his witnesses and injected his own opinion into the case.

Prosecutors may not vouch for their witnesses’ veracity or inject their own opinions or experience into the proceedings. *United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (prosecutor’s expression of personal opinion of guilt is improper); *see United States v. Brooks*, 508 F.3d 1205, 1209-10 (9th Cir. 2007) (prosecutor “threatens integrity” of conviction by indicating information not presented to jury supports government’s case).

Courts have “emphasize[d] that prosecutors should not use ‘we know’ statements in closing argument.” *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005). “The question for the jury is not what a prosecutor believes to be true or what ‘we know,’ rather, the jury must decide what may be inferred from the evidence.” *Id.*

These arguments are particularly harmful because a prosecutor “carries a special aura of legitimacy” as a representative of the State. *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 2000). Thus, “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own.” *Young*, 470 U.S. at 18-19. A prosecutor’s “position of trust and experience in criminal trials may induce the jury to accord unwarranted weight to his opinions regarding the defendant’s guilt.” *United States v. Splain*, 545 F.2d 1131, 1135 (8th Cir. 1976).

Here, the prosecutor repeatedly told the jury “we know” various disputed facts; assured the jury of government’s opinion of Berhe’s guilt by saying “we are convinced he’s the shooter”; and injected himself into the proceedings as if he were also a juror by telling jurors “we don’t have to decide” some aspects of the case.

The prosecutor repeated the phrase “we know” about certain strands of evidence 18 times during closing argument. 2/24RP 3258, 3259, 3260, 3262, 3264, 3265, 3268, 3269, 3271, 3284. He told the jury “we know” some witnesses were wrong in their descriptions of events, “we know” better than some witnesses about what happened in what order, “we know” the relationships among the witnesses, “we know for a fact” that Washington was not the shooter. 2/24RP 3264, 3269, 3283, 3333, 3334, 3338. The prosecutor said, “we are convinced that Berhe is the shooter, right?” RP 3267.

The prosecutor’s argument concluded by saying Berhe was the shooter because, “We know those things to be true. We know those things beyond a reasonable doubt. We know what happened.” 2/24RP 3284.

Berhe repeatedly objected to the prosecution’s injection of himself into closing arguments by using “we” throughout. *Id.* at 3256-57, 3265, 3271, 3275. The court gave defense counsel a standing objection after overruling the defense’s challenge to this mode of argument. *Id.* at 3271.

The prosecution’s insistence on what “we know” and “we are convinced” about constitutes vouching for its case. “[A] prosecutor is

not a member of the jury, so to use ‘we’ and ‘us’ is inappropriate and may be an effort to appeal to the jury’s passions.” *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006). It injected the prosecution’s personal opinion of guilt. It set up a union of the jurors and prosecution, against the defense. Considering the nature of Juror 6’s complaints of racial division in the jury room, the prosecutor’s tactics may have underscored the difference between the defendant and most jurors on racial or socioeconomic grounds.

d. The prosecution misled the jury about the law governing missing evidence.

A prosecutor also commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Such misstatements have “grave potential to mislead the jury.” *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). It is improper for a prosecutor to argue facts not admitted as evidence during the trial. *In re Glasmann*, 175 Wn.2d 696, 704-05, 286 P.3f 673 (2012). In addition, “a prosecutor must not impugn the role or integrity of defense counsel. *Lindsay*, 180 Wn.2d at 431-32. By maligning defense counsel, the prosecution may “severely damage an accused’s opportunity to present his or her case.” *Id.*

The defense does not need a missing witness instruction to properly argue that the prosecution's failure to investigate and present other evidence may be used to find the prosecution has not met its burden of proof. *See State v. Frost*, 160 Wn.2d 765, 772-73, 161 P.3d 361 (2007). The defense is constitutionally entitled to argue the reasonable and logical inferences it sees from the case, even if they lead to conflicting or alternative legal theories. *Id.* The prosecution bears the burden of proving all elements beyond a reasonable doubt and the defense may muster any available strand of evidence or argument to contend the prosecution has not met this burden.

Here, the prosecution derided the defense as misrepresenting the law to counter the defense argument that the police had not investigated all relevant witnesses or suspects. It insisted, "[t]here is absolutely no authority for" the jury to infer witnesses who did not testify would have been unfavorable to the prosecution. 2/24RP 3335. It contended the defense's argument that the State could be faulted for failing to call relevant witnesses is "not supported by the law." *Id.*

The prosecution made a similar argument about its failure to offer cell phone tower evidence, telling the jury: "There's no law that says that" evidence the State did not present can be assumed to be "bad

for the State.” 2/24RP 3339. The defense objected to the misstatement about facts not in evidence but was overruled. *Id.* at 3339-40.

Not only did the prosecution mispresent the jury’s prerogative to fault the prosecution’s case due to the absence of evidence, it argued that defense counsel was deceiving the jurors. The jury would assume the prosecution knew the law, as a quasi-judicial officer, rendering this argument particularly harmful. Prosecutorial statements that malign defense counsel can severely damage an accused’s opportunity to present his or her case and are therefore impermissible. *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir.1983). This tactic improperly denigrated the defense and misled the jury about how to evaluate the evidence and the absence of evidence.

e. The prosecution asked for a verdict based on what feels right.

“A prosecutor may not properly invite the jury to decide any case based on emotional appeals.” *In re Det. of Gaff*, 90 Wn.App. 834, 841, 954 P.2d 943 (1998). When discussing the prosecution’s burden of proof, it is “a serious misstatement of the law” to tell the jury it may convict the accused “if they ‘feel it in [their] gut’ and ‘think he did it.’” *State v. Bezhenar*, 181 Wn. App. 1034 (2014) (unpublished, cited as

non-binding authority under GR 14.1(a)). A person can “think” or “feel” that a defendant “did it” whether or not the State has proven all elements of the charged crime beyond a reasonable doubt. *Id.*

Here, the prosecution explained that “we” will “reach the correct verdict” by applying the law because “when we follow the law, it will feel right.” 2/24RP 3256-57. The defense objected, claiming the prosecution was vouching by framing this argument in a personal fashion. *Id.* at 3257. The court overruled the objection. *Id.*

The prosecution continued, explaining how the correct verdict with “feel right,”

It will feel right here, intellectually. It will feel right here, morally. It will feel right here. That’s because it makes sense. The law makes sense. It makes sense here.

Id. By telling the jury that the correct verdict is something that will “feel right,” the prosecution minimized its burden of proof and sought a verdict based on emotion. By inserting itself in this decision, as if “we” included the prosecution searching for the verdict that “feels right,” it improperly urged the jury to trust its opinion of the “correct verdict.”

f. The prosecution misrepresented facts not in evidence.

“[A] prosecutor may *never* suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.”

State v. Perez-Mejia, 134 Wn.App. 907, 916, 143 P.3d 838 (2006);
United States v. Brooks, 508 F.3d 1205, 1209-10 (9th Cir. 2007)
(prosecutor “threatens integrity” of conviction by indicating
information not presented to jury supports government’s case).

Throughout the trial, the defense tried to elicit information
implicating Dominic Oliveri. *See, e.g.*, 1/19RP 22-23, 27, 30, 37, 39-
40. The defense had reason to cast suspicion on Oliveri because
witnesses reported Williams had stolen drugs and potentially a gun
from Oliveri and Williams expressed fear Oliveri would kill him shortly
before he was shot. 2/2RP 1345; 2/10RP 2102. Oliveri disappeared
after the incident. 2/2RP 1331; 2/3RP 1563; 2/4RP 1796, 1883. Even
his closest friends never saw him again. *Id.*

Oliveri refused to answer questions from the police and through
a lawyer, said he would assert his Fifth Amendment right to silence if
called to testify. 1/19RP 39-40; 2/11RP 2379. The court would not
allow the defense to elicit that Oliveri refused to testify due to his
exercise of his Fifth Amendment right to remain silent. 2/16RP 2428-
29; *see Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95
L.Ed. 1118 (1951) (Fifth Amendment protection “confined to instances

where the witness has reasonable cause to apprehend danger from a direct answer.”).

In response to testimony that Oliveri disappeared after the incident, the prosecution elicited from Detective Cruise that he had “reliable contact” information for Oliveri throughout the investigation and “shared” this information with the defense. 2/11RP 2347.

Berhe objected to this testimony as misleading, because the only contact information they had was for Oliveri’s lawyer, not for Oliveri. 2/11RP 2379. And because Oliveri was asserting his privilege against self-incrimination, the defense was unable to interview him or call him as a witness. *Id.*; 1/19RP 39-30. At the prosecution’s insistence, the jury was never told Oliveri was asserting his right to remain silent. But by eliciting evidence that the defense knew how to reach Oliveri, the prosecution insinuated the defense knew Oliveri would not give testimony favorable to Berhe or it was deceiving the jury about Oliveri’s disappearance. 2/11RP 2379, 2382; 2/16RP 2429.

The court agreed the prosecution’s questions would make the jury wonder why no one was calling him to testify. 2/11RP 2380. The court allowed the jury to learn that Oliveri was unwilling to talk to the

detective, but not that he was asserting his Fifth Amendment right, thus precluding the defense from speaking with him. 2/11RP 2380-81.

But because the jury knew the detective had spoken with Oliveri early in the investigation, 2/11RP 2313-14, it would now speculate about why the defense did not speak with or call Oliveri. The prosecution improperly injected information implying Oliveri was an available witness, while insisting the jury could not be told the reason he was unavailable and then faulting the defense for complaining about evidence that was not offered.

g. The prosecution improperly elicited opinion testimony about a surveillance video.

When the prosecution offers visual evidence, it is the jurors' role to form opinions and conclusions from it. *Ashley v. Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999). A witness may relate first-hand observations, but may not interpret a photograph or videotape unless the information cannot be determined by the jury. ER 701; ER 704; *State v. George*, 150 Wn.App. 110, 117-18, 206 P.3d 697 (2009).

In *George*, the prosecution showed a poor quality surveillance videotape and photographs from it involving a robbery. 150 Wn.App. at 115. A police officer testified about the identity of the men in the

surveillance video. *Id.* The court ruled the officer's opinion of what the video showed was inadmissible because he was not better positioned than the jury to identify whether the defendants were pictured in the videotape. *Id.* at 119.

An officer's opinion about who is pictured in surveillance photographs is of "dubious value" and runs "the risk of invading the province of the jury and unfairly prejudicing" the accused. *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). "[T]he use of lay opinion identification by policemen" is particularly dangerous and should only be offered when there is no alternative. *Id.*

Over defense objection, the prosecution had the lead detective Alan Cruise painstakingly document what happened in the surveillance video from Eastlake Market on the night of the incident, identifying each witness and describing the time they took certain actions. 1/13RP 56; 2/11RP 2365-74. The accuracy of the time-stamp was disputed by the defense and objected to as evidence. 2/11RP 2197-99, 2238-39. The prosecution used the detective's exposition of the video as a central platform in closing argument, to insist that "we know" certain people were in the store at certain times, and therefore could not have been involved in the shooting. 2/24RP 3262-64, 3333, 3334, 3338.

As Berhe correctly argued to the court, the jurors could watch the surveillance video, decide what it showed, and determine its probative value. The prosecution impermissibly elicited opinion testimony, invading the province of the jury, to bolster this evidence.

h. The multiple instances of misconduct denied Berhe a fair trial.

When there is a substantial likelihood the prosecution's improper arguments affected the outcome, reversal is required. *Lindsay*, 180 Wn.2d at 440. By overruling the defense's numerous objections, the court lent "an aura of legitimacy to what was otherwise improper argument." *Davenport*, 100 Wn.2d at 764. This lends the court's "imprimatur" to the improper argument and "increases the likelihood that the misconduct affected the jury's verdict." *Perez-Mejia*, 134 Wn.App. at 920.

The prosecution's injection of what "we know" throughout its closing argument persuaded the jury to adopt the prosecution's version of events for improper reasons. Its impugning of defense counsel and misrepresentation of the law as well as the defense's argument undermined the jury's evaluation of the weaknesses in the prosecution's case. The prosecution's failure to act in good faith and seek a verdict

based on its proof demonstrates it failed in its duty to seek a fair trial and requires reversal. *Monday*, 171 Wn.2d at 676.

5. The cumulative harm from numerous errors requires a new trial.

The combination of trial errors may deprive a person of a fair trial, even where some errors viewed alone might not be grave enough to require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); U.S. Const. amend. 14; Const. art. I, § 3.

The cumulative harm generated by errors in this case had an overarching prejudicial effect. The court's failure to properly inquire into a facially troubling claim of jurors displaying racial bias in deliberations demonstrates the potential for a fundamentally flawed verdict. The court permitted the prosecution to mislead the jury about the scientific validity of its claim the bullets and gun definitively matched. It admitted custodial statements made after Berhe unequivocally asked to cut off questioning. The prosecution relied on Berhe's irrelevant custodial statements to portray his lack of cooperation with and hostility toward police as evidence of his guilt. The prosecution's numerous improper closing arguments further pressed the jury to decide the case for improper reasons.

These multiple errors occurred in a case where the evidence rested on tenuous eyewitnesses who did not see the incident and dubious participants who gave conflicting stories and seemed to be hiding information about their own or other people's culpability. These errors, viewed together, affected the outcome and require a new trial.

6. The court misunderstood its sentencing discretion to craft an exceptional term below the standard range.

a. The court abuses its discretion when it misunderstands its sentencing authority.

The court's sentencing authority stems from statute. *See In re Mulholland*, 161 Wn.2d 322, 329–30, 166 P.3d 677 (2007). RCW 9.94A.535 provides that mitigated sentences below the standard range may be imposed when the court identifies substantial and compelling reasons for doing so under the statutory scheme. *Id.* “While no defendant is entitled to an exceptional sentence . . . , every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111P.3d 1183 (2005) (quoted in *Mulholland*, 161 Wn.2d at 34).

In *Mulholland*, the court held that the SRA gives the trial court discretion to impose a mitigated sentence of concurrent terms for

serious violent offenses, even though RCW 9.94A.589(1)(b) states that sentences for these offenses must be consecutive. 161 Wn.2d at 329-31. The court further held that the trial court's erroneous belief it lacked discretion to impose concurrent sentences constituted a fundamental defect justifying collateral relief in that case. *Id.* at 332-33.

At Berhe's sentencing, the judge found mitigating factors favored giving Berhe an exceptional sentence below the standard range for his assault conviction involving Stukenburg, because it was undisputed that Stukenburg was accidentally shot and received a superficial wound, and there was reason to believe Stukenburg was complicit in arranging the shooting. 5/26RP 172. The judge imposed a concurrent sentence for first degree assault, rather than the consecutive time required under the standard range. *Id.* But the judge did not believe she had authority to impose a concurrent sentence for the firearm enhancement attached to the first degree assault and imposed a consecutive firearm enhancement. *Id.*

b. The court's authority to impose an exceptional sentence extends to firearm enhancements.

As *Mulholland* noted, the exceptional sentence statute, RCW 9.94A.535, governs the imposition of exceptional sentences. It does not

categorically prohibit any type of offense or sentence from eligibility for a reduced term.

RCW 9.94A.535 provides that exceptional sentences may be imposed even when the standard range appears to mandate consecutive terms. At issue in *Mulholland* was RCW 9.94A.589(1)(b), which states that a person convicted of serious violent offenses arising from separate and distinct criminal conduct “shall” receive consecutive sentences. But the *Mulholland* Court held that this language does not render inapplicable the exceptional sentence provisions of RCW 9.94A.535. 161 Wn.2d at 329-31.

Similarly, a statute provides that firearm enhancements “shall” be imposed consecutively. RCW 9.94A.533. This statute explains that the standard range sentence for firearm enhancements requires consecutive terms, notwithstanding other sentencing provisions, which is a deviation from the typical presumption of concurrent sentences that applies under the standard range. *State v. Brown*, 139 Wn.2d 20, 27-28, 983 P.2d 608 (1999).

In *Brown*, the court held that the statute adding deadly weapon enhancements bars an exceptional sentence below the standard range for that enhancement. *Id.* But as Justice Madsen explained in *State v.*

Houston-Sconiers, _ Wn.2d _, S.Ct. No. 92605-1, Slip op. at 2-4 (Mar. 2, 2017) (Madsen, J., concurring), *Brown* misconstrued the controlling statutory language. The statutory scheme does not prohibit a court from imposing an exceptional sentence that includes a firearm or deadly weapon enhancement. Indeed, it may amount to cruel and unusual punishment to misinterpret the statutory scheme in this fashion.

Houston-Sconiers, Slip. op. at 23-24. *Brown*'s misinterpretation of the statutory scheme is both incorrect and harmful because it requires courts to impose sentences far longer than a court believes the SRA otherwise mandates.

Neither RCW 9.94A.533 nor RCW 9.94A.535 prohibit the imposition of an exceptional mitigated sentence for firearm enhancements. RCW 9.94A.533 does not mention exceptional sentences. And RCW 9.94A.535 states that the multiple offense policy applies when it elevates a sentence in a manner that exceeds punishment, or when other case-specific mitigating circumstances arise.

While the presumptive standard range for firearm enhancements provides for consecutive terms under RCW 9.94A.533, courts are not precluded from considering the applicability of a reduced term under the strictures of the exceptional sentence statute.

A similar issue arose in an unpublished case, *State v. Nichols*, 184 Wash. App. 1020 (2014) (cited as nonbinding authority under RAP 14.1), involving multiple convictions for firearm offenses. In *Nichols*, the court understood it had discretion to depart from the presumptive consecutive sentences for firearm offenses such as unlawful possession of a firearm, discretion that the prosecution conceded and the Court of Appeals implicitly endorsed in its unpublished decision.

Here, the court agreed there was substantial and compelling reasons for an exceptional sentence involving concurrently imposed terms. 5/26RP 172. It did not believe it had discretion to impose a concurrent sentence for the firearm enhancement even if substantial and compelling reasons favored it. *Id.* The court's failure to understand its sentencing authority when imposing an exceptional sentence requires a new sentencing hearing.

c. The remedy is a new sentencing hearing.

When a sentencing court might have imposed an exceptional sentence if "it had known an exceptional sentence was an option," remand is proper. *Mulholland*, 161 Wn.2d at 334. Here, the court made clear its intent to impose an exceptional sentence but did not believe an exceptional sentence was an option for the firearm enhancement.

5/26RP 172. Because it misunderstood its authority to craft an appropriate term, a new sentencing hearing should be ordered.

F. CONCLUSION.

Tomas Berhe was denied a fair trial and remand is required for further proceedings.

DATED this 6th day of March 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written in a cursive style.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant
(206) 587-2711

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 75277-4-I
v.)	
)	
TOMAS BERHE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MARCH, 2017, I CAUSED THE ORIGINAL **AMENDED* OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	()	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	()	HAND DELIVERY
APPELLATE UNIT	(X)	AGREED E-SERVICE
KING COUNTY COURTHOUSE		VIA COA PORTAL
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] TOMAS BERHE	(X)	U.S. MAIL
887907	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13 TH AVE		
WALLA WALLA, WA 99362		

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MARCH, 2017.



X _____

*Amended only to correct the formatting of improperly centered first page of the table of contents.

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710