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No. 98496-4

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALAN JENKS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Should this Court decline review of the defendant's argument, raised for the first time on appeal, that the State violated the discovery rule by not naming the crime analyst as an "expert witness" before trial, where the defendant cannot establish any actual prejudice or that the crime analyst was an "expert witness"?

2. Did the trial court err when it instructed the jury on the definition of an "expert witness," and if this was error, was it harmless?

3. Did the trial court abuse its discretion when it prohibited mention of an unrelated robbery of a coffee shop, which had no connection to the present robbery?

4. Did the trial court abuse its discretion when it prohibited questioning of the victim's ability to properly fill out paperwork in his former employment as a police officer, which occurred between ten and twenty years before the current robbery, and which had no bearing on the victim's veracity?

5. Did the trial court abuse its discretion when it admitted two photographs, Exhibits 44 and 45, of the defendant and his ostensible girlfriend, who was wearing a Chicago Bulls hat, and which were taken from the defendant's purported girlfriend's Facebook account?

6. Was the relationship of the female (e.g., single, married, divorced, etc.) to the defendant, in Exhibits 44 and 45, material to any issue at trial and harmful to the defendant's theory of the case?

7. Has the defendant established any prejudice if the trial court sustained and struck a question and answer that the female shown in Exhibits' 44 and 45 was wearing a Chicago Bull's hat like the hat worn by the robber?

8. Did the trial court's putative telephone call with an appellate court judge regarding a pending jury instruction issue in the trial violate the appearance of fairness doctrine if the defendant has not established what impact, if any, the conversation had on the trial judge's decision and has not shown the trial court acted without independent judgment when it exercised its discretion to instruct on a lesser included offense?

9. Was the defendant's Equal Protection right violated if the judge, rather than a jury, determined the propriety of his predicate "most serious offenses," for sentencing the defendant as a persistent offender?

II. STATEMENT OF THE CASE

Procedural history.

Alan Jenks was charged in the Spokane County Superior Court with first degree robbery and first degree unlawful possession of a firearm. CP 1-

2. The matter proceeded to a jury trial and the defendant was convicted of the first-degree robbery. CP 73.[1] This appeal timely followed.

Substantive facts.

On December 8, 2014, shortly after midnight, Jeffrey Davila was working alone at a Zip Trip convenience store in Spokane, when the defendant entered the store, walked to the beer cooler, and approached the store counter with an 18-pack of Budweiser beer cans. RP 167-69, 170, 176, 180.[2] As Mr. Davila was scanning the beer, the defendant stated: "Yeah, I'll take that and give me all the money also." RP 170. Contemporaneously, the defendant unveiled what appeared to be a handgun tucked into the waistband of his pants. RP 170, 215. Mr. Davila became frightened and had some difficulty opening the register. RP 170-71. Eventually, Mr. Davila opened the register and gave the cash from the register to the defendant.[3] RP 171-72.

After Mr. Davila handed over the money, the defendant maneuvered himself behind the counter, asking Mr. Davila for the store "video"

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[1] The trial court dismissed the charge of first-degree unlawful possession of a firearm before trial for insufficient evidence. RP 24-29.

[2] Verbatim Report of Proceedings as reported by Crystal Hicks containing three volumes will be identified as "RP." The other reports of proceedings are not referred to.

[3] Approximately $50 to $75 was taken, along with some coins. RP 171, 305.

surveillance tapes. RP 173-74. The defendant then grabbed some Newport cigarettes, and asked Mr. Davila for his wallet and his store identification. RP 175-76. The defendant remarked that he wanted Mr. Davila's store identification because, "I know your name and your face now, so keep quiet or I'll fucking kill you." RP 175. Mr. Davila estimated the suspect's height was between 5 feet, 5 inches and 5 feet, 6 inches tall.[4] RP 176.

As the defendant was exiting the store, he faced Mr. Davila, made a slashing motion across his neck with his finger, and then placed his finger to his lips, which signified a threat to Mr. Davila that he should not report the crime. RP 175-76. The defendant left the store with the cash, the beer, and the Newport cigarettes. 175-76.

Mr. Davila described the defendant as wearing dark clothing with a baseball cap pulled down to his brow. RP 172. When the defendant pulled up his shirt to reveal the handgun, Mr. Davila observed red sweats or boxer shorts. RP 172. The defendant also had a goatee and a tear drop tattoo near his right eye and a tattoo on his neck, with cursive writing containing the letter "M." RP 172, 181-82. Mr. Davila also noticed an additional faded

[4] Detectives measured the front entrance to the Zip Trip, determined the suspect's exit point and generalized the suspect's height as between 5'3" and 5'6" inches tall. RP 272-73.

tattoo (as though a tattoo removal had been started, but not completed).[5] RP 172

Spokane Police Senior Crime Analyst Thomas Michaud reviewed the incident report involving the robbery at the Zip Trip. Mr. Michaud subsequently entered a description of the suspect given by the store clerk into a law enforcement regional database, including the reported tear drop tattoo below the suspect's right eye, with a height and weight range. RP 222-23, 230. The computer identified the defendant and no other suspects. RP 223. Mr. Michaud subsequently searched the defendant's Facebook account[6] for a photograph of the defendant and obtained a photograph, which was marked and admitted, without objection, as Ex. P-41. RP 226-27.

Law enforcement applied for and was granted a search warrant for the defendant's residence at 2508 West Grace three days after the robbery. RP 238-40, 304. On December 11, officers searched the residence. RP 241. The defendant was not present at the time of the search. RP 240. Budweiser beer cans were located inside the residence,[7] in addition to a pack of Newport cigarettes and three pair of red and white boxer shorts. RP 245-46,

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[5] The witness did not identify the area of that particular tattoo at the time of trial.

[6] The defendant's Facebook account was accessible to the public. RP 227.

[7] Seventeen cans of an 18-pack of Budweiser beer were located. RP 297.

259, 298. The distance between the residence and the Zip Trip store was approximately two city blocks. RP 280.

The defendant was ultimately arrested at a relative's address located at 2324 East 7th Avenue in Spokane, where an air soft pistol was collected inside the cupboard of the kitchen. RP 282, 284-85, 296. It was unknown whether this was the specific weapon used during the robbery. RP 285. The defendant denied any involvement in the robbery. RP 283.

At the time of trial, Mr. Davila positively identified the defendant in the courtroom. RP 177-78. Mr. Davila had previously identified the defendant with aid of a law enforcement photographic montage, marked and admitted as Exhibits P-63 through P-70. RP 177-81, 182-84, 211, 275-79. The store surveillance video of the incident was played for the jury. RP 177-81. The video showed the suspect enter the store, and subsequently place an 18-pack of Budweiser beer on the counter. RP 260. The defendant appeared to grab money from the counter. RP 270. A detective determined from viewing the surveillance video that the defendant was wearing a black, long-sleeve sweatshirt without a hood, and a Chicago Bulls baseball cap. RP 270. Photographs were later taken of the defendant upon his arrest, which showed, in part, a mole and a teardrop tattoo below his right eye, Ex. P-7; RP 287, and a tattoo on the right side of the defendant's neck, which contained a cursive "M," Exs. P-8, P-12; RP 287-88. Another photograph

revealed a faded tattoo on the right side of the defendant's neck. Ex. P-9; RP 288.

III. ARGUMENT

A. THIS COURT SHOULD DECLINE TO REVIEW THE DEFENDANT'S ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL THAT THE CRIME ANALYST WAS AN "EXPERT WITNESS," WHICH SHOULD HAVE BEEN DISCLOSED BEFORE TRIAL, NOTWITHSTANDING THE CRIME ANALYST WAS ONLY A FACT WITNESS.

For the first time on appeal, the defendant contends the crime analyst testified as an "expert" witness, and the State did not provide notice that it would call an expert witness at the time of trial under CrR 4.7(a)(2)(ii). He bases his claim that the analyst was an "expert," who testified that the computer search resulted in the identification of only one person, the defendant. RP 223.

1. The defendant cannot raise this argument for the first time on appeal.

A party generally cannot raise a new argument on appeal that the party did not present to the trial court. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). "There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *State v. Lazcano*, 188 Wn. App. 338, 356, 354 P.3d 233 (2015). Accordingly, the rule encourages "the efficient use of judicial resources ... by ensuring that

the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011).

RAP 2.5(a)(3) allows an appellate court to review an unpreserved error if it is a manifest error affecting a constitutional right. Here, the defendant does not analyze or discuss reviewability at all. To overcome RAP 2.5(a) and raise an error for the first time on appeal, the defendant "must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007); *see also State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). More specifically, this showing requires the defendant to show how the asserted error had practical and identifiable consequences at trial. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

2. <u>There is no showing of a "manifest error affecting a constitutional right."</u>

Alleged discovery violations should be raised at trial so the trial court can compel discovery if necessary. *State v. Boot*, 40 Wn. App. 215, 220, 697 P.2d 1034 (1985). The language of CrR 4.7(h)(7)(i) states a party should raise noncompliance with the discovery rules "during the course of the proceedings." The failure to raise the issue in the trial court waives the right to assign error to an alleged discovery violation on appeal. *Boot,*

40 Wn. App. at 220. Accordingly, to properly preserve an alleged discovery violation for appeal, the defendant must make a timely objection and request a remedy from the trial court. RAP 2.5(a); *State v. Wilson*, 56 Wn. App. 63, 66, 782 P.2d 224 (1989); *State v. Howell*, 119 Wn. App. 644, 653, 79 P.3d 451 (2003); *Boot*, 40 Wn. App. at 220 (claim of error based on a discovery violation waived by failure to make a timely objection).

In *Wilson*, the defendant argued that the trial court erred when it denied his motion for a dismissal or mistrial based upon an assertion that the State failed to disclose evidence before trial. 56 Wn. App. at 65. This Court ultimately found the error, if any, was waived by failing to make a timely objection in the trial court. *Id.* at 66. Similarly, in *Howell*, the defendant received a document from the State shortly before trial. The defense did not alert the trial court of any discovery violation nor did it argue that the late disclosure would prejudice the defense, how it would affect trial preparation, or ask the trial court for relief under CrR 4.7. On appeal, the defendant argued that he was denied access to discovery which would have assisted his defense. 119 Wn. App. at 653. Division One found the defendant did not raise the issue in the trial court nor did he contend it was manifest error affecting a constitutional right which would entitle him to relief under RAP 2.5. The court found no error and affirmed the conviction. *Id.* at 653-54.

A review of the record shows the defendant never objected to or sought relief from the trial court relating to a perceived discovery violation. There is no allegation that defense did not have all of the discovery pertaining to the crime analyst and did not interview him prior to trial. Indeed, defendant's trial counsel admitted during the instructions conference that "I don't think searching a computer database like that anymore is considered expertise." RP 216. Furthermore, the defendant fails to assert or offer authority that an alleged discovery violation of not proffering a witness as an "expert" involves a manifest error affecting a constitutional right.

In addition, the defendant cannot establish any actual prejudice from the alleged violation. In *State v. Brush*, 32 Wn. App. 445, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983), the defendant moved for a mistrial because the prosecutor failed to provide defense counsel with the statement of a witness until the first day of trial. *Id.* at 455-56. This Court found "[b]ecause the available remedy was the granting of a continuance and since defense counsel did not move for such a continuance, the prosecutor's noncompliance with the discovery rule was not prejudicial error." *Id.* at 456.

The defendant fails to identify or argue how this alleged failure actually prejudiced his defense strategy or his ability to effectively cross-

examine the crime analyst, or how he was hampered by the alleged non-disclosure. Without actual prejudice, the error cannot be manifest. Accordingly, this claim fails and this Court should decline review of the issue.

B. THE DEFENDANT FAILS TO IDENTIFY HOW THE CRIME ANALYST WAS AN "EXPERT WITNESS," WHEN THE CRIME ANALYST DID NOT INTERPRET ANY DATA OR OFFER AN "OPINION" AS TO THE IDENTITY OF THE ROBBER, BUT RATHER TESTIFIED AS A FACT WITNESS REGARDING THE POTENTIAL IDENTITY OF THE PERSON AS REPORTED BY THE STORE CLERK.

The defense next argues, for the first time, on appeal that the trial court improperly allowed the crime analyst to testify that after entering the relevant search terms into a regional data base, the computer identified the defendant.

Prior to trial, the defense advanced a motion to exclude any law enforcement officer from identifying the defendant as the robber based on their observations of viewing the Zip Trip store surveillance video and from the clothing collected at the defendant's residence, as there were other alternatives available for the State to make the identification. RP 7-13. The defense did not move to exclude the testimony of the crime analyst or his computer search findings. The trial court ultimately ruled that law enforcement officers could not state an opinion that the defendant was the

person in the surveillance video or that the clothes observed in the video were the same as those seized from the defendant's residence. RP 14-16.

As discussed above, the crime analyst testified during trial, without objection, that he entered certain facial peculiarities (a tear drop tattoo, mole, cursive tattoo, and a fading tattoo) of the robber, as reported by the store clerk, into the computer. The computer identified the defendant as the only person having those specific facial marks. Importantly, the crime analyst did not offer an opinion nor state that the defendant was the "robber" in the store video, or that the defendant robbed the store. The analyst merely testified that the defendant had the same facial characteristics reported by the store clerk. Moreover, the crime analyst was a fact witness and did not offer a lay or expert opinion at the time of trial, such as interpretation of the data.

1. The defendant may not raise the issue for the first time on appeal because it is not a manifest constitutional error.

Here, the defendant did not object to the complained of testimony. As discussed above, where a defendant does object below, he may only raise an error on appeal if it is manifest constitutional error. *Kirkman*, 159 Wn.2d at 934. "Manifest" requires a showing of actual prejudice. *Id.* Improper opinion testimony is only reviewable as a manifest constitutional error if the witness made "an explicit or almost explicit statement on an ultimate issue

of fact." *Id.* at 936; *see also State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) (defendant may challenge admission of lay testimony on appeal for first time if he can show a manifest error that causes actual prejudice or practical and identifiable consequences).

In the present case, the defendant does not discuss how this alleged error was "manifest" or how he was actually prejudiced. The crime analyst did not opine that he believed the defendant was guilty, or that he believed the victim's versions of events, nor did he interpret any data. Consequently, the crime analyst did not offer an "opinion" on an ultimate fact in the case, but rather testified as a fact witness as discussed below. Even if the crime analyst offered an "opinion," the defendant fails to establish that the crime analyst's testimony constituted manifest error warranting reversal.

2. <u>The crime analyst testified as a fact witness rather than an expert witness, and there was no error.</u>

As a general rule, witnesses are to state facts and not to express inferences or opinions. *State v. Wigley*, 5 Wn. App. 465, 488 P.2d 766 (1971). Accordingly, the evidence rules make a distinction between fact witnesses, ER 602, and expert witnesses, ER 702. Fact witnesses may testify regarding matters within their personal knowledge and are not permitted to testify on matters that are based upon scientific, technical, or specialized knowledge within the scope of expert opinion, as defined by

ER 702. Specifically, under ER 602, a fact witness may testify as to a matter only if "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602.

Pursuant to ER 701, a witness not testifying as an expert may provide testimony in the form of an opinion provided that the opinion is: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." "Opinion evidence" is defined as "[a] witness's belief, thought, inference, or conclusion concerning a fact or facts." BLACK'S LAW DICTIONARY 677 (10th ed. 2014).

Here, the defendant presumes that the crime analyst's entry of data into a computer system and his testimony as to the result of that data search made him an "expert" witness, without offering any authority or analysis as to how or why this methodology or procedure qualified the crime analyst as an "expert" witness, rather than a fact witness. As stated above, even defense counsel agreed that the crime analyst's testimony did not constitute "expert opinion." RP 216. Under the defendant's theory, anyone who types

data into a computer, tablet, smart phone, or even into a basic calculator,[8] conducts a search, and views and reports on the results would be characterized as an "expert witness." Under those circumstances and the facts of this case, there is no interpretation of data or an opinion given. The crime analyst testified as a fact witness.

3. The defense did not object to the crime analyst's testimony and has not preserved the issue for appeal.

Furthermore, the defense failed to object to the testimony. Although the trial court made a final ruling regarding officer "opinion" testimony about viewing the surveillance video, there was no motion in limine to exclude the crime analyst's testimony nor an objection voiced at the time of trial. A party must specifically object to evidence presented at trial to preserve the matter for appellate review. RAP 2.5(a); *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000).

Here, even assuming the trial court's order covered the crime analyst's testimony and the trial court ruled that evidence inadmissible, by failing to timely object to the scope of the evidence, the defendant deprived the trial court of the opportunity to limit such evidence. Moreover, the defendant fails to demonstrate the pretrial order covered the crime analyst's

[8] Undoubtedly, elementary school children who conduct such tasks in a classroom, would not be classified as "experts" when recalling or reporting their respective results to their parents or teacher.

testimony, that the crime analyst's testimony was an "opinion" rather than facts directly observed by the crime analyst, or that objecting to this testimony was itself prejudicial or that a subsequent motion to strike the prosecutor's question or request a curative instruction would have been granted. The defendant did not preserve the alleged error. Consequently, this claim has no merit.

C. THE DEFENDANT HAS NOT ESTABLISHED THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY CONCERNING EXPERT WITNESS TESTIMONY.

The defendant further asserts the trial court erred by instructing the jury concerning expert testimony. The defendant changes gears and now argues the crime analyst was not an expert witness,[9] and the court's instruction elevated the crime analyst to that of an expert witness. *See* Br. of Appellant at 16-18.

Standard of review.

Jury instructions are reviewed de novo, within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007).

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[9] Contrary to his first argument, the defendant subsequently argues that "[the crime analyst] Michaud was not in fact qualified as an expert, but the court nonetheless gave the [expert witness] instruction." Br. of Appellant at 17.

Prior to instructing the jury, there was some preliminary discussion between the court and counsel regarding whether to instruct the jury on expert testimony and whether to include an instruction on the lesser included offense of second degree robbery. The court inquired of the parties whether it should instruct on expert testimony, as neither party had proposed the standard WPIC instruction, WPIC 6.51 (expert testimony). RP 312. Later, the defense remarked: "I was going to object, Judge, just because I don't think searching a computer database like that anymore is considered expertise." RP 316. The deputy prosecutor believed it would be better to give the instruction. RP 316. The defense expressed concern that "identity tends to be the key issue and we have a guy who finds one name, so I don't want to make him an expert." RP 317. The court responded asserting that the crime analyst was "an expert in finding one name." RP 317. The court ultimately ruled that it would error on the side of caution and instruct on the definition of an "expert witness." RP 323. The defense formally objected to the instruction. RP 326. The court then instructed the jury of the definition of an "expert witness." CP 59; RP 335; *see* WPIC 6.51.

An appellate court does not review the sufficiency of a single instruction, but rather looks at the instructions as a whole. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Instructions are sufficient if they set forth the

applicable law, do not mislead the jury, and allow the defendant to argue his theory of the case. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

The defendant cannot establish any prejudice from the trial court instructing on the definition of "expert witness."

Other jurisdictions have held that an instruction which states the law correctly but is unsupported by the evidence can be considered harmless error if the defendant cannot establish prejudice. *See United States v. McGown*, 711 F.2d 1441, 1452 (9th Cir. 1983); *People v. Letner and Tobin,* 50 Cal. 4th 99, 183-184, 112 Cal. Rptr. 3d 746, 235 P.3d 62 (2010) (inclusion of a superfluous instruction was harmless as it was not reasonably likely that the jury misunderstood or misapplied the law); *People v. Palmer,* 133 Cal. App. 4th 1141, 1156 (2005) (giving a superfluous instruction raises a concern only where there is a serious concern that the instruction misled the jury); *People v. Baca*, 852 P.2d 1302, 1308 (Colo. App. 1992) (inclusion of an unnecessary instruction did not require reversal because it "did not pose any barrier to the jury giving full consideration to the defendant's theory of defense"); *Badgley v. State*, 527 N.E.2d 713, 714 (Ind. 1988) ("[e]ven if we would assume for the sake of argument that it was error to give such an instruction, the giving of an improper instruction does not justify reversal unless the error is of such a nature that it misleads the jury

as to the law of the case"); *State v. Griego*, 90 N.M. 463, 465, 564 P.2d 1345 (1977) (the defendant could not establish prejudice where the unnecessary instructions did not conflict with other instructions, the unnecessary instructions were definitions not covered by other instructions, and there was no error); *Pappas v. Evans*, 242 Iowa 804, 809, 48 N.W.2d 298 (1951) (unnecessary or immaterial instructions are not reversible where not prejudicial); *Beck v. Fond du Lac Highway Committee*, 231 Wis. 593, 601, 286 N.W. 64 (1939) (any error in giving a correct but unnecessary instruction is harmless when it does not prejudice the parties).

Here, the instructions received by the jury correctly laid out the elements of the crime and the State's burden of proof. In addition, notwithstanding that the defendant has not established that data entry requires expertise or that reciting the result of a computer search was an "opinion," as opposed to an assertion of fact, the instruction, if anything, was unnecessary, but not prejudicial. The instruction did not mandate that the jury draw a particular inference and the parties were free to argue for any conclusion they pleased. In addition, the jury was instructed it was not required to accept an "expert's opinion." RP 336; CP 59. Additionally, the "expert witness" instruction was not mentioned or discussed by the parties during their respective closing arguments. RP 342-51 (State), 351-65 (defense), 365-68 (rebuttal).

Furthermore, and contrary to the defendant's assertion, neither the court nor the instruction itself identified or singled out any particular witness as an "expert," including the crime analyst. A fair reading of the instruction compels the conclusion that it could have equally applied to the store clerk, who had special training by his employment at the Zip Trip and offered his opinion that it was the defendant who robbed him based upon his observations of the defendant at the time of the robbery; or to the police officers who investigated the crime; or ostensibly to the crime analyst.

The defendant fails to identify or establish how he was prejudiced or how the jury was misled by the court's inclusion of the instruction. If there was error, it was harmless and this claim has no merit.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PRECLUDED MENTION OF A DIFFERENT, UNRELATED ROBBERY WHICH OCCURRED TWO WEEKS PRIOR TO THE CURRENT ROBBERY, IN WHICH LAW ENFORCEMENT DID NOT IDENTIFY ANY SUSPECT, AND WHERE THE DEFENDANT COULD NOT ESTABLISH ANY CONNECTION OF THAT ROBBERY TO THE CURRENT ROBBERY.

The defendant next claims that the trial court erred when it excluded mention of a coffee shop robbery which occurred approximately two weeks prior to the current robbery.

Standard of review.

Trial court decisions on the admission of evidence are reviewed for manifest abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-07,

903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

At the time of trial, the deputy prosecutor moved the trial court to prohibit the introduction of any "alternative suspect evidence," arguing there had been a robbery of a coffee stand several weeks before the current robbery and there was no connection to the present robbery. RP 38-39, 42-43.

The defense responded and made the following proffer:

> The Jitters[10] [coffee shop] robbery occurred on November 23rd, about two weeks before this one. The defendant or the robber in that case was approximately the same size: Five-three to five-five is what I believe Detective Barrington put in his report. He was the detective in the Jitters case. There were statements made at both robberies, which is crucial that it's not your money so don't worry about fighting for it, basically. The robber said: It's not your money. So encouraging them to give up the money easily.
>
> Similar neighborhood. Dark clothes. The robber at Jitters had a ski mask with eye holes, but it's assumed or believed that that person was a white male or a light-skinned male because you could see apparently some of his white face around his eye holes. That's all they had. There wasn't any other evidence to my knowledge.
>
> Detective Barrington didn't feel, and this was discussed with the Court earlier, that there was sufficient to charge

[10] "Jitters" is formally referred to as "Jitterz Java." *See* https://www.facebook.com/pages/Jitterz-Java/1469093850054370 (last accessed September 6, 2018).

> Mr. Jenks with that case because in the Zip Trip case it's possible that the robber had longer hair stuffed up under the back of the ball cap that he was wearing. And in the Jitters case, it's a stretch ski mask and there's no indication that there's a bump for long hair back there and there's no other physical evidence.
>
> When they searched when they executed the search warrant in this case, the Zip Trip case, they did not find the ski mask or anything related to the Jitters robbery at the location.
>
> So, Judge, my argument to the Court is that the fact that these are so near in time, so near in place, fairly close in description, and you have the robber saying the same things, the same "not your money" statements, that that's sufficient to make the connection that's required for admissibility, that makes it relevant and I would ask the Court to allow me to make reference to it.

RP 41-42.

The trial court exercised its discretion, granting the State's motion to exclude any reference to an alternative suspect, holding the Jitterz Java coffee shop robbery was too tenuous and speculative and there was no evidence connecting the two robberies. RP 44-45.

In *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016), this Court outlined the parameters for admission of alternative suspect evidence:

> As the proponent of the evidence, the defendant bears the burden of establishing relevance and materiality. In establishing a foundation for admission of "other suspect" evidence, the defendant must show a clear nexus between the other person and the crime. The proposed evidence must

> also show that the third party took a step indicating an intention to act on the motive or opportunity.

Id. at 752 (internal citations omitted).

Accordingly, the threshold analysis for "other suspect" evidence is a focused relevance inquiry, reviewing the evidence's materiality and probative value for "whether the evidence has a logical connection to the crime." *State v. Franklin*, 180 Wn.2d 371, 381-82, 325 P.3d 159 (2014). Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. Relevant evidence is generally admissible at trial, but can be excluded where its value is outweighed by other considerations such as misleading the jury or wasting time. ER 402, 403.

A trial court must determine whether the probative value of the evidence is outweighed by other factors, such as "unfair prejudice, confusion of the issues, or potential to mislead the jury," and focus the trial "on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Franklin*, 180 Wn.2d at 378.

Here, there was no evidence proffered as to who robbed the Jitterz Java coffee shop and nothing to distinguish it from the multitude of other robberies, which have occurred in the Spokane area. The defense proffered only that a robbery happened at a coffee shop several weeks earlier and that

the robbery had similarities common to all other robberies, including the current robbery. The trial court properly focused solely on the connection of the proffered "alternative suspect evidence" to the current robbery. There was *no* evidence as to who had the opportunity or who had a motive to commit the Jitterz Java robbery. Likewise, there was no physical evidence connecting that coffee shop robbery to the current robbery, and no identified suspect. The trial court did not abuse its discretion by excluding this evidence.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED TESTIMONY ABOUT MR. DAVILA'S ABILITY TO ADEQUATELY COMPLETE POLICE PAPERWORK BETWEEN TEN AND TWENTY YEARS BEFORE THE ROBBERY, AS IT HAD NO BEARING ON MR. DAVILIA'S ABILITY TO BE TRUTHFUL.

The defendant next argues the trial court erred when it excluded testimony regarding Mr. Davila's ability to properly fill out paperwork during his employment with a California law enforcement agency ten to twenty years before the present robbery.

At the time of trial, the State moved the court to exclude any mention of the reason Mr. Davila no longer worked as a police officer in California. RP 32. During a pretrial interview with the parties, Mr. Davila disclosed

that he resigned from a police department in California. The deputy prosecutor stated:

> Mr. Davila stated it was for failing to provide medical information on booking intake forms on an inmate and that was a policy violation. He didn't state whether or not it was a formal discipline or whether or not he was terminated. He stated he was not terminated but he left because law enforcement wasn't for him any longer is basically what he said and he moved up to Washington shortly thereafter with his family. So the State would move to prohibit going into his background as far as that is concerned based upon that information.

RP 33-34. The deputy prosecutor also remarked that there were no criminal charges and no mention whether Mr. Davila had been disciplined by the department. RP 32.

The defense offered no further facts for the trial court's consideration but claimed that as a matter of fundamental fairness, the defense should be allowed to ask Mr. Davila regarding his employment issue with the California police department and the reason for his departure.

The court granted the State's motion stating:

> Mr. Davila worked in law enforcement in Culver City, California, between 1996 and 2006. As the Court understands it, he resigned from that position and perhaps was disciplined in some fashion for failing to fill out or complete medical information regarding inmates that were, sounds like being booked, something of that sort. Officer Davila was never charged with any crime.
>
> The Court didn't hear about anything else that had to do with his particular record that was stunning or particularly

> enlightening, so I'm satisfied for a couple of reasons that this shouldn't come in.
>
> First of all, this information is too distance in time. I also know that Mr. Davila was never charged with anything. I think it's in a number of ways very different from the case that Counsel cited, *York*,[11] which was really designed to paint the witness in a bad light. And that is, of course, defense counsel's job, but given the particular facts in this case and the video, I think it's unnecessary and I'm going to otherwise order that it not come up, any discipline or reasons beyond Mr. Davila working no longer in law enforcement.

RP 37.

Standard of review.

The standard of review for exclusion of cross-examination of a witness with specific instances of conduct to establish untruthfulness under ER 608(b) is reviewed for abuse of discretion. *See State v. Clark*, 143 Wn.2d 731, 767, 24 P.3d 1006 (2001). In general, the "scope of cross-examination is within the discretion of the trial court." *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014); *see also* ER 611(b). A court abuses its discretion "when a decision is manifestly unreasonable or based upon untenable grounds." *State v. O'Connor*, 155 Wn.2d 335, 351, 119 P.3d 806 (2005). An appellate court will reverse the trial court "only if

[11] *State v. York*, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980).

no reasonable person would have decided the matter as the trial court did." *Id.* at 351.

Cross-examination is permitted under ER 608(b) into specific instances that are relevant to veracity. *State v. Wilson*, 60 Wn. App. 887, 893, 808 P.2d 754 (1991), *review denied*, 117 Wn.2d 1010 (1991). In exercising its discretion under ER 608(b), a trial court considers "whether the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial." *O'Connor*, 155 Wn.2d at 349. "[N]ot every instance of a witness's (even a key witness's) misconduct is probative of a witness's truthfulness or untruthfulness under ER 608(b)." *Id.* at 350. Relevant evidence is evidence that tends 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 401.[12]

ER 608(b)[13] provides that, within the discretion of the trial court, specific instances of a witness's conduct introduced for the purpose of

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[12] In that regard, the right to present a defense and the right to cross-examination are not absolute. *State v. Jones*, 167 Wn.2d 713, 720, 230 P.3d 576 (2010). A criminal defendant has no constitutional right to present irrelevant or otherwise inadmissible evidence. *Id.*

[13] ER 608(b) states:

> Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in

attacking that witness's credibility, may not be proved by extrinsic evidence. But, specific instances may be inquired into on cross-examination in the discretion of the court, if probative of truthfulness or untruthfulness. ER 608(b).

In the present case, the defendant's proposed cross-examination involved Mr. Davila's conduct, which occurred at least 10 years earlier, if not more, before his employment as a store clerk at the Zip Trip. The defense proffered no evidence as to when an issue might have arisen with his paperwork during the time of Mr. Davila's employment as a police officer, between 1996 and 2006. In addition, there was no evidence as to whether this was a single incident or involved multiple occasions or whether Mr. Davila was ever disciplined, including termination, over the event.

Moreover, the defendant has not provided any authority that Mr. Davila's ability to properly fill out paperwork at least 10 years before the robbery impacted, to any degree, his veracity, or how that affected Mr. Davila's ability to accurately recite the events of the robbery. Finally,

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> rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

as distinguished from *York*,[14] the defense did not proffer any evidence that Mr. Davila fabricated or had the motive to fabricate any statements during his employment as a police officer, or as a witness on the stand.

The trial court did not abuse its discretion by excluding Mr. Davila's ability to accurately fill out paperwork ten years before the robbery. If the trial court had allowed this type of examination, it would have cast the trial into the sea of innuendo on a collateral issue, with no probative value. This claim fails.

F. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED PHOTOGRAPHS OF THE DEFENDANT AND HIS PURPORTED GIRLFRIEND FROM THE FEMALE'S FACEBOOK PROFILE AS THERE WAS SUFFICIENT PROOF THAT IT WAS THE DEFENDANT AND THE FEMALE IN THE TWO PHOTOGRAPHS. THE RELATIONSHIP OF THE FEMALE PICTURED WITH THE DEFENDANT, IN THE TWO PHOTOGRAPHS, WAS NOT MATERIAL TO ANY ISSUE AT TRIAL.

The defendant also complains that the trial court erred when it admitted, over defense counsel's objection, two photographs of the

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[14] *York* involved an undercover buyer of marijuana and was the only State's witness with knowledge of the sale. This Court concluded that the trial court abused its discretion in excluding the evidence, because the investigator was the only witness to have seen York sell the drugs and because his unsullied background and credibility were stressed by the prosecution. 28 Wn. App.. at 35-36. It noted that the investigator's credibility was not a collateral matter, but was instead the very essence of the defense. *Id.* at 364. This Court found the irregularities of the undercover buyer's paperwork procedures causing him to be fired from a previous job was itself an act calling the investigator's credibility into question. The court additionally found it was probative of whether he was fabricating his testimony related to the drug buy. No such factual basis exists in the present case.

defendant and his purported girlfriend taken from his purported girlfriend's Facebook profile.

Standard of review.

The decision to admit or exclude evidence at trial is reviewed for manifest abuse of discretion. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Any error in the admission of evidence is harmless if "within reasonable probabilities" it did not affect the outcome of the trial. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

1. Facebook photos of the defendant and his supposed girlfriend.

At trial, the crime analyst, Mr. Michaud, testified that he had been specifically trained and had experience in open source intelligence. RP 220. After Mr. Michaud input his search criteria into the regional database, the computer identified the defendant as discussed above, and provided an accompanying photograph of him. RP 225. The photograph was admitted, without objection, as Ex. P-71, at trial. RP 224-25. As part of his investigation, Mr. Michaud looked for verification of the photograph from the regional database, including reviewing footage of the store surveillance video and viewing the defendant's Facebook profile through an open source. RP 225. Mr. Michaud located a public Facebook account for the defendant, which had many photographs of the defendant. RP 225. One of the photographs was marked and admitted without objection as Ex. P-41.

RP 226-27. In addition, the defendant's Facebook account linked to what Mr. Michaud believed to be the defendant's girlfriend's Facebook account. RP 227. Without objection, Mr. Michaud testified he found what he believed to be the defendant and his girlfriend together in several photographs on his purported girlfriend's Facebook account. RP 227. Thereafter, the defense objected to admission of Exhibits P-44 and P-45, stating that "I don't know how [Mr. Michaud] knows that that's Mr. Jenks' girlfriend." RP 229. Over the defendant's objection, Exhibits P-44 and P-45 were admitted. RP 229.

To authenticate a photograph, the proponent must "put forward a witness able to give some indication as to when, where, and under what circumstances the photograph was taken, and that the photograph accurately portrays the subject illustrated." *State v. Sapp*, 182 Wn. App. 910, 914, 332 P.3d 1058 (2014); *see State v. Tatum*, 58 Wn.2d 73, 75, 360 P.2d 754 (1961).

In *Tatum*, the State sought to introduce film from a device showing a photograph of the check and the individual attempting to use it to establish a forgery charge. 58 Wn.2d. at 74. An employee of the store testified that she could not specifically recall processing the victim's check, but noted that her initials appeared on the face of the check consistent with her regular protocol. *Id.* at 74. The employee also identified the store from the

background of the photograph. *Id.* at 75. Another witness testified in detail to the filming process. *Id.* at 75. On appeal, our Supreme Court affirmed the trial court's admission of the photograph, holding that "[t]he testimony of the two witnesses taken together amounted to a sufficient authentication to warrant the admission of the photograph." *Id.* at 75.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901(a). The requirement under ER 901(a) is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984). The proponent "need not rule out all possibilities inconsistent with authenticity or conclusively prove that evidence is what it purports to be." *State v. Andrews*, 172 Wn. App. 703, 708, 293 P.3d 1203 (2013). "Once a prima facie showing has been made, the evidence is admissible under ER 901." *State v. Young*, 192 Wn. App. 850, 855, 369 P.3d 205 (2016).

In the present case, there was testimony, without objection, that the defendant had a link on his Facebook account to his purported girlfriend's account, which contained several photographs of the defendant with his purported girlfriend together in the same photographs on his girlfriend's Facebook account. RP 227-29. When the State moved to admit

Exhibits P-44 and P-45, from the purported girlfriend's Facebook account showing the defendant and his purported girlfriend together, the defense asserted there was no evidence the female in the photograph was the defendant's girlfriend, notwithstanding the detective testified, without objection, that there were photographs on the Facebook account depicting the defendant and his girlfriend together.[15]

Under the circumstances, there was sufficient evidence presented under ER 901(b) for the trial court to conclude that the Exhibits 44 and 45 were photographs of the defendant and a female, with a Chicago Bull's hat, found on the female's Facebook account, in light of the unobjected-to testimony by the crime analyst describing the several photographs as portrayed. The trial court did not abuse its discretion when it admitted that the photographs purported to be that of the defendant and a female with a

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[15] Evidentiary error is unpreserved unless a timely objection or motion to strike is made that states the specific ground of objection. *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987); *see also* ER 103(a)(1), "[e]rror may not be predicated upon a ruling which admits ... evidence unless ... a timely objection or motion to strike is made, stating the specific ground of objection." A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Sage*, 1 Wn. App. 2d 685, 702, 407 P.3d 359 (2017), *as amended on denial of reconsideration* (Apr. 4, 2018). Furthermore, an objection to testimony "must be made when testimony is offered and an objection to a question after it has been answered comes too late." *State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). But "[e]ven if ... an objection to a question already answered is timely, it will not be considered unless accompanied by a motion to strike." *State v. Richard*, 4 Wn. App. 415, 428, 482 P.2d 343 (1971); *Jones*, 70 Wn.2d at 597-98; *State v. Delaney*, 161 Wash. 614, 620, 297 P. 208 (1931).

Chicago Bulls hat. *See State v. Snow*, 437 S.W.3d 396, 402-03 (Mo. Ct. App. 2014) (mother's testimony established that she and defendant both had MySpace pages and that she had printed defendant's message to her from her MySpace page); *State v. Paster*, 15 N.E.3d 1252, 1258-59 (Ohio Ct. App. 2014) (police investigator's testimony that she printed out Facebook accounts sufficient under Rule 901 to authenticate printouts as coming from Facebook); *Campbell v. State*, 382 S.W.3d 545, 551 (Tex. Ct. App. 2012) (analyzing under ER 901, "the content of the messages themselves purport to be messages sent from a Facebook account bearing [the defendant]'s name to an account bearing [the victim]'s name"); *Griffin v. State*, 419 Md. 343, 19 A.3d 415, 428 (2011) (one possible method for authenticating a social networking profile is "to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it"); *Commonwealth v. Foster* F., 86 Mass. App. Ct. 734, 20 N.E.3d 967, 971 (2014) (Facebook records adequately authenticated where the prosecutor offered, among other things, the Facebook communications themselves and "an affidavit from the Facebook keeper of records").

Even if the Court determines it was error to admit Exhibits 44 and 45, appellate courts apply "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been

materially affected had the error not occurred." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, both parties provided in opening statement and anticipated that Mr. Davila would describe the robber as wearing, in part, a Chicago Bulls style baseball cap during the robbery. RP 161 (State's opening statement), 164 (defense opening statement). However, that testimony from the victim never materialized during trial. Nonetheless, Exhibit P-1, the store surveillance video, showed the robber wearing a Chicago Bulls cap. RP 270. The status of the female pictured with the defendant in the photograph was immaterial to any issue at trial. Specifically, the defense did not dispute that it was the defendant who was pictured with a female, who was wearing a Chicago Bulls hat in Exhibits P-44 and P-45.[16] The defendant has not analyzed or provided any authority that the female's relationship status, who was pictured in Exhibits 44 and 45, was material to either the prosecution or to the defense, or how he was specifically prejudiced. The trial court did not abuse its discretion when it admitted Exhibits P-44 and P-45. Accordingly, this claim is without merit.

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[16] The appellant's implied argument that there could have been fabrication or tampering of either Facebook account was not argued below nor is there any evidence in the record below to support that position. *See* Br. of Appellant at 31-32.

2. Stricken testimony.

Mr. Michaud further testified that the photograph of the defendant's purported girlfriend had on a Chicago Bulls hat that resembled the hat worn by the robber. RP 228. The court sustained the defendant's objection to that particular testimony and granted the defense motion to strike. Outside the presence of the jury, the court later followed up stating:

> Moving to strike in my book is kind of a misnomer because you really can't effectively strike something from the record. It has to remain on the record for purposes of appellate review. So, but rather than spending time discussing that, I also wanted to follow up and say I typically don't grant motions to -- unless it's really extraordinary to provide an alternate instruction, curative instruction to jurors because my perspective is it just typically draws a big red circle around something that we're asking them to not pay attention to. But your argument and your objection is well taken, which is why I granted it.

RP 261-62.

Contrary to the defendant's assertion, the defense never requested the trial court admonish the jury to disregard the testimony. *See* RP 227-28. The court granted the defense motion to strike the testimony and the jury was instructed at the conclusion of testimony that it could not consider this stricken evidence in deciding the case, stating:

> One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that

> evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

CP 52.

Here, by striking the testimony from the evidence in the jury's presence and by instructing the jury not to consider any stricken evidence, any potential prejudice was cured by the court striking the testimony and the court's instruction. *See* RP 330; CP 52. Juries are presumed to follow the court's instructions. *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

If anything, the objected-to testimony was superfluous and not material to the case in any regard. Furthermore, if there was any error, the defendant has not met his burden to establish it was prejudicial, considering the court's directive to the jury not to consider the stricken testimony. There was no error and this claim has no merit.

G. THE TRIAL COURT'S OSTENSIBLE TELEPHONE CONSULTATION WITH AN APPELLATE COURT JUDGE DURING TRIAL, REGARDING A JURY INSTRUCTION ISSUE, DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE.

The defendant next argues for the first time on appeal that the appearance of fairness doctrine was violated by the trial court's asserted communication with an appellate court judge.

At the time of trial, the State moved the court for a "lesser-included" instruction of second degree robbery. RP 317-18. For tactical reasons, the defense objected to a "lesser-included" second robbery instruction. RP 318. The Honorable Michael Price requested authority from the State to instruct on the "lesser-included" offense because the defense had objected to giving the instruction. The deputy prosecutor informed the court he would consult the appellate unit in the prosecutor's office. RP 319-20. After a brief discussion, the trial court remarked:

> THE COURT: Okay. Let's do this, then, Counsel. Mr. Treppiedi, will you chat with either [appellate counsel] or somebody, somebody with a bigger brain than all of us that can tell us if there's people -- one of our colleagues that enjoys reading case law all day and see if they can tell us that we're committing error on the lesser included here.
>
> [DEFENSE ATTORNEY]: It occurred to me that if they don't believe there's a firearm and they don't believe that there was a threat, we should submit a third-degree theft.
>
> THE COURT: Well, I don't want to get the cart before the horse here. Let's see what happens, Mr. Treppiedi, with –
>
> [DEPUTY PROSECUTOR]: I will step out.
>
> THE COURT: -- with a lesser included and see what the law is there. If you can just do some quick research for me.

RP 321.

The parties returned after a recess and Judge Price stated:

> Counsel, let me tell you what I've done. First of all, Mr. Treppiedi, I understand you've checked with perhaps

> [the appellate unit] and he had some thoughts about the lesser included issue. Ms. Dorman told me about that. Since I was waiting around, I picked up the phone and called one of my colleagues at Division III, not going to say who it was, I'll just say it's a prosecutor. I hope that doesn't give it away.

RP 322.

> Then [WPIC] 4.11 is the defendant is charged in Count 1 with first-degree robbery and it directs the jurors whether they should consider the lesser crime of second-degree robbery.
>
> After just taking a look at a little bit of authority and chatting with Division III, I think it's appropriate to include it, the lesser included [of second-degree robbery]...

RP 325.

The defense did not object at the time of trial nor alleged the court violated the appearance of fairness doctrine.

Second degree robbery is a lesser included offense of first degree robbery, and the jury should be so instructed if the evidence supports it. *State v. Wheeler*, 22 Wn. App. 792, 797, 593 P.2d 550 (1979). Furthermore, if an offense is lesser included, either party is entitled to an instruction on a lesser included offense if it satisfies a legal prong and a factual prong. RCW 10.61.006; *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978); *State v. Mak*, 105 Wn.2d 692, 745, 747, 718 P.2d 407 (1986),

overruled on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).[17]

This Court should not address the defendant's claim that the "appearance of fairness" doctrine was violated for the first time on appeal.

An appellate court will generally not consider an issue that a party raises for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *McFarland*, 127 Wn.2d at 333. Although there is a constitutional right to an impartial judge, a complaint under the appearance of fairness doctrine is not constitutional and generally cannot be raised for the first time on appeal. *State v. Blizzard*, 195 Wn. App. 717, 725, 381 P.3d 1241 (2016), *review denied*, 187 Wn.2d 1012 (2017); s*ee also State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. Morgensen*, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008). If the defense waits until a judge has issued an adverse ruling, it is considered tactical and constitutes a waiver. *Blizzard*, 195 Wn. App. at 725.

In the present case, the defendant does not argue that any manifest constitutional error occurred or why this claim should be addressed for the

[17] The appellant has not assigned error to the court instructing the jury on the lesser included offense of second degree robbery, including that the legal and factual prongs of the *Workman* test were satisfied.

first time on appeal. Therefore, the defendant has failed to preserve his claim that the appearance of fairness doctrine was violated as he did not object below, and it has been waived. *See Morgensen*, 148 Wn. App. at 90-91. Moreover, the defense decision was tactical as the trial court was uncertain as to what ruling it would make regarding the lesser included offense. The defense was on notice that the court had generally requested case authority on how to resolve the issue of the lesser included offense instruction from both parties, and that the deputy prosecutor remarked, during that discussion, that it would contact the appellate unit of the prosecutor's office. Yet, the defendant made no request for recusal. The defense actions in the lower court demonstrated a calculation that the trial court would accept the defense request not to instruct on the lesser included offense.

Even if this Court accepts the defendant's proposition that this issue can be raised for the first time on appeal, the defendant has not demonstrated the appearance of fairness doctrine was violated. The appearance of fairness doctrine permits a defendant to make fair trial claims based on violations of the Code of Judicial Conduct (Code) (hereinafter "CJC"), regardless of whether those claims implicate due process. *Blizzard*, 195 Wn. App. 725.

The appearance of fairness doctrine and Canon 3(D)(1)[18] of the CJC require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

It is presumed that a judge not biased, *In re Borchert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961), and a judge will keep an open mind and do his or her duty according to the law. *State v. Franulovich*, 89 Wn.2d 521, 525, 573 P.2d 1298 (1978). Accordingly, a party claiming bias or prejudice must affirmatively support the claim; prejudice is not presumed. *Id.* at 526; *Dominguez*, 81 Wn. App. at 328-29. Likewise, a party asserting a violation of the appearance of fairness doctrine *must* produce sufficient evidence demonstrating bias; mere speculation is not enough. *Tatham v. Rogers*, 170 Wn. App. 76, 96, 283 P.3d 583 (2012).

CJC 2.9(3) allows judges to consult with one another on pending matters, but a *comment* following that rule states that a judge "must avoid ex parte discussions of a case ... with judges who have appellate jurisdiction

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[18] Judicial Canon 3(D)(1) (hereinafter "CJC") states:

> "Rule 3.1. Extrajudicial Activities in General. A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not: (C) participate in activities that would undermine the judge's independence, integrity, or impartiality."

over the matter." CJC 2.9 cmt. 5. However, the record is devoid as to what, if anything, was discussed during the asserted telephone call and what impact, if any, it had on the trial court exercising its discretion. Moreover, a judge is presumed to perform his or her duties regularly and properly, without bias or prejudice. *State v. Leon*, 133 Wn. App. 810, 813, 138 P.3d 159 (2006).

Here, the defendant engages in speculation and hyperbole, both of which fail to meet his burden. For example, the defendant claims he was present when the trial judge stated he spoke to an appellate court judge who was a former prosecutor and that the judge "failed to 'weigh the scales of justice equally between contending parties.'" Br. of Appellant at 39. This unsupported assertion, in and of itself, demonstrates nothing to overcome the presumption that the trial judge was not biased. The defendant further asserts "Mr. Jenks's concerns about the court receiving advice from 'a prosecutor' were well-founded as the court immediately ruled against the defense, after being advised by phone by this Court." Br. of Appellant at 39. The record is devoid of any concern or objection voiced by the defendant or his counsel regarding the trial court's purported telephone call. Moreover, the defense had an equal opportunity to provide case authority, consult with lawyers in his office, and provide argument before the court ruled on the lesser included instruction. Indeed, the trial court properly

followed the relevant case authority and statute and exercised its discretion. Finally, even though the jury was instructed on the lesser included offense of second degree robbery, it found the evidence supported only the greater charge of first degree robbery.

Regarding the trial court's impromptu remark that it had contact with an appellate court judge, there is nothing in the record as to what, if anything, was discussed about the lesser-included offense instruction, and what, if anything, the trial court did with any purported information from the appellate court judge, or how the trial court was influenced, if at all, from the putative discussion with the appellate court judge. It cannot be disputed that the trial court had the discretion to instruct on the lesser included offense if the factual and legal prongs were met. Ultimately, the court exercised its discretion to instruct on the lesser included offense. The record does not demonstrate, even remotely, that the trial court judge did not use his independent judgment, after careful consideration of all the evidence in light of the applicable law to the case.

It is difficult to envision how a purported inquiry with an appellate court judge that related to a legal question interfered with the trial court's independent decision-making in this case, or how the judge was biased in doing so, when there is no evidence to support that claim or that the defendant was prejudiced. The appearance of fairness claim has no merit.

H. IT IS WELL ESTABLISHED THAT A SENTENCE UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT[19] IS NOT SUBJECT TO *BLAKELY V. WASHINGTON*,[20] REQUIRING A JURY TO DETERMINE ANY FACT OTHER THAN A PRIOR CONVICTION THAT INCREASES THE PENALTY FOR THE CRIME BEYOND THE STATUTORY MAXIMUM.

1. The defendant's persistent offender sentence did not violate equal protection.

The defendant additionally alleges that his persistent offender sentence violated the Equal Protection Clause claiming because the Legislature arbitrarily discriminates between persistent offenders and other recidivists by treating "elements" of the crime and "sentencing factors" differently.

When a defendant's prior conviction is an element of an offense, the prior conviction must be established beyond a reasonable doubt. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (gross misdemeanor raised to felony when defendant has prior sex offense conviction). But when the defendant's prior convictions are sentencing factors that bear on his status as a persistent offender, the prior convictions must be established by

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[19] RCW 9.94A.570 states that whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not eligible for parole or any form of early release. "Persistent offender" is an offender currently being sentenced for a "most serious offense" who also has two or more prior convictions for "most serious offenses." RCW 9.94A.030(37). RCW 9.94A.030(32) lists Washington's "most serious offenses."

[20] *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

a mere preponderance of the evidence. RCW 9.94A.500(1), 9.94A.570; *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001).

Our Supreme Court has consistently rejected the defendant's argument, most recently in *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014), which held: "Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence." This Court has also previously rejected this same argument. *See State v. Williams*, 156 Wn. App. 482, 496, 234 P.3d 1174 (2010), *review denied*, 170 Wn.2d 111 (2010) (sentencing under the Persistent Offender Accountability Act does not violate equal protection); *see also State v. Reyes-Brooks*, 165 Wn. App. 193, 207, 267 P.3d 465 (2011), *review granted, cause remanded on other grounds*, 175 Wn.2d 1020, 289 P.3d 625 (2012) (same). The defendant does not discuss or attempt to distinguish *Witherspoon* or *Williams* from his case. They are controlling and the defendant's argument has no merit.

2. <u>The defendant was not entitled to have a jury determine the propriety of his "most serious offenses."</u>

As stated above, the Supreme Court has consistently rejected the defendant's argument in *Witherspoon*, 180 Wn.2d 875. *See also State v. O'Connell*, 137 Wn. App. 81, 88, 152 P.3d 349 (2007) (holding "the federal

constitution does not require that prior convictions be proved to a jury beyond a reasonable doubt." *Id.* at 89 (citing *State v. Smith*, 150 Wn.2d 135, 141-42, 75 P.3d 934 (2003)).

The defendant's equal protection argument and his claim that he was entitled to have a jury determine the propriety of his "most serious offenses" is contrary to settled law and it has no merit.

IV. CONCLUSION

For the reasons stated herein, this Court should affirm the judgement and sentence.

Respectfully submitted this 7 day of September, 2018.

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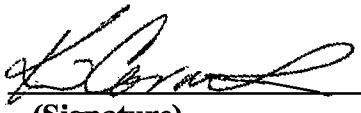
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. ALAN JENKS, Respondent.	NO. 35427-0-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on September 7, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jan Trasen
wapofficemail@washapp.org

9/7/2018	Spokane, WA	
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SPOKANE COUNTY PROSECUTOR

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