

No. 95920-0

NO. 75277-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

TOMAS BERHE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE C. SPEARMAN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Did the trial court appropriately handle the defendant's claim of juror misconduct?

2. Did the trial court correctly exercise its discretion in allowing ballistics evidence that showed the gun found in the defendant's car was the murder weapon?

3. Did the trial court correctly rule that the portion of the defendant's custodial statement before he invoked his right to remain silent was admissible, and if not, was admission of the few superfluous sentences harmless?

4. Has the defendant shown that the prosecutor committed such egregious misconduct that his convictions must be reversed?

5. Has the defendant shown numerous errors of such gravity that he can avail himself of the cumulative error doctrine?

6. Has the defendant shown that the sentencing court did not understand the law in regards to imposing sentences for multiple firearm enhancements such that he must be resentenced?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

A jury convicted the defendant of murder in the first degree for shooting to death Everett Williams, and assault in the first degree for the shooting of Michael Stukenberg. CP 1-2, 285, 287. Each count carried a firearm sentencing enhancement. CP 1-2, 288, 290. The defendant received a 420-month term of confinement that consisted of standard range sentences on each count, served concurrently, with two firearm enhancements, served consecutively. CP 352.

## 2. SUBSTANTIVE FACTS

Twenty-two minutes after midnight on July 22, 2013, a man walked up to a white Lexus parked in the alley adjacent to the upper parking lot of the Eastlake Market<sup>1</sup> and fired four shots through the right side front passenger window. 1/27RP 679-80, 683, 763-65. Sitting in the front passenger seat was Everett Williams. 2/18RP 2977. All four bullets struck Williams. 2/17RP 2798. One bullet passed through Williams' face and struck Mike Stukenberg, who was seated in the driver's seat. 1/27RP 709-10. The bullet passed through Stukenberg's arm and landed on the floor of the car. 2/3RP 1693-95. Apartments surround the parking lot and alleyway and many residents heard the shooting.

James Brighton was sitting on his balcony that looked directly down onto the alley and the market parking lot. 1/28RP 946-48. He heard a series of pops and saw the flash of the gun out of the corner of his eye. 1/28RP 950, 953-56, 984. Immediately looking down to where the flashes came from, Brighton saw a black male standing next to the passenger door of a white Lexus with his arm extended and holding an object that he had no doubt was a gun. Id. Asked on examination if he really witnessed the shooting, Brighton testified that he heard the pops and saw the flashes of

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<sup>1</sup> The Eastlake Market sits on a slope and faces west towards Lake Union. 1/27RP 701. There is a parking lot that sits on top of the market with car access via an alleyway. The shooting occurred in the alleyway just adjacent to the parking lot. 1/27RP 701, 708.

the gun at the same time; he looked down immediately towards the flashes and saw a man with his arm outstretched and holding an object. 1/28RP 984. Unless he had something else that made a pop and a flash, Brighton added, it was a gun. 1/28RP 984.

Brighton watched as the man walked towards the market parking lot where he lost sight of him. 1/28RP 956. As Brighton called 911 he saw a dark-colored sedan drive away down the alley. 1/28RP 958. While he had not seen the man get into the car, he heard the car door just before the sedan sped away. 1/28RP 959. Brighton described the shooter as a black male with a dark oversized jacket or garment of some kind, and a white baseball cap. 1/28RP 954-55. This matched what the defendant was wearing. See Exhibit 58 Photos 10-20; Exhibit 93 Photos 9-12. Officer Daniel Auderer confirmed that the defendant was wearing a dark jacket or sweatshirt, white hat and jeans or shorts as some people wear shorts almost down to their ankles. 1/28RP 877, 887. Both still photos and patrol car dash cam video show the defendant's attire. E.g., Exhibits 3, 10, 15, 58, 93.

Matthew Bellando heard the gunshots and looked out his window. 1/27RP 786, 789. He saw a black male walk over to a dark Chevy Impala that was parked in the market's upper parking lot, after which he saw the Impala speed down the alley. 1/27RP 794, 798, 800; 1/28RP 831. Bellando did not see the male's face but he did see his clothing. 1/27RP 804.

Lucas Alvarez heard the shooting and looked out to see a person walk across the parking lot away from the Lexus and get into a dark-colored sedan that then drove away. 1/27RP 733, 743, 758, 768. The car drove past a man who Alvarez saw stumbling about. 1/27RP 743. The man was Stukenberg, who had gotten out of the car after being shot in the arm. 1/27RP 762.

Kimberly Chung, another apartment resident, also heard the gunshots. 1/28RP 904, 907. She saw a darker skinned male with what she believed to be a gun. 1/28RP 918-20.

Jacob May saw a dark-skinned male in a black shirt walking and holding up his baggy shorts that were hanging down to his shins before getting into the front passenger seat of a Chevy Impala and driving away. 2/1RP 1139-44, 1147-49, 1154-55.

Within minutes of the shooting, police observed a black Impala getting onto I-5 southbound around Stewart Street, just a mile and a half from the scene of the shooting. 2/1RP 1196-97, 1223-24. Officers followed as the vehicle travelled erratically down I-5 south near the Convention Center. 1/28RP 1003-05; 2/1RP 1201, 1204, 1199. The front passenger fit the description of the shooter. 1/28RP 1005. The Impala exited at James Street and then drove up Yesler towards Broadway. 1/28RP 1009-10.

The vehicle was pulled over and its two occupants detained – the defendant, in the front passenger seat, and the driver, Elijah Washington. 2/1RP 1102, 1235-36, 1251. The defendant had a white baseball hat and dark shirt as Brighton described. 1/28RP 954-55; 2/1RP 1102, 1119, 1207. Washington had on a dark hat and light-colored clothing. 2/1RP 1206.

Officer Brian Hunt advised the defendant of his Miranda rights and told him that the car and he fit the description from an “incident” up north. 2/1RP 1106. The defendant lied and said that he was coming from Lake City. 2/1RP 1106. The defendant also got very confrontational and began yelling and cursing at Officer Hunt. 2/1RP 1107, 1112. When a second officer came up and told the defendant that the Impala had been seen leaving the scene of a shooting, the defendant began swearing at the officer, stated that he had not been at the scene and demanded to know who said that he was. 2/1RP 1253-56. When asked who owned the car, the defendant responded, “It doesn’t fucking matter.” 2/1RP 1256-58.

Matthew Bellando was driven to the scene of the stop for a show-up. 1/27RP 810-11; 1/28RP 873. He positively identified the car as the Chevy Impala he had seen in the market parking lot. 1/27RP 811. Bellando was also asked if he could identify the driver and passenger of the Impala. Bellando said he did not recognize the person or clothing of the driver (Washington) but he positively identified the passenger (the

defendant) as the person he had seen walk over to the Impala when he first looked out the window after the shooting. 1/27RP 811-13. Bellando testified that when he ID'd the Impala and the defendant, he was certain of his identification. 1/28RP 853, 876, 878.

A Springfield Armory .45 semiautomatic handgun was recovered from under the front driver's seat of the Impala -- the defendant's Impala. 2/4RP 1931-33; 2/10RP 1985-86. The safety was off meaning the gun was in a firing position. 2/11RP 2349. There were three holes drilled through the trigger, a technique that allows the gun to have a lighter trigger pull. 2/4RP 1935. Only two bullets remained in the gun -- one in the magazine and one in the chamber. 2/4RP 1938. Both bullets were .45 caliber and had a headstamp RP .45 Auto for Remington Pierce. 2/4RP 1936.

Mike Stukenberg testified that he had been good friends with the defendant and that they partied together 3 or 4 times a week. 2/2RP 1357-59. He testified that he had seen the defendant with a gun about 10 times. 2/2RP 1466-68. He described the gun as a chrome .45 Springfield semiautomatic with a black grip and that it had a number of holes drilled through the trigger. Id. His description matched the gun recovered from the defendant's car. See Exhibit 75 Photo 11.

The four bullets fired into Williams were recovered intact -- three from Williams' body and one from the floor of the Lexus after it passed

through Williams' face and Stukenberg's arm. 2/3RP 1683-84, 1692-95, 1722, 1734; 2/17RP 2797-2800, 2807. Four shell casings were found just outside the front passenger door of the Lexus. 2/3RP 1683-84; 2/11RP 2266. The casings had the same RP .45 Auto headstamp as the bullets found in the defendant's gun. 2/3RP 1699-1700. All the bullets were .45 hollow-points, with the spent bullets having a weight and dimension consistent with .45 semiautomatic bullets. 2/17RP 2699-2700.

The gun was test-fired five times for ballistics testing. 2/17RP 2687. A comparison of the test-fired casings with the casings found at the scene showed that the casings had all been fired from the gun recovered from the defendant's Impala. 2/17RP 2698. A comparison of the test-fired bullets with the recovered fired bullets showed that they all had the same pattern of lands and grooves – six lands and grooves with left-twisting rifling. 2/17RP 2700-04. The defendant's fingerprints, along with a number of other people's prints, were found on the exterior of the Lexus. 2/18RP 2900-08.

Elijah Washington had been friends with the defendant for about a year. 2/10RP 1970. He was also friends with Mike Stukenberg, the victim Everett Williams, and others who were together at various times the night of the shooting.<sup>2</sup> 2/10RP 1972-73, 1976-78.

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<sup>2</sup> Washington agreed to testify at the defendant's trial. 2/10RP 2138, Exhibit 50 and 53. He admitted that when first interviewed by the police he told a number of lies about what had happened. 2/10RP 2031-33. Per agreement, he would not be prosecuted for the single

On the day of the shooting, the defendant and Washington went to the Bite of Seattle and then to Green Lake where they drank for a few hours. 2/10RP 1988, 1993. While the two were hanging out, the defendant started talking about Williams having been involved in a drug deal in south Seattle where his "little cousin" had been killed. 2/10RP 1994-95. The defendant told Washington that Williams was responsible and that he was going to "take care" of him. 2/10RP 1996. Washington told the defendant that Williams was his friend and he didn't want anything to do with it. 2/10RP 1996. The two then went home, drank some more and got ready to go out and party. 2/10RP 1996-97.

The two drove to a McDonalds in the University District where they met up with Luciano Cascioppo, who knew about a party on a houseboat in the Eastlake area. 2/10RP 1998-2000. Also at the McDonalds were Claire Villiot, Dominic Oliveri and others. 2/2RP 1380-82; 2/10RP 2001, 2011. One of the people had a bluish convertible Volkswagen. 2/10RP 2002.

While at the McDonalds, Washington heard the defendant talking to "Mike" on the phone, getting directions but sounding angry. 2/10RP 2003-05. Washington believed he was talking to Stukenberg. 2/10RP 2005.

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crime of rendering criminal assistance if he fully cooperated and complied with the terms of the agreement. *Id.* Per agreement, if the facts proved that he had more involvement in Williams' death, he could still be charged with murder. 2/10RP 2138, 2168-69, 2177.

Leaving the McDonalds, Washington and the defendant followed the Volkswagen. 2/10RP 2007. They ended up in the Eastlake Market parking lot where they were going to hang out before the party. 2/10RP 2007-10.

At one point, Washington went down the stairs to the market to get some beer for Cascioppo. 2/10RP 2012-13. Just before he went down the stairs, the defendant said he would be right back and walked away. 2/10RP 2012-13. Washington did not know where the defendant was going. Id.

Stukenberg testified that he was with Williams in his white Lexus when he spoke with the defendant on the phone. 2/2RP 1375, 1386, 1393. Stukenberg cut the call short because he was trying to get directions to the party. 2/2RP 1393. The party ended up being low-key and with a younger crowd so Stukenberg and Williams decided to go to a bar on Capitol Hill. 2/2RP 1404-05. The defendant called Stukenberg again just as Stukenberg was about to leave the party. 2/2RP 1406-07. He asked Stukenberg where he was parked. 2/2RP 1406-07. Stukenberg thought this was strange and testified that he thought the defendant was drunk. 2/2RP 1407, 1409.

Stukenberg drove about 200 yards down the street from the party when he saw the defendant walking in the roadway. 2/2RP 1411-12. With Williams in the front passenger seat, the defendant hopped into the back seat. 2/2RP 1414. Stukenberg said they should get some food because the defendant seemed pretty drunk and they ended up pulling into

the alleyway adjacent to the Eastlake Market parking lot. 2/2RP 1416-18.

The defendant then got out of the car and walked down the stairs to the market, with Stukenberg and Williams remaining in the car. 2/2RP 1422.

A few minutes later, Stukenberg saw a silhouette out of the corner of his eye and then there were a number of flashes as someone fired a number of rounds into the car. 2/2RP 1425. Stukenberg did not see where the gunman went and initially he did not realize he had been struck. 2/2RP 1429, 1431. He checked Williams but he wasn't responding. 2/2RP 1430. He then got out and yelled for somebody to call 911. 2/2RP 1433. When he got out, he saw the defendant, Cascioppo and a few people he did not recognize. 2/2RP 1436-37. He then laid down on the ground until the police arrived. 2/2RP 1439.

Washington testified that when he was at the check stand in the market he heard a series of pops. 2/10RP 2013. He ran outside and saw the defendant running down the stairs. 2/10RP 2014. Surveillance video from the market confirmed that Washington was at the check stand as he described when the first 911 call of the shooting came in. 2/11RP 2222, 2235-38, 2252.

Washington ran up the stairs and saw Stukenberg on the ground, although he did not know who it was at the time. 2/10RP 2017-18. Washington jumped into the Impala and drove down the alley looking for

the defendant. 2/10RP 2022. The defendant waved him down and jumped into the car. 2/10RP 2023-24. The defendant then pulled a gun from his waist and told Washington to get on the freeway. 2/10RP 2024. The defendant told Washington that he shot Williams and accidentally shot Stukenberg. 2/10RP 2025. He added that he would have to kill Stukenberg if he snitched on him. 2/10RP 2026.

When Washington exited the freeway at James going onto Yesler at the defendant's direction, the "cops lit us up." 2/10RP 2027.

Washington testified that the defendant yelled at him to turn the corner so he could toss the gun but that he did not comply. 2/10RP 2027. The defendant then tossed the gun onto Washington's lap and Washington put it under the seat. 2/10RP 2027. The two were then taken into custody.

Jacqueline Rios testified that she knew of or was friends with everyone involved. 2/2RP 1289-94. She confirmed that Stukenberg and Williams were with her at the houseboat party but that they left to go to a bar. 2/2RP 1302-07.

Claire Villiot testified that she knew of or was friends with everyone involved. 2/4RP 1752-63. She admitted being in the market parking lot at the time of the shooting but that because of the Xanax and alcohol she had that night, she had little memory of the event. 2/4RP 1765-67. She testified that she was with Cascioppo when she saw the flash of a gun as a person

shot into a car. 2/4RP 1770-73. She could not testify as to any characteristics of the shooter other than she recalled saying he was black. 2/4RP 1773. She remembers screaming and then ending up at Cascioppo's mother's house on Capitol Hill. 2/4RP 1773-74. She recalled that Oliveri was at the house with her and Cascioppo. 2/4RP 1775, 1793.

Luciano Cascioppo testified that Villiot was his girlfriend at the time of the murder. 2/4RP 1807. He recalled meeting with the others at McDonalds and that the group included Kevin Simmonson who was driving an old VW. 2/4RP 1821-23; see also 2/2RP 1316-17. He believed that Oliveri was also present. 2/4RP 1823. He said they all ended up in the market parking lot. 2/4RP 1829-30. He remembered Stukenberg's Lexus pulling into the alley and that a bit later he saw the defendant fire a number of shots into the vehicle with a silver gun. 2/4RP 1838, 1840, 1843. He said he heard Villiot screaming and that he took her by the arm and walked her to his mother's house. 2/4RP 1844, 1846. At the time of the shooting Cascioppo did not know where Simmonson or Oliveri were. 2/4RP 1879.

Simmonson and Oliveri did not testify. The defendant did not testify. One defense theory, the defense told the court, was that Oliveri murdered Williams because he allegedly stole drugs from him. 2/2RP 1484-89. Oliveri is tall, skinny and Caucasian. 2/10RP 2178.

Additional facts are included in the sections below they pertain.

**C. ARGUMENT**

**1. THE TRIAL COURT CORRECTLY HANDLED THE DEFENDANT'S JUROR MISCONDUCT CLAIM**

The defendant contends that the trial court failed to appropriately investigate his claim of juror misconduct. To the contrary, after the defendant raised the issue, the court authored a letter that was sent to each jury member advising them that the lawyers for the State and the defendant wished to speak with them. Multiple jurors responded and declarations were taken. The court then found that the defense had not met its burden of showing juror misconduct requiring a full hearing.

**a. The Limited Ability To Impeach A Verdict**

The United States Supreme Court has reiterated that “fair and impartial verdicts can be reached if the jury follows the court’s instructions and undertakes deliberations that are honest, candid, robust, and based on common sense.” Pena-Rodriguez v. Colorado, \_\_ U.S. \_\_, 137 S. Ct. 855, 861, 197 L. Ed. 2d 107 (2017). To protect the integrity of the jury system, at common law and in every jurisdiction there exist a “no impeachment” rule. Id. at 861, 863. The purpose of a “no impeachment” rule is to “give substantial protection to verdict finality and to assure jurors that once their verdict has been entered, it will not later be called into question based on the

comments or conclusions they expressed during deliberations.” Id. at 861.<sup>3</sup>

The rule “gives stability and finality to verdicts.” Id. at 865.

In Washington, courts will generally not inquire into the internal process by which the jury reaches its verdict. Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003). Thus, “[t]he individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” Id. (quoting State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)). As a result, a juror’s post-verdict statements regarding the way in which the jury reached its verdict cannot be used to support a motion for a new trial. Id.

The Supreme Court set forth a test for determining whether evidence of misconduct inheres in the verdict. One question asks “whether the facts alleged are linked to the juror’s motive, intent, or belief, or describe their effect upon him.” Id. at 205 (quoting Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962)). Another question asks “whether that to which the juror testifies can be rebutted by other testimony without probing the juror’s mental processes.” Id.

Against this backdrop, the United States Supreme Court in

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<sup>3</sup> “Our judicial system rests upon the idea of finality in judgments given by the courts. Lacking the principle that every action will one day terminate in a final adjudication, subject no longer to re-examination, the judicial system would likely disappear. For that reason and other good reasons, the courts have long accepted the premise that jurors may not impeach their own verdict.” Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967).

Pena-Rodriguez, created an exception to the “no impeachment” rule where there exists racial bias. The Court held that “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant...the no-impeachment rule [must] give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.” Id. at 869.

In Pena-Rodriguez, two jurors spoke with counsel after the verdict and said that another juror had expressed anti-Hispanic bias. A sexual assault case, the comments included the juror stating that “I think he did it because he’s Mexican and Mexican men take whatever they want,” and “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” Id. at 862. In holding that the trial court should have considered the juror’s statements, the Court cautioned “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry.” Id. at 869.

“For the inquiry to proceed,” the Court stated, “there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.”<sup>4</sup> Id. “To qualify,” the Court added,

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<sup>4</sup> The defense cites to two civil cases and states that the court must adopt as factually true any allegations of racial bias. Def. br. at 13. There is no support for such a proposition. In In re Zufelt, 112 Wn.2d 906, 774 P.2d 1223 (1989), the court was tasked with determining

“the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict.” Id.<sup>5</sup>

Whether a defendant meets this threshold is committed to the sound discretion of the trial court in light of all the circumstances, “including the content and timing of the alleged statements and the reliability of the proffered evidence.” Id.; Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 203, 75 P.3d 944 (2003). An abuse of discretion is shown when the reviewing court is satisfied that “no reasonable judge would have reached the same conclusion.” State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). “A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

**b. The Relevant Facts**

Closing arguments occurred on February 24, 2016. The jury returned guilty verdicts on March 1, 2016. During this time period, the record contains no evidence of any disharmony within the jury.<sup>6</sup>

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whether a recall petition was factually and legally sufficient under a particular statute. In stating what a party must show, the court defined *prima facie* as applied “in this context” of a recall petition. Zufelt, at 911. In N. Fiorito Co. v. State, 69 Wn.2d 616, 871, 419 P.2d 586 (1996), the court was tasked with determining the sufficiency of the evidence where a dismissal or nonsuit is granted. Neither case has any application to the issue at hand.

<sup>5</sup> The Court noted that “careful *voir dire*,” the court’s instruction that jurors “not let any bias, sympathy or prejudice” influence their decision, and full and thoughtful deliberations are existing processes designed to prevent racial discrimination during deliberations.

In returning guilty verdicts, the court polled the jury, asking each individual juror if the verdicts were the verdicts of the jury and if the verdicts were each juror's individual verdicts. 3/1RP 3363-66. Each juror answered both questions in the affirmative. Id.

On March 10, 2016, the parties appeared before the court. The court indicated that juror 6, who happened to be the lone black on the jury,<sup>7</sup> came into court emotionally upset. 3/10RP 6. The court put her in contact with a counselor the court uses for jurors. Id. The defense indicated that juror 6 had contacted them and that they felt there may have been juror misconduct, that after 3 1/2 days, juror 6 acquiesced due to pressure from other jurors and voted guilty. Id. The defense wanted more time to investigate the matter. Id.

The court noted that another juror had contacted the court upset at uninvited contact by the defense. Id. at 7, 11. The defense proclaimed that they have every right to contact jurors and did not need the court's permission. Id. at 22. The court disagreed.<sup>8</sup> The court authored a letter that was sent to each juror that informed them that counsel wished to

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<sup>6</sup> The jury sent out a single question asking for a street map. CP 283-84.

<sup>7</sup> One of the other jurors noted that the jury consisted of a mix of men and women with one Native American and at least two people of "Asian heritage." CP 334.

<sup>8</sup> GR 31(j) provides that juror information other than name is presumed to be private and may be accessed only upon a showing of good cause.

Speak with them. CP 292. The letter provided contact information for the prosecutor and defense. Id.

Fifteen days later, the defense prepared an affidavit and had juror 6 sign it. CP 474-78. The defense then filed a motion for a new trial. CP 452-87. The State filed affidavits from six other jurors. CP 322-28. The court then held a hearing to determine whether the defense had made a *prima facie* showing of juror misconduct necessitating further investigation.

Per her affidavit, juror 6 stated that she did not agree with the jury's verdict. CP 474. She stated she "felt personally attacked and belittled during the deliberation process." CP 475. She stated she "felt these attacks carried an implicit racial bias." Id. She said she felt this way because other jurors were dismissive of her and accused her of being partial and close-minded. CP 475. That is why, she claims, she voted guilty. CP 476.

The other six jurors who responded were asked two questions (1) Did you personally do anything to juror 6 which was motivated by racial bias during deliberations, and (2) Did you observe any other juror do anything to juror 6 which appeared to be motivated by racial bias during deliberations. CP 322-28. All six jurors who responded indicated that they did not perceive anything considered racist during deliberations. Id. Some of the jurors added that juror 6 was challenged because she kept saying that she did not believe the defendant was guilty but she did not support her

position with a discussion of the evidence and did not seem very open-minded. Id. The jurors indicated that any discussion was respectful. Id. Some other jurors added that juror 6 expressed difficulty based on a friend of her son who she claimed was falsely accused of murder. Id.

In denying the defendant's motion, Judge Spearman noted that juror 6 was clearly emotionally distressed and felt that she was attacked by the other jurors but that there was no support for the proposition that the other jurors did so based on implicit bias. 4/6RP 109-10 (see also court's written findings CP 405-10). Judge Spearman noted that in her experience, the lone holdout often feels pressured. Id. at 110. Judge Spearman also noted that in her experience, many times persons who feel they have been treated disrespectfully by persons of another race will presume that the disrespect is due to the person's race. Id. The court noted that there was no allegation that the other jurors found the defendant guilty because of his race. Without more, the court ruled, she would not assume implicit bias. Id. at 111.

**c. The Court Did Not Abuse Its Discretion**

As much as the defense wants to repeat the language used by juror 6 that she felt "mocked" and "ridiculed," the defense cannot get past that Judge Spearman was correct, juror 6's feeling that she was treated this way because of her race is just that, her feelings. There was no racial language used against her or even language where one could reasonably

presume any type of racial animus, racial intent or unconscious racial bias against the defendant or against her. It is certainly worth noting that there is not even an allegation that any juror found the defendant guilty even in part because of the defendant's race.

Nothing in juror 6's affidavit remotely comes close the showing of "overt racial bias that cast serious doubt on the fairness and impartiality of the jury deliberations and resulting verdict" required by the Supreme Court in order to set aside the no-impeachment bar. Pena-Rodriguez, at 869.

It seems that the defense relies heavily on one juror's statement that she "appreciated some of the insights juror 6 had, specifically about the norm in hip-hop culture and baggy pants without a belt and the need to hold them up with one's hands. This was a norm that some of the other jurors seemed unaware." CP 336. First, contrary to the defendant's assertion, hip-hop is not synonymous with African-American youth. See Eminem, Beastie Boys, Machine Gun Kelly, Mac Miller, G-Easy, Lil Dicky, Aesop Rock, Macklemore & Ryan Lewis. Second, the nexus between racism, express or implied, and one juror appreciating that juror 6 apparently provided some knowledge to the jury, seems to be missing. While racism is repugnant and

it should be a strong concern, here, the defendant has failed to show that Judge Spearman abused her discretion in denying the defendant's motion.<sup>9</sup>

**2. THE DEFENDANT'S BALLISTICS EVIDENCE CHALLENGE WENT TO THE WEIGHT OF THE TESTIMONY, NOT ADMISSIBILITY**

The defendant contends that the trial court erred in admitting "unreliable and scientifically dubious opinion testimony" that the bullet casings and bullets recovered from the scene and from Williams' body were fired from the gun found in his car. Def. br. at 20. Although the basis for the defendant's challenge is unclear, if he is claiming that no firearms expert can reach such a conclusion, the issue has been waived because the defendant never requested a Frye hearing. If he is claiming that in his case the expert had no basis to testify as such, this would be an evidentiary issue that goes to the weight of the testimony, not its admissibility.

**a. The Relevant Facts**

Mike Stukenberg testified that he had seen the defendant with a handgun on multiple occasions. 2/2RP 1466-68. He described the gun as a chrome .45 Springfield semiautomatic with a black grip and a number of holes drilled through the trigger. Id.

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<sup>9</sup> The defendant, citing State v. Jackson, 75 Wn. App. 537, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995), states that the court's failure to hold a hearing requires a new trial, not a remand for an evidentiary hearing. The Jackson court did not remand for an evidentiary hearing in part because "we have not been asked to remand the matter for an evidentiary hearing." Jackson, at 544. It would seem a travesty of justice to reverse a conviction based on an allegation not proven. Should this Court find that Judge Spearman should have held a hearing, the State hereby requests that the case be remanded for a hearing.

When the shooting occurred James Brighton was on his balcony that overlooked the alley. 1/28RP 946-48. He heard the shots, saw the flash of the gun and a black male standing next to the passenger door of a white Lexus with his arm extended and holding an object that he had no doubt was a gun. 1/28RP 950, 953-56, 984. As Brighton called 911 he watched the man walked towards the market parking lot and then he saw a dark-colored sedan drive away. 1/28RP 956, 958. While he did not see the man get into the car, he heard the car door just before the sedan sped away. 1/28RP 959.

Matthew Bellando also heard the shots and looked out his window. 1/27RP 789. He saw a black male walk over to a dark Chevy Impala and then saw the Impala speed down the alley. 1/27RP 794, 798, 800. Within minutes police pulled the Impala over and its two occupants were detained – the defendant and Elijah Washington. 2/1RP 1235-36, 1251.

A Springfield .45 semiautomatic was recovered from under the front seat of the defendant's Impala. 2/4RP 1931-33; 2/10RP 1985-86. There were three holes drilled through the trigger, a technique that allows the gun to have a lighter trigger pull. 2/4RP 1935. The gun matched to a T the gun Stukenberg had seen the defendant with on prior occasions. See Exhibit 75 Photograph 9.

The four bullets fired into Williams were recovered intact along with four casings found next to the front passenger door of the Lexus. 2/3RP

1683-84, 1692-95, 1721-22; 2/11RP 2266. Two bullets were in the Springfield .45. 2/4RP 1938. All six casings were identical, made of brass with a nickel primer and with a RP .45 headstamp indicating .45 caliber ammunition by Remington Peters. 2/3RP 1699-1700; 2/4RP 1936; 2/17RP 2688. All the bullets were hollow points and the weight and dimensions of the four fired bullets consistent with .45 auto caliber bullets. 2/17RP 2699-2700. Even before any ballistics evidence testimony, this is some of the evidence that tied the gun found in the defendant's car to Williams' murder.

Toolmarks and Firearms Expert Kathy Geis conducted the ballistics testing. A forensic scientist for over 15 years, a toolmarks and firearms expert for 10 years, Geis has a Bachelor of Science Degree from UC Davis and a Masters from the University of Washington. 2/17RP 2646-47, 2660. At the time she conducted testing in this case, she was working for the Washington State Crime Lab. 2/17RP 2649, 2655. Fully accredited by the International Organization for Standardization, the lab works with complete transparency, it must follow "best practices," have a standard operating procedure in place and there must be a written documentation of all work performed. 2/17RP 2655-56. The lab also undergoes an internal audit every year and periodic audits from accrediting agencies in the United States and internationally. 2/17RP 2656-57. Geis satisfactorily completed every proficiency test given to her over her career. 2/17RP 2649, 2657.

After verifying that the gun was fully operational, Geis test-fired the gun to see if the firearm imprinted potentially unique markings on fired casings and bullets. 2/17RP 2688-91. The normal procedure is to fire two bullets and then microscopically view the bullets and casings. 2/17RP 2712. In this case, Geis fired five rounds. 2/17RP 2687, 2711. All five casings had a quality and quantity of marks that were reproducible and thus identifiable by comparison. 2/17RP 2698. The five casings were compared microscopically with the four casings found at the scene, to which Geis "identified them as having been fired from the firearm." 2/27RP 2698. The four spent bullets and five test-fired bullets all had the same discernible marks, including six lands and grooves with a left twist, leading Geis to "identify them as having...been fired from this firearm." 2/17RP 2699-2704. Geis indicated that as part of the lab's standard operating procedure, her results had gone through the verification process by a separate examiner. 2/17RP 2662, 2705; Trial Exhibit 75.

On cross, Geis confirmed that there is a level of subjectivity in ballistics analysis and that she could not say with 100% certainty that the recovered bullets and casings were fired from the gun recovered from the defendant's car. 2/17RP 2730-31, 2741-41. She added that together with the other consistencies between the bullets and casings, the chance of error was less remote. 2/17RP 2725-26. Geis also testified that she was familiar

with the National Academy of Sciences report and agreed that there is always a need for more research, although she indicated that the report appeared to focus on academia and not practical research. 2/17RP 2724.

The defense retained their own firearms expert but declined to call him as a witness. 1/19RP 58. The defense theory at trial did not include an assertion that the gun found in the defendant's car was not the murder weapon. See 2/24RP 3284-3330.

**b. A Meritless Evidentiary Claim Or A Waived Challenge To The Science**

In determining the admissibility of evidence based upon novel scientific theories or methods Washington courts employ the "general acceptance" standard set forth in Frye v. United States, 293 F. 1013 (D.C.Cir.1923). State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996). The Frye standard provides that evidence deriving from a scientific theory or principle is admissible if that theory or principle has achieved general acceptance in the relevant scientific community. State v. Baity, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000). "Unanimity" as to general acceptance "is not required." State v. Gore 143 Wn.2d 288, 302-03, 21 P.3d 262 (2001).

It has also never been held that a trial court must undergo the substantial burden of holding a Frye hearing every time a defendant raises an objection or even if persons in the scientific community have a differing opinion. To the contrary, it is only where a party can prove that

“there is a significant dispute among qualified scientists in the relevant scientific community” that the evidence will not be admitted under Frye. Gore, 143 Wn.2d at 302. “Once a methodology is accepted in the scientific community, then application of the science to a particular case *is a matter of weight and admissibility under ER 702*, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.” State v. Gregory, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006) (emphasis added).

Under ER 702, the court must determine (1) whether the witness qualifies as an expert and (2) whether the witness’s testimony will assist the trier of fact in understanding the evidence. Copeland, 130 Wn.2d at 256. Evidence is helpful if it concerns matters beyond the common knowledge of a layperson and does not mislead the jury. State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), rev. denied, 154 Wn.2d 1026 (2005). Courts interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases. Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). If the two above requirements are met, the witness “may testify thereto in the form of an opinion or otherwise.” ER 702.

Toolmarks and ballistics evidence has been and still is generally accepted in the relevant scientific community. See State v. Kunze, 97 Wn. App. 832, 855, 988 P.2d 977 (1999) (recognizing the general acceptance of

toolmarks and ballistics evidence), rev. denied, 140 Wn.2d 1022 (2000), e.g., United States v. Williams, 506 F.3d 151, 161 (2d Cir. 2007) (firearms identification methodology matching particular guns to particular bullets is not pseudoscience); United States v. Hicks, 389 F.3d 514, 526 (5th Cir.2004) (matching shell casing through ballistics testing is accepted methodology), cert. denied, 546 U.S. 1089 (2006); Fleming v. State, 194 Md.App. 76, 1 A.3d 572, 586, 590 (2010) (microscopic “[f]irearms toolmark identification” is generally accepted in scientific community); Al-Amin v. State, 278 Ga. 74, 597 S.E.2d 332, 344 (holding that ballistic and tool marks evidence is not novel), cert. denied, 543 U.S. 992 (2004).

The defendant does not cite the Frye standard but many of the cases he relies upon are based on Frye. See, e.g., Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 260 P.3d 857 (2011) (a toxic chemical case wherein the court was tasked with determining whether certain evidence was subject to the Frye test). The problem the defendant faces is that he never asked for a Frye hearing and the failure to request a Frye hearing constitutes waiver of the issue on appeal. See State v. Lizarraga, 191 Wn. App. 530, 567 n.23, 364 P.3d 810 (2015), rev. denied, 185 Wn.2d 1022 (2016) (Lizarraga’s claim that ballistics evidence is subject to Frye was waived where not requested below), accord, State v. Florczak, 76 Wn. App. 55, 72, 882 P.2d 199 (1994) (failure to raise a Frye claim is

not a manifest error affecting a constitutional right that may be raised for the first time on appeal), rev. denied, 126 Wn.2d 1010 (1995), see also State v. Newbern, 95 Wn. App. 277, 975 P.2d 1041, rev. denied, 138 Wn.2d 1019 (1999) (an objection on a different grounds to expert scientific testimony does not preserve the issue for appeal).

In addition to waiver, “it is well supported in case law that if a scientific test is generally accepted by the relevant scientific community, lack of certainty goes to weight rather than admissibility,” just as the court held here. State v. King Cty. Dist. Court W. Div., 175 Wn. App. 630, 641, 307 P.3d 765, rev. denied, 179 Wn.2d 1006 (2013) (citing State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997)) (uncertainty of presumptive phenolphthalein test for detecting human blood went to weight rather than admissibility); State v. Lord, 117 Wn.2d 829, 854, 822 P.2d 177 (1991) (“the weight to be given the expert’s conclusion is generally left to the jury,” noting the certainty or lack thereof of hair identification is subject to cross-examination and argument).

When determining admissibility under ER 702, the trial court exercises discretion based on the facts of the case before the court. City of Fircrest v. Jensen, 158 Wn.2d 384, 398-99, 143 P.3d 776 (2006); State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004) (admissibility under ER 702 “requires a case by case inquiry”). The trial court’s decision to

admit evidence will be overturned only upon a finding that the court abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). An abuse of discretion is shown only when the reviewing court is satisfied that “no reasonable judge would have reached the same conclusion.” Hopson, 113 Wn.2d at 284.

Here, the defendant did not allege any particular error or failing in the ballistics analysis done in his case. The defense declined to call their ballistics expert, thus strongly suggesting that there was nothing specific about Geis’ testing and analysis that was questionable. Instead, the defendant relies on broad sweeping claims that testimony about ballistics is “unreliable and scientifically dubious.” These types of broad claims go to “general acceptance” under Frye, an issue that has been waived. In any event, cases show the failings of the defendant’s argument.

In King Cty. Dist. Court W. Div., for example, the defense argued, and the trial court accepted the notion that without a “confidence interval” a breath alcohol measurement in a DUI case is “inherently misleading and unhelpful to the trier of fact in every case.” 175 Wn. App. at 639. In reversing, this Court held that “in essence” the lower court was finding that breath alcohol test results fail the Frye test. The lower court’s ruling was “fatally flawed” in that it was applying the Frye standard without conducting a Frye hearing. Unless error rates “are so serious as to be unhelpful to the

trier of fact,” this Court held, “error rates go to weight, not admissibility.” Id. at 641. Without case specific assertions of error under ER 702, any challenge went only to the weight of the evidence. Id. at 639-40.

“Mere disagreement as to the conclusions or weight to be given the results, however, does not amount to a significant dispute.” State v. Phillips, 123 Wn. App. 761, 767, 98 P.3d 838 (2004), rev. denied, 154 Wn.2d 1014 (2005).

The defendant’s own evidence also shows why the issue is one of Frye and why his claim has no merit. In the President’s Council of Advisors on Science and Technology, Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods (Sept. 2016) (hereinafter Council Report), the writers acknowledge the number of validation studies that have been conducted over the past 15 years regarding ballistics evidence. Council Report at 64, 106. For example, the report notes that a 2009 article by the chief of the Firearms-Toolmarks Unit of the FBI wherein he found that empirical studies showed false-positive errors (misidentifications) to be extremely rare. Id. at 105. In one study, out of 3255 test results, 3239 were found to be correct, 14 had inconclusive findings and there were only two false positives. Id. at 108 n.324. Still, the report seems to side with the Director of the Defense Forensic Science Center in criticizing these

validation studies while asking for “black box” studies to be conducted -- a different type of study. Id. at 106. The report thus shows that if there is a debate, it is a scientific debate under Frye.

At the same time, with the validation studies that have been conducted, as an evidentiary matter a reasonable judge could find that false positives rarely occur and in a particular case – absent facts to the contrary, testimony that cartridges were fired from a specific gun is admissible. In any event, any error was harmless.

The erroneous admission of expert testimony is not of constitutional magnitude and thus, error will not be found to be prejudicial unless, within reasonable probabilities, it materially affected the outcome of the trial. State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989). Even accepting limitations on her testimony, Geis would still have been permitted to testify that the shell casings and spent bullets were fired from the gun found in the defendant’s car. She would just have been required to use different language, such as, it is “highly likely” that the shell casings were fired from the same gun. Considering the plethora of other evidence, both direct and circumstantial listed in the fact section above, that linked the gun to the defendant and the murder, the defendant cannot show that the outcome of trial would have been different.

**3. THE DEFENDANT'S CUSTODIAL STATEMENTS WERE ADMISSIBLE AT TRIAL AND ANY ERROR IN THE COURT'S RULING WAS HARMLESS**

The defendant does not dispute that he waived his right to remain silent by agreeing to be questioned by detectives. The State does not dispute that during the course of being questioned, the defendant changed his mind and invoked his right to remain silent. The question on appeal is at what point did he unequivocally assert his right to remain silent. The defendant asserts that he unequivocally invoked at a point earlier than the trial court found. Correct or not, the few sentences admitted that occurred after the defendant feels he invoked were harmless.

**a. The CrR 3.5 Hearing**

Prior to trial, the court held a CrR 3.5 hearing to determine the admissibility of custodial statements made by the defendant. See 1/19RP 133-206; 1/20RP 225-43, 30-310. The pertinent facts are as follows:

At the scene of his arrest the defendant was advised of his Miranda rights and then made various statements to Officers Matt Lilje, Brian Hunt and Steven Bales. 1/19RP 145-74; 1/20RP 242-43, 306-10; CP 385. The statements were recorded on the officers' dash cams. 1/20RP 233, 255, 306-10; CP 385. None of these statements are challenged on appeal.

The defendant was then transported to the homicide unit where he was interviewed by Detectives Alan Cruise and Russ Weklych. 1/19RP

182-89. The entire conversation was audio and video recorded.<sup>10</sup> 1/19RP 189. Prior to questioning, Detective Weklych read the defendant his Miranda rights. 1/19RP 187, 189. The trial court found, and the defendant does not dispute, that he impliedly waived his Miranda rights by engaging the detectives in a conversation. 1/19RP 189-92; CP 387-88.

The nature of the interview was not your typical question and answer interrogation. Rather, the defendant repeatedly asked questions of the detectives and was at times evasive, hostile and argumentative. 1/19RP 189-90, 198. For example, when asked his name, the defendant responded “[i]t’s not like you guys don’t recognize me, right...[s]o let’s not play no bullshit games again man.” CP 145. The detectives had had prior contacts with the defendant. 1/19RP 198. When asked “[d]o you know his name,” of the person who was driving the Impala, the defendant responded, “No, why?” CP 147. When asked who the Impala belonged to, the defendant responded “[i]t belongs to somebody else.” When asked where he had been coming from before he was stopped, the defendant responded, “[i]t doesn’t matter where I was. Am I in trouble? ... because nobody told me shit, they just brought me here.” CP 149. He followed up by telling the detectives “I already know both you guys’ styles. I already

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<sup>10</sup> The unredacted transcript of the interview is found at clerk’s papers 143 to 187.

know how you guys do this shit. Okay. So I'm not going to play this sick game with you guys anymore." CP 150.

At one point during the interview, Detective Weklych asked, "[t]hat's all I'm asking you, what you were doing." CP 153. The defendant responded, "[w]hat do you mean, what I – I don't even want to talk to you, dog. I don't even want to talk to you. I don't want to talk to you or you." CP 153 (page 11, lines 7-9). This is the point that the defendant claims he unequivocally invoked. Detective Cruise testified that he did not take the defendant's comments to mean he did not want to continue talking. Asked why not, the detective explained:

[H]e was still engaging us...and what you mentioned before about my prior contact with Mr. Berhe, the dynamic at that time was quite similar. We have to make a decision in these situations whether someone is requesting to remain silent. In Mr. Berhe's case, his demeanor is generally combative and belligerent. It was in this instance. It was in the previous instance that I had an interview with him...So it's a tough decision to make whether the person is expressing emotion or if they truly don't want to talk anymore.

1/19RP 198-99.

The defendant continued to engage the detectives. CP 153-87. At various times he made similar statements, such as "I would like you not to talk to me about shit and tell me what the fuck I'm here for," and "[o]kay, let's go. I don't want to keep talking to you guys anymore." CP 153, 166. Each time the defendant continued to engage the detectives.

The State conceded that at some point during the interview the defendant's protestations were his attempt to invoke his right to remain silent. 1/20RP 318. The question was where. Id. The trial court ruled that the "clear point" when the defendant invoked occurred on page 11 (CP 153) at lines 22-24. 1/20RP 344. The difference between where the court found the defendant invoked and where the defendant claims he invoked resulted in the following few statements being heard by the jury:

Weklych: Why are you so ticked off?

Defendant: Because I don't like that fucking smirk you got on your face looking at me like that. I know you're up to some fucking fucked-up ass game [redaction]. So it doesn't matter. And I know that shit right there is recording, I don't care.

Weklych: Okay.

Defendant: I don't care. You're not telling me what the fuck 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.

Weklych: What would you like me to do?

Defendant: I would like you not to talk to me about shit and tell me what the fuck I'm here for. All you're telling me is, oh, I'm investigating an incident. What incident?

Trial Exhibit 63; CP 153 (page 11, lines 10-24).<sup>11</sup>

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<sup>11</sup> Trial Exhibit 63 is the DVD played for the jury. The DVD was redacted to take out various statements ruled inadmissible on evidentiary grounds. The redaction in the quoted text is the single sentence "and I already have a fucking history with you." Compare Trial Exhibit 63 and CP 153. The transcript was not provided to the jury.

**b. The Trial Court's Ruling And The Law**

Under the Fifth Amendment an individual has the right to be free from compelled self-incrimination while in police custody. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). To protect this right the police must provide Miranda warnings to a person in custody before questioning commences. Miranda, 384 U.S. at 479.

Before a statement obtained during custodial interrogation may be admitted at trial the State must show by a preponderance of the evidence that the defendant knowingly and intelligently waived his right to remain silent. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). A defendant may expressly, or by his actions, impliedly waive his right to remain silent. State v. Cashaw, 4 Wn. App. 243, 248, 480 P.2d 528, rev. denied, 79 Wn.2d 1002 (1971).

Once a suspect has waived right to remain silent, an officer may continue questioning up until the point where the suspect changes his mind and unequivocally requests an attorney or asserts his right to remain silent. Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); State v. Radcliffe, 164 Wn.2d 900, 194 P.3d 250 (2008). The invocation must be clear and unequivocal in order to be effectual. State v. Walker, 129 Wn. App. 258, 276, 118 P.3d 935 (2005), rev. denied, 157 Wn.2d 1014 (2006). To be unequivocal, an invocation requires the

expression of an objective intent to cease communication with interrogating officers. State v. Piatnitsky, 180 Wn.2d 407, 411-12, 325 P.3d 167 (2014).

The inquiry into whether an invocation is unequivocal is an objective one. Davis, 512 U.S. at 459. The invocation must be sufficiently clear “that a reasonable police officer *in the circumstances* would understand the statement to be a request to remain silent.” Id. (emphasis added). When the request is not clear and unequivocal, police are not required to ask clarifying questions and may continue interviewing a suspect. Piatnitsky, at 411.

A trial court’s CrR 3.5 decision is reviewed to determine if substantial evidence supports the trial court’s findings of fact, and whether those findings support the conclusions of law. State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Unchallenged findings are verities on appeal. Id. Conclusions of law are reviewed *de novo*. Id.

Here, considering the defendant’s confrontational and argumentative manner of engaging the detectives, the trial court certainly had reason to find that the defendant’s earlier protestation, taken in context, was not an unequivocal invocation of his right to remain silent. As an example, the court in Piatnitsky noted that the phrase “I don’t want to talk right now, man” could certainly be considered an unequivocal invocation when viewed in “isolation.” 180 Wn.2d at 411-12. However, when viewed in context with Piatnitsky’s additional statement that “I just write it down, man. I can’t

do this,” the Court held that Piatnitsky’s statement was not sufficiently clear that a reasonable police officer in the circumstances would understand his statement to be an expression of an objective intent to cease communication. Id. at 412-13.

**c. Any Error Was Harmless**

The erroneous admission of custodial statements is subject to constitutional harmless error review. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995).

Any error in the admission of the few extra lines of the defendant’s statement made after his initial protestation was harmless. In the added few lines the defendant did not confess or admit to a single fact relative to the crime. He did not put himself at the scene, in the Impala, in possession of the weapon, etc. He did nothing more than express his anger at not being told what he was being investigated for. However the jury already heard the testimony of the arresting officers (and saw their dash cam videos) wherein the defendant was argumentative and verbally abusive to the officers. The jury also heard and saw the defendant exhibit these same behaviors to the detectives before he invoked. Thus, even if the defendant’s initial protestation

can be deemed an unequivocal request to remain silent, the few extra lines were insignificant, harmless and cumulative of evidence already admitted.

**d. The Defendant's Evidentiary Claim**

Without citing to an evidence rule, the defendant claims that the DVD of his interview with the detectives should not have been shown to the jury because it was overly prejudicial and thus his conviction must be reversed. This claim should be rejected.

The decision to admit evidence is left to the sound discretion of the trial court. Demery, 144 Wn.2d at 758. A trial court's decision to admit evidence will be overturned only upon a finding that the trial court abused its discretion. Id. An abuse of discretion is shown only when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284.

At the most basic level, evidence is admissible if it meets the requirements of ER 401, ER 402 and ER 403.

ER 402 provides that "[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

ER 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence.”

ER 403 provides that relevant evidence may be excluded only “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

In considering a defendant’s evidentiary claims, a reviewing court must examine what actions the defendant took in the trial court. Where a defendant fails to raise an evidentiary objection, review is barred. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1185 (1985). Where a defendant makes a specific evidentiary objection in the trial court, review is limited to the specific ground raised at trial. Id.

Here, many of the defendant’s arguments are barred for failing to make a specific objection or for arguing a different basis for his objection on appeal. At trial, the defendant objected to the playing of the DVD of the detectives’ interview because, he asserted, it was cumulative of what was shown on the dash cam videos already admitted. See 1/20RP 343. He also objected to certain statements that showed the defendant had a prior history with the detectives. 1/20RP 343-44. Otherwise, it appears

his other objections were sustained and the DVD redacted.<sup>12</sup> His claims on appeal are thus limited to his specific objections.

Nonetheless, the defendant asserts that his failure to answer questions posed by the detectives was “inherently ambiguous” and his denial of having committed the crime irrelevant. While this may or may not be true, that is not what occurred here.

The defendant repeatedly lied to the detectives. He claimed not to know the name of the person who was driving his Impala, even though evidence would show that the driver and he were longtime friends. CP 147. He claimed that the Impala was not his and he did not know who it belonged to, even though evidence would show it was his car, the getaway vehicle and the car that contained the murder weapon. CP 147. He feigned indignation and ignorance about why he was stopped, even though the evidence showed he had just fled from the scene of a murder (whether he committed the murder or not). CP 147. He asserted that he had been cooperative with patrol officers but that they treated him “like shit,” even though evidence showed he was not treated poorly and he had not been forthcoming with the patrol officers. CP 148.

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<sup>12</sup> It does appear there was one statement the parties agreed to redact but it mistakenly was not. See 1/20RP 345; CP 150. Both parties had viewed the redacted DVD and agreed that it accurately reflected the court’s rulings. 2/11RP 2325-26.

Lying to police is evidence of consciousness of guilt. State v. Huff, 64 Wn. App. 641, 647, 826 P.2d 698, rev. denied, 119 Wn.2d 1007 (1992). Providing improbable explanations and false answers may be indicative of consciousness of guilt. State v. Goodman, 42 Wn. App. 331, 711 P.2d 1057 (1985), rev. denied, 105 Wn.2d 1012 (1986). Evasive behavior may be evidence of consciousness of guilt. State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996). Even nervous behavior can indicate consciousness of guilt. Illinois v. Wardlow, 528 U.S. 119, 124-25, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

While the defendant can certainly argue the weight of the evidence, the determination of the relevance of proffered evidence is a matter within the discretion of the trial court. Locke v. City of Seattle, 133 Wn. App. 696, 714, 137 P.3d 52 (2006), aff'd, 162 Wn.2d 474 (2007). The defendant cannot show that no reasonable judge would have found the DVD relevant and not substantially outweighed by unfair prejudice.

In any event, an evidentiary error is grounds for reversal only if it results in actual prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An evidentiary error “is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Bourgeois, 133 Wn.2d at 403. In assessing whether error was harmless, a reviewing court measures

the admissible evidence of the defendant's guilt against the prejudice caused by the improperly admitted evidence. Id.

It is difficult to see how the challenged evidence could have been so prejudicial where the defendant argues the evidence was "inherently ambiguous." If the evidence was inherently ambiguous, whatever prejudice existed was minor in comparison to the damning evidence of the defendant being caught fleeing the scene in a car that contained the murder weapon and one other person -- a person who could not have committed the murder.

#### **4. THE DEFENDANT'S FAILED CLAIMS OF MISCONDUCT**

Raising a plethora of claims, the defendant contends that the prosecutor committed such flagrant and egregious misconduct that his murder conviction must be reversed. The defendant's claims, many unsupported by the record, are without merit.

##### **a. The Law Regarding Claims Of Misconduct**

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

In regards to the first prong of the test, a prosecutor is an advocate and is free to argue all reasonable inferences based upon the evidence introduced at trial. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (2002). A prosecutor is also entitled to make a fair response to arguments made by defense counsel. Id. Considering the fluid nature and purpose of closing argument, greater latitude is given in closing argument than elsewhere during trial when assessing whether a particular statement constitutes misconduct. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). Prejudicial error does not occur until such time as it is “*clear and unmistakable*” that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev. denied, 111 Wn.2d 641 (1985).

In regards to the second prong of the test, even where misconduct has occurred, a conviction will not be reversed unless the defendant can show that the misconduct actually resulted in prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). A defendant must prove that there was a “substantial likelihood” that the challenged comments actually affected the verdict. Warren, 165 Wn.2d at 26. In making this determination, the prejudicial effect of alleged improper comments will not be determined by looking at the comments in isolation, rather, the prejudicial effect will be determined by placing the remarks in the context

of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The court will also consider the nature of the comments and whether the comments were of an isolated nature. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993), rev. denied, 123 Wn.2d 1030 (1994).

Finally, a defendant's failure to object to alleged misconduct at trial constitutes waiver of the issue on appeal unless the misconduct was "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request. Russell, 125 Wn.2d at 85.

One reason for requiring the defense to object is that it is the defense that is most acutely attuned to perceive the possible prejudice of the prosecutor's remarks. State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039, rev. denied, 141 Wn.2d 1005 (2000). Thus, the absence of an objection indicates that the comments did not strike the defense as improper or particularly prejudicial. Klok, 99 Wn. App. at 85. Additionally, "[c]ounsel may not remain silent, speculating upon a

favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

**b. The Alleged Misconduct**

The defendant begins by claiming that the prosecutor’s use of the words “we” and “we know” in closing argument constituted vouching for the State’s witnesses. The defendant goes so far as to count the number of times the prosecutor used the words. Def. br. at 49. It is improper for a prosecutor to vouch for the credibility of a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), rev. denied, 170 Wn.2d 1016 (2011). But that did not happen here.

Vouching occurs in two ways, either by the prosecutor placing the prestige of the government behind the witness or by indicating that information not presented to the jury supports the witness’s testimony. Id. While the defendant cites a number of out-of-state cases, this Court has previously held that using the pronoun “we” or words “we know” in a rhetorical manner is not necessarily misconduct. See State v. Robinson, 189 Wn. App. 877, 359 P.3d 874 (2015). A prosecutor or defense attorney may use the words to illustrate what the evidence at trial shows. Id.

For example, here the prosecutor discussed the fact that the Eastlake Market video showed Elijah Washington at the checkout counter

at 19 minutes 34 seconds after midnight and showed him leaving the store at 20 minutes 19 seconds after midnight. 2/24RP 3264. The prosecutor then noted that the first 911 call came in at 20 minutes and no seconds after midnight. Id. Thus, the prosecutor stated, “we know for a fact that Elijah Washington is not the shooter. It’s impossible.” Id. This was not misconduct, just as it was not misconduct for defense counsel to use the same rhetorical manner of speaking in using “we” or “we know” 37 times.<sup>13</sup> See 3284, 3286, 3288, 3290, 3294, 3296, 3298-3301, 3304-05, 3307, 3313-17, 3321, 3324-27, 3329.

The defendant next argues that the prosecutor shifted the burden of proof by mischaracterizing the defense theory of the case and providing the jury with a false choice of options need to acquit. Again, that is not what happened here.

It is improper to create a false dichotomy; to tell the jury that in order to acquit, the jury must find that the State’s witnesses are lying. This is because the jurors could acquit simply by finding that the State had not met its burden of proof. State v. Casteneda-Perez, 61 Wn. App. 354, 359, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991). It may also be an

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<sup>13</sup> For example, defense counsel told the jury, “[t]here are a hundred reasons to doubt and a hundred reasons to find him [the defendant] not guilty. And only one way to find him guilty is to put full faith in the testimony of people we know are lying.” 2/24RP 3329. Similarly, counsel told the jury “Elijah told us that Tomas actually put his arm out of the window and began shooting the gun as they were on the freeway. Elijah apparently didn’t know what we know, which is that Officer Hunt, Officer Bale, and Officer Julius were all behind that Impala the entire time that it was on the freeway.” 2/24RP 3316.

improper “tactic” to intentionally misrepresent defense counsel’s argument in rebuttal for the purpose of creating a “straw man” that can easily be destroyed in the minds of the jury. State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), rev. denied, 185 Wn.2d 1015 (2016).

On the other hand, it is not improper to comment critically on a defense argument or to argue that the evidence does not support the defense theory. Russell, 125 Wn.2d at 87, accord, State v. Coleman, 74 Wn. App. 835, 838, 876 P.2d 458, rev. denied, 125 Wn.2d 1017 (1994) (“A prosecutor does not commit misconduct by arguing that the jury would have to disregard the evidence in order to reach a certain result”). And a prosecutor is entitled to make a fair response to the arguments of defense counsel. Brown, 132 Wn.2d at 566.

In addressing the defense closing argument the prosecutor stated:

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 on the world.

2/24RP 3331. The prosecutor added “[t]hat’s certainly a theory. It’s not supported by any evidence.” 2/24RP 3331. The prosecutor reiterated that “[t]here is no doubt that the burden of proving those elements that I showed you on the screen are mine...[a]ll I’m saying is they come up here and they made an impassioned argument...scrutinize it. Where is the

evidence of this conspiracy theory?" 2/24RP 3332. The prosecutor followed up by discussing the facts as it pertained to the defense claims.

A conspiracy is "the act of conspiring together, an agreement among conspirators." [www.merriam-webster.com/dictionary/conspiracy](http://www.merriam-webster.com/dictionary/conspiracy). Conspires means "to join in a secret agreement to do an unlawful or wrongful act, to act in harmony toward a common end." [www.merriam-webster.com/dictionary/conspires](http://www.merriam-webster.com/dictionary/conspires).

The defendant claims that he did not put forth a conspiracy theory and that by making the argument the prosecutor did, he was shifting the burden of proof, mischaracterizing the defense theory and creating a false choice. This is incorrect – defense counsel did in fact argue just as the prosecutor stated evidenced in part by the defendant's failure to object on this grounds.

A "category" of witnesses, defense counsel told the jury, included "witnesses from Everett's [Williams'] party circle who did see what happened, and they are trying very hard to obscure the truth." 2/24RP 3285. Counsel added, "the State ignored those in this group of nine who were up there in that parking lot. The State ignored that those who were not either arrested or injured reconvened half an hour later to talk everything over at Lucci's [Cascioppo's] mansion." 2/24RP 3287. "The State just ignored Dominic Oliveri completely" and then he just "disappears." 2/24RP 3287, 3306. "[A]nd his friends," counsel

proclaimed, “are doing everything they can to keep him out of this.”

2/24RP 3307. “It’s very interesting” counsel said, “that it is only Elijah and Lucci who will say Tomas had a gun.” 2/24RP 3316.

Counsel continued, stating that the detectives “failed to fully investigate this case because they focused too early on one person because they took Lucci and Elijah at face value. They focused on the *most vulnerable person, the outsider, the newcomer* to the group from the very inception of an investigation of convenience.” 2/24RP 3321 (emphasis added).

Contrary to the defendant’s claim on appeal, the defense argued as one of their theories that the State’s witnesses acted together in lying about who really committed the murder. Defense counsel never argued that Williams’ friends were mistaken as to what they saw. Rather, the defense claimed they were lying. And while the prosecutor used the term patsy, and called him unlucky, it was defense counsel who told the jury that the defendant “is sitting here for a crime he didn’t commit,” and he was chosen because he was “the most vulnerable person.” 2/24RP 3284, 3321.

In addition, during rebuttal, the prosecutor told the jury he was addressing the defense theory. The prosecutor never asserted that if the jury did not believe the defense theory, they were required to convict. In short, the defendant’s argument here is not well taken.

Next, the defendant claims the prosecutor misled the jury regarding “the law governing missing evidence” by telling the jury that “[t]here’s no law that says that’ evidence the State did not present can be *assumed* to be ‘bad for the State.’” Def. br. at 51-52 (emphasis added). There are two problems with this argument. First, it is not what the prosecutor said. It is only by piecing together segments of sentences that the defendant is able to make this argument. Second, the defendant did not object. Had he informed the court that the prosecutor was misstating the law, the trial court could easily have remedied the problem. Absent an objection, this issue has been waived. See Warren, 165 Wn.2d at 24-28 (complete misstatement of the burden of proof remedied by court reinstructing the jury upon objection).

In closing, defense counsel told the jury that “there is actually a third group of witnesses in this case. These are the witnesses that the State ignored. . . the State’s case has been misleading. The State has *ignored witnesses that contradicted their storyline* just like the detectives did.” 2/24RP 3285 (emphasis added). “We did not hear from Dominic [Oliveri]. Where was Dominic? We did not hear from Kevin Simmonson. Where was Kevin? We did not hear from Jonah Evett. Where was Jonah Evett? The State failed to call witnesses *who would contradict their storyline.*” Id. at 3288 (emphasis added).

In regards to Washington's testimony that he was with the defendant at Green Lake earlier in the day, defense counsel told the jury that "[i]f the State could corroborate his story with cellphone tower data that they said – Detective Cruise said they received, [w]e would have heard it. You would have heard that evidence. You didn't hear it because they don't have it." Id. at 3310; see also id. at 3315.

Prior to closing arguments the court instructed the jury that "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." CP 254.

In responding to the defense closing, the prosecutor stated:

They talk a lot about Dominic and his motive. But really, again, no one describes Dominic Oliveri as being right next to the Lexus when shots were fired. They talk about missing witnesses, and the way they phrase it, the way counsel phrased it, was the State didn't call Dominic, they didn't call Kevin, they didn't call Jonah because they would contradict their story line. Well, where does that come from? Is there evidence that Dominic, Kevin, and Jonah would contradict the State's story line? That's the inference they want you to draw, but there is *no instruction* at all that the judge gave you that says if the State doesn't call a witness, *you should draw a negative inference* from that; *you should assume* that that person is going to contradict the State's story line. There is absolutely no authority for that. That's their theory. They want you to buy off on it, but it's not supported by the law.

2/24RP 3335 (emphasis added).

In addressing the lack of cell tower evidence, the prosecutor stated:

They talk about the cell tower evidence. What they ask you to assume – again, it’s not in the law – but they have asked you to assume that since the State didn’t present any of this evidence, it’s bad for the State. There’s no law that says that.

Id. at 3339-40.

A defense attorney is free to argue that the State has not met its burden of proof based on a failure to present certain evidence – whether the evidence is documentary evidence, like cell phone tower records, or eyewitness testimony, like the witnesses who did not appear here. However, the defense went beyond this by arguing that the State did not call certain witnesses and did not present certain evidence because the State knew the evidence was damaging to the State’s case.

As an advocate, a prosecutor is entitled to respond to the arguments of defense counsel. Russell, at 86. Here, it was perfectly appropriate for the prosecutor to argue that no evidence supported defense counsel’s assertions. No evidence was introduced as to what the missing witnesses would testify to, let alone that the State did not call them because the State knew their testimony would be damaging. The same is true in regards to cell phone tower evidence.

Following up on the argument that no evidence supported the defense assertions, the prosecutor correctly stated that the law as given did not require that jurors “assume” a negative inference from the absence of

evidence. The prosecutor's statement was a correct statement of the law. The jurors were free to assume what they wanted from the evidence or lack of evidence, but there was no legal presumption one way or another.

Next the defense argues that the prosecutor improperly urged the jury to convict based on "emotions" and how they "felt."

So these are the elements, right? Let's talk about them. Well, actually, before I get there, let's talk about the law. Let's take a step back and talk about the law. The law is not a mystic thing, right? It's supposed to represent us as a society. That's what the law is. Our shared beliefs, our shared understanding, our shared morals. The law is simply a codification of it. We put it in writing, we have some numbers attached to it, and we put it all in a book. And that's what you have before you in the form of these jury instructions: The law. At first blush, you might look at this and think, God, that's really complicated, it's really wordy, it's killed a lot of trees. It might be confusing. But I suggest to you it's not. Take a look at it. If you are confused by it, read it again because if you read it carefully and you think about it, you will see that it makes sense. That's because the law is rooted in our common intellectual sense. The law is also rooted in our common moral sense. Rooted in our common intellectual sense and rooted in our common moral sense. What that means is if we apply the law to the facts that are proven at trial, if we follow the law, we are going to reach the correct verdict. And when we do that, because it's our shared common intellectual sense and our common moral sense, when we follow the law, it will feel right. And it will feel right –

Ms. Pickering: Your Honor, I'm going to object to the vouching of counsel.

The Court: Go ahead.

Mr. Yip: 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.

2/24RP 3256-57.<sup>14</sup>

While defense counsel raised an objection, the objection relied on a different basis than what is now argued on appeal. Because any misconduct here could easily have been remedied by an admonishment to the prosecutor and instruction to the jury, the issue has been waived.

It is correct that a prosecutor may not appeal to the passions of a jury so as to encourage a verdict based on emotion rather than evidence. State v. Berube, 171 Wn. App. 103, 118-19, 286 P.3d 402 (2012), rev. denied, 178 Wn.2d 1002 (2013). It is also the defendant who has the heavy burden of establishing the actual impropriety of a prosecutor's argument. Warren, 165 Wn.2d at 26. Prejudicial error does not occur until such time as it is "*clear and unmistakable*" that counsel has committed misconduct. Sargent, 40 Wn. App. at 344.

Here, it appears that the prosecutor was addressing the daunting task of making sense of the 32 jury instructions provided to the jury. See CP 250-82. While maybe inartful and unnecessary, it does not appear that the prosecutor was actually asking the jurors to ignore the standard of proof and to base their verdict decision on emotion. Further, the jurors were instructed that "[y]ou must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and

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<sup>14</sup> The defendant cited to a small portion of the above. The State has included the complete text so that the alleged misconduct is viewed in context.

on the law given to you, not on sympathy, prejudice, or personal preference. CP 253. The court will “presume that juries follow all instructions given.” State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Next, the defendant claims that the prosecutor suggested the jury convict the defendant based on evidence that was not presented to them. Specifically, he asserts that the “prosecutor’s questions” made the jury wonder why the defense was not calling Dominic Oliveri as a witness. This claim has zero merit. The defendant’s recitation of the facts is inaccurate. It was the defendant who directly and in no uncertain terms suggested that the State was declining to call Oliveri as a witness because his testimony would contradict the State’s theory.

Prior to trial the defense said that they were going to attempt to present evidence that Oliveri had a motive to kill Williams; specifically, that Williams had stolen money, drugs and a gun from Oliveri. 1/19RP 22-24. Having no direct evidence, the theory was supported mostly by rumor and hearsay evidence. 1/19RP 26.

Neither the prosecutor nor defense counsel had been able to interview Oliveri. 1/19RP 32, 39. The defense informed the court that Oliveri was in Oregon and that “[w]e obviously have a way to contact Mr. Oliveri through Mr. Leary.” 1/19RP 39-40. Tim Leary was Oliveri’s attorney. 1/19RP 39. Although Leary had previously suggested that

Oliveri would exercise his right to remain silent, defense counsel noted that Oliveri “could testify” and he could not exercise a “blanket invocation,” especially when he did not even know what questions would be asked of him. 1/19RP 32, 39. Still, both sides informed the court that they did not intend on calling Oliveri as a witness.

Neither Oliveri nor Leary ever appeared in court. Thus, Oliveri was never directed to testify and he never actually invoked his right to remain silent, assuming he had such a right.

At trial, defense counsel elicited testimony from multiple witnesses that they had not seen or heard from Oliveri since the murder. 2/2RP 1330; 2/3RP 1563; 2/4RP 1796-97, 1883. Testimony was also elicited that Oliveri told at least two people that he was upset with his friend Williams because Williams had stolen some pills. 2/2RP 1346; 2/10RP 2101-02. Detective Cruise testified that he had conducted a recorded interview of Oliveri in August of 2013. 2/11RP 2312-13. While the substance of the interview was not admitted at trial, the jury was informed that Detective Cruise had questioned Oliveri about the alleged theft. 2/11RP 2313-14. The detective also testified that he had “reliable contact” information for Oliveri and that this information had been provided to the defense. 2/11RP 2346-47.

Contrary to the defendant’s claim on appeal, the defendant did not object to this testimony. See 2/11RP 2346-47. Instead, defense counsel

asked the court to find that the detective's testimony had opened the door to admission of evidence that Oliveri was represented by counsel. 2/11RP 2378-79; 2/16RP 2428. The defense also wanted to clarify that the contact information for Oliveri was via his attorney. Id.

The State responded that it was concerned by the defense questioning of witnesses regarding Oliveri having not had contact with anyone since the murder and the possible defense argument that the State had spoken with Oliveri and was not calling him as a witness because the State did not like what he was going to say. 2/11RP 2378-79, 2381. This would be negated by showing the jury that both parties had the same access or lack of access to Oliveri. 2/11RP 2380. The court agreed that jurors would wonder why Oliveri was not being called as a witness. 2/11RP 2380; 2/16RP 2430. The court indicated that the defense could ask the detective regarding Oliveri's cooperation and contact information but that nobody could discuss possible Fifth Amendment issues. 2/11RP 2382; 2/16RP 2430. The defense indicated that they had not intended to elicit any information about Fifth Amendment rights. 2/16RP 2429.

When Detective Cruise retook the stand, he confirmed that the contact information for Oliveri was for his attorney. 2/16RP 2480. The detective also confirmed that post-interview Oliveri was unwilling to speak with him. 2/16RP 2481.

In closing, defense counsel argued as the prosecutor had warned:

Despite the fact that there were nine people in the Eastlake parking lot that night, nine people who likely saw who the real shooter was, the State called Lucci, Claire, Mike and Elijah. We did not hear from Dominic. Where was Dominic? . . . The State failed to call witnesses who would contradict their storyline.

2/24RP 3288. In sum, the facts are not as claimed by the defendant on appeal. Oliveri never was called to testify and he did not invoke his Fifth Amendment rights. And it was the defendant, not the State, that argued Oliveri's failure to testify showed he possessed unfavorable evidence.

The defendant's last claim is equally misguided. He asserts the prosecutor improperly elicited opinion testimony about the Eastlake Market surveillance video. To begin, a witness providing improper opinion testimony is an evidentiary issue, not a misconduct issue.

Here, Detective Jon Engstrom was tasked with obtaining the surveillance video from the Eastlake Market's EyeMax computer security system. 2/11RP 2235, 2238. The first thing Detective Engstrom did was compare the date and time on the security system with the date and time on his phone – they matched. Id. at 2238, 2234. The defense stated they did not object to the detective testifying as to his observations of the date and time on his phone and computer system, just that they did not want him to testify about the accuracy of the system itself. Id. at 2198-99. Thus, this testimony was properly admitted.

The detective then exported the video from the security system onto a thumb drive. Id. at 2244. The thumb drive was admitted as Exhibit 56. Id. at 2247-56. The only defense objection was based on “authentication,” an objection that was overruled. Id. The video was played while Detective Cruise was testifying. See id. at 2360-93.

The defendant raised a single “opinion” objection when the prosecutor asked if there was “anything of interest” on the first half-hour of the video. Id. at 2362. The prosecutor rephrased the question and asked if there was anything “related to the case” on the first half-hour of the video, to which the detective said no. Id. at 2363. Later the defense asked that the video be played with no narration by the detective. Id. at 2367. The court allowed the detective to testify as to what he saw on the video. Id.

The video does not show the murder. Rather, the video shows the inside of the market and the area just out front. See Exhibit 56. At trial, there was no dispute as to who appeared in the video. In other words, unlike the cases cited by the defendant, nobody was opining regarding a disputed identification from the video.

In addition, the video is time stamped. The accuracy of the time stamp on the video did not come from Detective Cruise opining that the video time was accurate; rather, it came from two sources.

First, Detective Engstrom testified that the date and time on the security system matched the time on his phone when he downloaded the video. 2/11RP 2238.

Second, witness Thomas Lindsey called 911 from inside the market. 2/22RP 3076-99. Lindsay identified himself on the video when testifying. 2/22RP 3099-3102. In viewing the video, he testified that he stopped talking to the 911 operator at 24 minutes 4 seconds after midnight. Id. at 3102. 911 records show that his call ended at 12:24 and 3 seconds. Id. at 2391-93. These were the two key pieces of evidence, not opinions, that showed the time on the video was accurate.

As an evidentiary issue, a lay witness may give opinion testimony if it is rationally based on perception and helpful to a clear understanding of the evidence. ER 602, ER 701; State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), aff'd, 129 Wn.2d 211 (1996). In Hardy, for example, lay opinion regarding identity of a person in a surveillance video was upheld on appeal as admissible evidence. Here, if the defendant had raised an “improper opinion” objection, this Court would review the trial court’s ruling for an abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). But any evidentiary claim is waived. Further, the defendant fails to explain how anything the detective testified to was

unfairly prejudicial. As the defendant said at trial, it's all on the video for the jury to see.

**c. The Failure To Object Or Prove Prejudice**

A conviction will be reversed upon a claim of misconduct only upon the defendant showing that there is a substantial likelihood that the alleged misconduct affected the verdict. Russell, at 86. In addition, failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by an instruction to the jury. Id. In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request.<sup>15</sup> Russell, at 85.

Here, the defendant has raised a plethora of misconduct claims. As argued above, many are not supported by the record and/or were not objected to below. Some are evidentiary issues, mischaracterized as misconduct claims, that have been waived and would fail under an abuse of discretion standard.

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<sup>15</sup> The need for a defendant to give the trial judge an opportunity to cure misconduct is paramount. For example, in Warren, the prosecutor's complete misstatement of the law regarding the burden of proof, an error of constitutional magnitude, was sufficiently cured by the trial judge after the defendant raised an objection. Warren, 165 Wn.2d at 24-28. This shows the level of error that can be cured and the need for a defendant to lodge an appropriate objection.

At the same time, the State concedes that trial counsel at times was inartful -- maybe even careless in the language used and arguments pursued. But inartful language does not equal reversal of a conviction. Instead, the defendant bears the burden of showing that the misconduct was so egregious that it could not be cured by the court and that there is a "substantial likelihood" he would not have been convicted but for the alleged misconduct.

The jurors were properly instructed in all regards, including that the lawyers' comments were not evidence, that they must base their decision on the law as given by the court and the evidence or lack thereof. CP 250-54. They were instructed that they must not let sympathy, prejudice, or personal preference decide their verdict and that the State was required to prove every element beyond a reasonable doubt. Id. Jurors are presumed to follow the court's instructions. Stein, 144 Wn.2d at 247.

What made the State's case so strong was the array of evidence. As the prosecutor correctly noted in closing, the jury's verdict did not hinge or rely on the testimony of any one person and any single piece of evidence. For example, the murder weapon was found in the defendant's car but proving it was the murder weapon did not depend solely on ballistics evidence. The defendant had been seen with a gun before that matched the description of the murder weapon to a T. The defendant fled from the scene

and was stopped just minutes later – with the gun in his vehicle. He lied about where he had been and feigned ignorance of why he had been stopped. The defendant was identified as the shooter and particularly damning, it was shown that the only other person in the car could not have been the shooter because he was caught on video in the Eastlake Market at the exact time Williams was shot. Whatever minor prejudice the defendant can ascribe to the alleged misconduct, he cannot show that the verdict was based on anything but a careful evaluation of all the evidence.

**5. THE DEFENDANT’S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT**

The defendant contends that the cumulative effect of multiple trial errors warrants a new trial, even if they do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the “accumulated error” doctrine, a defendant must establish the presence of multiple trial errors *and* that the accumulated prejudice affected the verdict. Reversals due to cumulative error are justified only in rather extraordinary circumstances. See State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

Here, the errors alleged, even if true, are not of such magnitude that the jury's verdict can be called into question -- either by the alleged individual errors or as combined. The defendant was stopped in a fleeing car within minutes of the murder, the murder weapon under the front seat. The driver, Elijah Washington, was inside the market at the time of the murder. The only other person in the car -- the defendant.

**6. THE COURT KNEW FIREARM ENHANCEMENTS MUST BE SERVED CONSECUTIVELY**

The defendant contends that he must be resentenced because the sentencing court was ignorant in regards to the law when imposing sentence for multiple firearm enhancements. The defendant is mistaken. Over 17 years ago the Supreme Court held that firearm enhancements must be served consecutively to each other -- as the trial court understood.

The defendant received a term of confinement of 420 months. CP 352. The term consisted of a 300-month standard range sentence on count I, a 113-month standard range sentence on count II, to be served concurrently based on the court finding that an exceptional sentence was warranted;<sup>16</sup> plus two 60-month firearm enhancements, to be served consecutively. CP 350, 352, 375-80. The court rejected the defense

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<sup>16</sup> Absent an exceptional sentence, sentencing courts are required to impose consecutive sentences when a defendant is convicted of two or more "serious violent offenses" that arise from "separate and distinct criminal conduct." RCW 9.94A.589(1)(b). First-degree murder and first-degree assault are serious violent offenses. RCW 9.94A.030(46)(i) and (v). Offenses arise from separate and distinct criminal conduct when they involve separate victims. In re Orange, 152 Wn.2d 795, 821, 100 P.3d 291 (2004).

request to have the firearm enhancements served concurrently with each other. CP 378; 5/26RP 173. The court correctly stated that there was no authority allowing firearm enhancements to be served concurrently. Id.

While every defendant may ask for and have the court consider a request for an exceptional sentence, no defendant is entitled to an exceptional sentence. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). With rare exception, when the sentence imposed is within a defendant's standard range it "shall not be appealed." RCW 9.94A.585(1); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989).

An appeal of a standard range sentence is permitted only "where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), rev. denied, 136 Wn.2d 1002 (1998). "A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." Id. "A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if, for example, it takes the position that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex, or

religion.” Id. But when a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling. Id.

None of the above exceptions to the no-appeal rule exist here. Rather, the defendant relies on the principle that if the trial court erroneously believes it lacks the authority to grant a reduction of sentence, remand for resentencing is appropriate. See In re Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007) (resentencing required where trial court failed to recognize that it had the discretion to run convictions for serious violent offenses concurrently to each other as a mitigated exceptional sentence), see also State v. Mohamed, 187 Wn. App. 630, 646-47, 350 P.3d 671 (2015) (resentencing required where trial court erroneously believed it did not have authority to impose an alternative sentence for a drug charge with a school-zone enhancement).

Here, the defendant asserts that Judge Spearman was ignorant of the fact that she could run his two firearm enhancements concurrently to each other. He is mistaken and his reliance on the recent case of State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) is misguided.

RCW 9.94A.533(3)(e) provides that “[n]otwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon

enhancements, for all offenses sentenced under this chapter.” In State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999), the Supreme Court held that the weapons enhancement statute deprives a sentencing court of discretion to impose an exceptional sentence in regards to the enhancements. Brown remains the law today. As applicable to the defendant, Houston-Sconiers did not change things.

Houston-Sconiers and co-defendant Treson Roberts were juveniles when they committed a series of armed robberies. Tried in adult court, their convictions included seven and six firearm enhancements, respectively, with the Supreme Court noting that ordinarily the enhancements would be mandatory and must be served consecutively. However, with the defendants being juveniles, the Court had to determine the impact of the United States Supreme Court decision in Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

In Miller, the Supreme Court held that under the Eighth Amendment, trial courts must consider the difference between children and adults in imposing sentence. Houston-Sconiers, 188 Wn.2d at 17-19. Thus, the Washington Supreme Court held that:

In accordance with Miller, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the

extent our state statutes have been interpreted to bar such discretion *with regard to juveniles*, they are overruled.

Houston-Sconiers, 188 Wn.2d at 21 (emphasis added, footnote omitted).

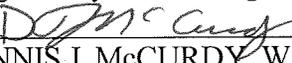
Born in 1981, the defendant was 32 years old at the time he murdered Everett Williams and shot Michael Stukenberg. Houston-Sconiers did not overrule Brown as it pertains to adult offenders.<sup>17</sup> CP 354. Contrary to the defendant's assertion, Judge Spearman was not ignorant of the law in regards to imposing sentence for multiple firearm enhancements where the offender is an adult. Thus, the defendant is not entitled to be resentenced.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 26 day of June, 2017.

Respectfully submitted,

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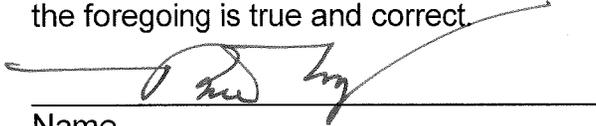
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<sup>17</sup> In addition, the legislature is presumed to be familiar with prior judicial construction of its acts. Failure of the legislature to amend a statute for a considerable period of time after it has been judicially construed indicates intent to concur in that construction. Buchanan v. International Broth. of Teamsters, 94 Wn.2d 508, 617 P.2d 1004 (1980); State v. Fenter, 89 Wn.2d 57, 70, 569 P.2d 67 (1977). This is particularly true when the act has subsequently been amended in other respects. State ex rel. Pirak v. Schoettler, 45 Wn.2d 367, 371-72, 274 P.2d 852 (1954). The SRA sentencing provisions have been amended countless times over the last 17 years.

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Today I directed electronic mail addressed to the attorneys for the appellant, Nancy Collins of Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE v. BERHE, Cause No. 75277-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

06-26-17  
Date

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