NO. 103194-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

RICK LEFT HANDED WOLF STONE, Petitioner

FROM THE COURT OF APPEALS DIVISION II
CAUSE NO. 56586-2-II
CLARK COUNTY SUPERIOR COURT
CAUSE NO. 21-1-00109-06

RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street, PO Box 5000
Vancouver WA 98666-5000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Supreme Court Cases

Rules

Unpublished Opinions

IDENTITY OF RESPONDENT

The Respondent, State of Washington, by and through Aaron Bartlett, Senior Deputy Prosecuting Attorney for Clark County, provides the following response to Rick Left Hand Wolf Stone's Petition for Review.

DECISION BELOW

On May 29, 2024, Division II of the Court of Appeals issued an unpublished opinion affirming Stone's convictions and sentence in *State v. Stone*, No. 56586-2-II, 2024 WL 2753334 (2024).

RESPONSE TO ISSUES PRESENTED FOR REVIEW

I. The decision of the Court of Appeals finding that Stone's crimes had an independent purpose or effect—so that the convictions and attendant sentences did not violate double jeopardy—faithfully followed controlling case law from this Court. Stone invents a conflict by focusing on cases examining double jeopardy under the same

evidence test[1].

II. **A potential juror made a racist comment about Native Americans but did not serve on the jury. The decision of the Court of Appeals correctly determined that due to the isolated nature of the comment and the lack of proof that the venire was biased by it, that Stone could not establish (1) that the trial court erred by not sua sponte striking the venire; or (2) he received the ineffective assistance of counsel based on counsel's decision not to move to strike the venire.**

III. **The decision of the Court of Appeals rejecting Stone's claims of prosecutorial misconduct, and of ineffective assistance of counsel for failing to object to the same conduct, straightforwardly applied existing precedent.**

STATEMENT OF THE CASE

The St. John's Minit Mart and Shell Station is in Vancouver, Washington. 2RP 251, 297. Like most convenience stores, it has surveillance cameras trained on the premises and

[1] *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004) (explaining that the referenced test has been "termed the 'same elements' test, the 'same evidence' test, and the *Blockburger* test") (citing *U.S. v. Blockburger*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).

inside the store. 2RP 195-96, 261, 277-78; Exhibit 1. A neighbor to the store also had surveillance cameras, a couple of which could record the goings on at the Minit Mart parking lot. 2RP 151-54, 157, 160-61, 277-78; Ex. 1.

During the evening of July 2, 2020, two altercations took place at the Minit Mart separated by about thirty minutes to an hour. 2RP 183, 257-58, 279-281, 325, 348; Ex. 1. Both were caught on video. Ex. 1.

The first altercation began with Mitchel Kedalo sitting in his parked car in the Minit Mark parking lot. Ex. 1. At the same time, Stone was at the Minit Mart with his girlfriend, Renae Bersoza, and Pauline Crowell. 2RP 232, 413-15; 437-39; Ex. 1. When Stone's group began to leave, Kedalo began speaking at them. Ex. 1. Kedalo followed the group as they were attempting to leave, slowly backing his vehicle out of the parking stall in which it had been parked. Ex. 1. Shortly thereafter, Stone, stationed at the front passenger side of Kedalo's car, threw his drink at Kedalo. Ex. 1. Kedalo continued driving in reverse and

then suddenly lurched forward towards Bersoza, hitting the bicycle she was holding, and pushing her backwards. Ex. 1.

Stone immediately opened Kedalo's front, passenger door, leaned inside, and began punching Kedalo. Ex. 1. Twenty seconds passed before Kedalo's car began rolling backwards and Stone discontinued the attack. After he paced beside Kedalo's car, Stone reached underneath it, kicked it, and left the scene. Ex. 1. Bersoza and Crowell followed. Ex. 1. Kedalo's now disabled vehicle remained motionless in the middle of the parking lot. 2RP 220, 236, 340; Ex. 1.

About an hour later, Stone returned to the Minit Mart with his friend Billy Jean Nelson. 2RP 230-33, 250. Stone was on foot and Nelson rode a bicycle. 2RP 232. Ex. 1. Stone was wearing a hooded, green reflective jacket and carrying a plastic bag with gasoline inside. 2RP 233-34, 284, 409-410; Ex. 1. Kedalo, meanwhile, was still seated in the driver's seat of his car. Ex. 1.

Stone walked quickly and directly towards Kedalo's car, while Nelson sat on his bike across the street observing. 2RP 233-34; Ex. 1. Stone doused Kedalo and his car with gasoline, ignited the gasoline, and ran away to the east. 2RP 234; 409-412 Ex. 1.

Kedalo's car and person were instantly engulfed in flames. Ex. 1. A now on-fire Kedalo ran inside the Minit Mart to try find to help. 2RP 258-59, 298-99, 412; Ex. 1.

At the same time, Nelson rode his bicycle away with the fleeing Stone. 2RP 237-38. As Stone was running, he threw the green, reflective jacket he had been wearing onto the ground, and he and Nelson went their separate ways. 2RP 237-38.

Emergency personnel responded to the scene. Police found the green, reflective jacket about 100 yards east of the Minit Mart. 2RP 167-178, 198; Exhibit 6-13. It smelled like gasoline. 2RP 175, 198.

Police sent the jacket for forensic testing. 2RP 362-63. DNA sampled from the "red brown staining on the left collar,"

which tested presumptively positive for blood, matched that of Stone. 2RP 375-77, 381-82. The jacket also contained gasoline. 2RP 396-98.

Kedalo, who lacked the ability to provide much information, "had about 22 percent of his body burned from flame burns," most of which occurred on his left side. 2RP 216-225, 315-16; Ex. 21-26. The burns were "predominantly third degree burns," which constitute "a threat to life and limb" because the burn is "all the way through the dermis. . . ." 2RP 316-17. He required surgery and skin grafting. 2RP 319. Kedalo remained intubated and sedated for many days, and remained hospitalized for over three weeks. 2RP 320.

Crowell testified as a defense witness. 2RP 434-35. She testified about the first altercation, but also testified that Stone could not have been at the Minit Mart setting Kedalo and his car on fire because he was at her apartment. 2RP 437-42. Stone called no other witnesses.

ARGUMENT

This Court will grant a petition for review "only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Stone argues that review should be granted in this case because the double jeopardy holding of the Court of Appeals is in "conflict with a decision of" this Court and amounts to a "significant question of" constitutional law; the decision of the Court of Appeals on the jury venire issue satisfies each of the review criterion; and the Court of Appeals's resolution of his prosecutorial misconduct claims "is in conflict with a decision" of this court and a "published decision of the Court of Appeals," and involves a significant question of" constitutional law. Pet. Rev. at 1-2, 10-11, 18, 27,

38. This Court should deny Stone's petition for review because the unpublished decision of the Court of Appeals in this case properly applied established case law in reaching its holdings and is not in conflict with decisions of this Court or published decisions of the Court of Appeals. Furthermore, the issues raised, in the context of this case, do not amount to significant questions of law under the Constitution or issues of substantial public interest.

I. The decision of the Court of Appeals finding that Stone's crimes had an independent purpose or effect faithfully followed controlling case law from this Court.

The jury convicted Stone of Attempted Murder in the First Degree and Arson in the First Degree. CP 41-42. The State argued that Stone attempted to kill Kedalo by setting him on fire. RP 509-11 The State charged Stone with Arson in the First Degree under the theory that the fire he set "was manifestly dangerous to human life." CP 1. Thus, the fire that Stone set formed the basis for his two convictions. But because Stone's

crimes had an independent purpose or effect, the Court of Appeals concluded that imposing punishment for both crimes did not amount to a double jeopardy violation.

A. This Court has concluded that even where two crimes are the same in law and fact that cumulative punishment may imposed where the crimes have an independent purpose or effect.

Claims of double jeopardy are reviewed de novo. *State v. Arndt*, 194 Wn.2d 784, 815, 453 P.3d 696 (2019). Where two crimes are the same in law and fact, cumulative punishments may offend the principles of double jeopardy unless the legislature "authorized cumulative punishments for both crimes." *Id.* In other words, "cumulative punishments may be imposed for the same act or conduct in the same proceeding if that is what the legislature intended." *Id.* at 818. Courts apply "four analytical steps to determine legislative intent regarding whether cumulative punishment is authorized":

> (1) consideration of any express or implicit legislative intent (2) application of the Blockburger,

> or 'same evidence,' test, (3) application of the 'merger doctrine,' and (4) consideration of any independent purpose or effect that would allow punishment as a separate offense.

Id. at 816. If legislative intent allowing for multiple punishments "can be found in *one* of the four double jeopardy analytical steps" then there is no double jeopardy violation. *Arndt*, 194 Wn.2d at 818 (emphasis added).

The fourth step is the only step at issue in this case.[2] The fourth step is "consideration of any independent purpose or effect that would allow punishment as a separate offense." *Id.* at 816." To establish "'an independent purpose or effect of a particular crime, that crime must injure the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element.'" *In re Knight*, 196 Wn.2d 330, 338, 473 P.3d 663 (2020) (quoting *Arndt*, 194

[2] The State has already conceded "that the first three steps are not dispositive of legislative intent allowing for multiple punishments for the two charges." *Stone*, 2024 WL 2753334 at *5; Brief of Respondent at 8.

Wn.2d at 819). Generally considered an exception to the merger doctrine, "[t]his exception is less focused on abstract legislative intent and more focused on the facts of the individual case." *Id*. Nonetheless, abstract legislative intent can provide the "independent purpose" that "prevents the merger of the two offenses and allows for the imposition of multiple punishments." *Arndt*, 194 Wn.2d at 819-820.

This Court's application of the independent purpose or effect exception in *Arndt* to First-Degree Murder aggravated by Arson and First-Degree Arson is on all fours with this case and compels the outcome that Stone's convictions for Attempted First-Degree Murder and First-Degree Arson, and separate punishments for the same, do not violate double jeopardy. *Id.* at 819-821. *Arndt* held that the "independent purpose or effect exception" applies to "aggravated first degree murder" and "first degree arson." *Id.* As this Court explained when considering the particular facts of that case:

> Arndt was charged with aggravated first degree murder for the death of a single victim, Darcy Veeder Jr. In contrast, her conviction for first degree arson, in addition to resulting in the death of Veeder, also destroyed the O'Neils' home *and was 'manifestly dangerous' to the other occupants: O'Neil, Thomas, Kriefels, and the minor children*. . . . The presence of additional victims places this case inside the 'independent effect' exception to the merger doctrine that allows for the imposition of separate punishments.

Id. at 819 (emphasis added). But *Arndt* also found "that in the consideration of these two crimes, an independent purpose exists on an abstract level that also prevents the merger of the two offenses and allows for the imposition of multiple punishments" as "the two statutes in question are located in different chapters of the criminal code and are intended to protect different societal interests." *Id.* at 819-820.

Following *Arndt*, *State v. Heng*, held that convictions for a Felony Murder predicated on Arson and a First-Degree Arson did not constitute double jeopardy and did fall "within the 'independent effect' exception" because "Heng's arson had an effect independent of the murder and because the purpose of

criminalizing arson is to protect property whereas the purpose of criminalizing murder is to protect human life." 22 Wn. App. 2d 717, 731-37, 512 P.3d 942 (2022) *aff'd* 2 Wn.2d 384, 539 P.3d 13 (2023). There, the defendant set fire in a building that resulted in the victim's death, but which also burned down the building and the businesses held within that were owned and run by other individuals. *Id.* That defendant tried to distinguish his case from *Arndt* by asserting that in *Arndt* the fact of the "other victims was pled and proved to the jury" and that in his case the prosecutor did not sufficiently incorporate those other victims into its closing argument or theory of the case. *Heng* rejected these arguments since the "predicate offense [(the arson)] could and did independently affect victims other than the victim of the murder." *Id.* at 735-37.

Here, the decision of the Court of Appeals correctly concluded that "*Heng* and *Arndt* control the outcome of this case." *Stone*, 2024 Wl 2753334 at *6. In this case, the prosecutor recognized that the fire Stone set created additional

victims—not just Kedalo—by being manifestly dangerous to others. That is, Stone's fire affected more than just Kedalo. The prosecutor argued:

> You don't go to a Minit Mart with kids and people and couples and pets and throw gasoline on a vehicle in the middle of that gas station Minit Mart and light it on fire and think that's not arson in the first degree.

RP 510.

> And the evidence overwhelmingly shows [t]hat the fire or explosion was manifestly dangerous to human life so not only was Mitchel Kedalo's life endangered but blowing up a car at a busy Minit Mart endangers other people.
>
> You may not have noticed that this person in the video here is smoking a cigarette. You may not have noticed in the video that we played for you in the Minit Mart where Kedalo runs in there's kids jumping around in the aisle. You've got other people here and here and cars. And the decision to blow up a vehicle, that endangered not only Kedalo's life, it endangered others' lives.

RP 532.

The prosecutor also questioned witnesses and elicited testimony about the fire's danger to others. RP 192, 303-04 (a

witness who exited the Minit Mart contemporaneous to Kedalo's car exploding testified that "[y]ou could almost feel the heat . . ."). For example, the fire department station caption explained that he was concerned about "the proximity of the public or anybody that might be in the area might be exposed to that fire or the products of combustion or the smoke" because "[c]ar fires are especially hazardous" due to the "very toxic by-products of combustion." RP 192. That Stone's actions sent an on-fire Kedalo into the Minit Mart where others were working or shopping created additional danger. RP 298-99 (witness inside the Minit Mart when Kedalo entered testifying that he was in line to purchase cigarettes behind "a mother and her child").

The decision of the Court of Appeals concluded that the evidence presented at trial and the arguments made by the State supported application of the independent purpose or effect exception:

> Stone was charged with attempted first degree murder for attempting to cause death by the burning of one victim, Kedalo. In contrast, his conviction for first degree arson, in addition to resulting in the serious burning of Kedalo, destroyed the car Kedalo was in, and was 'manifestly dangerous to any human life' for the other individuals in the proximity because the fire occurred at an open gas station and because car fires produce highly toxic fumes. To that end, the State elicited testimony about a fire fighter's concerns regarding the proximity of the fire to the gas pumps and regarding the toxic fumes. And in closing, the State argued 'You don't go to a [gas station] with kids and people and couples and pets and throw gasoline on a vehicle in the middle of that gas station ... and light it on fire and think that's not arson in the first degree.'

Stone, 2024 WL 2753334 at *6 (internal citations omitted).

Stone argues that the Court of Appeals's conclusion that *Arndt* and *Heng* controlled the outcome of his case "conflicts with" this Court's decisions in *In re Orange* and *In re Borrero*. 152 Wn.2d 795, 100 P.3d 291 (2004); 161 Wn.2d 532, 167 P.3d 1106 (2007); Pet. Rev. at 10-11. The nature of this conflict is inscrutable. Pet. Rev. at 15-18. For one, *Arndt* and *Heng* analyzed and applied the independent purpose and effect

exception *after* concluding that crimes at issue were the same in law and fact under the same evidence test[3]. 194 Wn.2d at 818-19; 22 Wn. App. at 732-37. *Orange* and *Borrero* applied only the second analytical step, i.e., the 'same evidence' test, to determine whether the relevant attempted and completed crimes were the same in law and fact and resulted in a double jeopardy violation. 152 Wn. 2d at 815-820 (finding a double jeopardy violation); 161 Wn.2d at 536-39 (not finding a double jeopardy violation). That the same evidence test may "require[] further refinement" when one of the two crimes is an attempt crime" is irrelevant to Stone's case. *Borrero*, 161 Wn.2d at 537. Neither *Orange* or *Borrero* discussed the independent purpose or effect exception[4], let alone articulated a holding suggesting that (1)

[3] Again, the test is "variously termed the 'same elements' test, the 'same evidence' test, and the *Blockburger* test." *Orang*e, 152 Wn.2d at 816.

[4] This is unsurprising since it does not appear the exception was raised by the parties or would have applied given the facts of each case.

the independent purpose or effect exception does not apply when an attempt crime is at issue; or (2) when considering double jeopardy and an attempt crime that the same evidence test is necessarily dispositive of the legislature's intent to allow for multiple punishments. Absent either of these holdings, there can be no conflict between the decision of the Court of Appeals in this case and this Court's decisions in *Orange* and *Borrero*. Therefore, there is no basis by which this Court should grant review on this issue. This Court should deny Stone's petition for review.

II. The decision of the Court of Appeals correctly concluded that the possibility of racial bias against Stone stemming from a potential juror's single, racist comment did not amount to manifest constitutional error such that the trial court was required to sua sponte strike the venire.

During voir dire, defense counsel told the venire that she was going to "talk about race." 2RP 102. She then stated her client's last name, "Left Hand Wolf Stone" and asked, "if that

means anything to anybody." 2RP 102. When one juror said, "Native American," Stone's counsel asked the venire whether anybody had "any feelings about Native Americans one way or the other? Bad? Good?" 2RP 102. The first audible answer that she received was "I married one." 2RP 102. After some additional minor discussion, Juror 32 asked if he could say something on the topic and the following occurred:

> Juror 32: I have elderly grandparents down in Madris in Warm Springs reservation. In my experience with them, my wife and I coached a couple, and the depression that is hung over these people. People in this room don't know that when some American Natives reach a certain age, they just take their children and drop them off at the nearest relative, and then that relative sits there and raises their children. And, you know, they get to the point where, okay, I've done enough here, and then they pass the children off. And that is not right. It's not right.
>
> Defense Counsel: Doesn't sound right.
>
> Juror 32: And that's from experience. That's the honest to God truth.
>
> Defense Counsel: And, yeah, that is not right. I suppose that would make kids who feel abandoned.

2RP 103.

No objection was made, nor did counsel try to rehabilitate Juror 32. 2RP 103. Defense counsel also did not try to challenge the entire panel under CrR 6.4(a) as somehow tainted from hearing Juror 32's comments. Instead, counsel attempted to change course and discuss law enforcement, but for another potential juror who interjected to opine positively about their time attending "Teetop Vacation Bible School on a Navajo Indian reservation for two different years." 2RP 103-04. In any event, once the parties finished questioning the panel, Juror 32 was removed for cause. 2RP 111-12. Additional challenges for cause were made, and the trial court played an active role in the proceedings even suggesting a potential juror about whom he had concerns, which led to another for-cause challenge by defense counsel. 2RP 111-15. A jury was seated without objection.

Because there was no objection to the venire or to the seated jury, the Court of Appeals considered whether Stone, for

the first time on appeal, could raise the issue of whether the trial court erred by failing to strike the venire sua sponte and whether he received the ineffective assistance of counsel for her failure to move to strike the entire venire after the racist comment. In each instance, it answered in the negative. *Stone*, 2024 WL 2753334 at *13-15.

A defendant's right to a fair and impartial jury comprised of "unbiased and unprejudiced" jurors is constitutionally guaranteed. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022) (quoting *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000)). "The right to an impartial jury, however, is not typically implicated unless a biased juror was actually seated." *State v. Bell*, 26 Wn. App. 2d 821, 838, 529 P.3d 448 (2023).

If a party seeks to dismiss an entire jury panel or venire, the party must show a "material departure from the procedures prescribed by law" in the selection process. CrR 6.4(a); *State v. Roberts*, 142 Wn.2d 471, 518-19, 14 P.3d 713 (2000). If, on the

other hand, the "the selection process is in substantial compliance with the statutes, the defendant must show prejudice," at which point the trial court can "sustain a challenge to the entire jury panel." *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

When it comes to issues of race and jury selection, "the decision to question prospective jurors about racial prejudice is best left to defense counsel." *Davis*, 141 Wn.2d at 834. "[T]he Constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 223, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017); *Zamora*, 199 Wn.2d at 715.

Our courts have frequently rejected claims that statements made during jury selection by a single, prospective juror have biased entire venires and constituted reversible error. *see State v. Strange*, 188 Wn. App. 679, 684-97, 354 P.3d 917 (2015); *State v. Quintana*, 6 Wn. App. 2d 1047, 2018 WL 6819504, *9-10 (2018); *State v. Rawlins*, 21 Wn. App. 2d 1037,

2022 WL 896010, *7-9 (2022); *State v. Pimentel Ramirez*, 13 Wn. App. 2d 1037, 2020 WL 2026072, *3 (2020); *State v. Setzer*, 185 Wn.App. 1020, 2015 WL 161270, *5 (2015)[5]. In doing so they have looked to "the expertise of the potential juror in relation to the statement, the number of statements or the amount of times a statement is repeated, the certainty of the statement, and the nature or relation of the statement to the crimes charged." *Quintana*, 2018 WL 6819504 at 9; *Strange*, 188 Wn.App. at 684-87. The juror in this case did not have "expertise" on the topic on which he opined, the problematic statements were not repeated, and though he seemed to appear "certain" of his statements, the statements had nothing at all do with crimes charged or any of the events surrounding the crimes. RP 103. There is no persuasive reason to believe that Juror 32's statements tainted the venire and resulted in a trial before a biased jury.

[5] The opinions in *Quintana, Rawlins, Pimentel Ramirez,* and *Setzer* are unpublished and cited pursuant to GR 14.1(a).

Moreover, after challenges are exercised and the jury panel has taken its oath, "[t]he law presumes each juror sworn is impartial and qualified to sit on a particular case, otherwise [they] would have been challenged for cause." *State v. Munzanreder*, 199 Wn.App. 162, 176, 398 P.3d 1160 (2017). Claims that a seated juror harbors actual bias, must be established by proof, not speculation or the "mere possibility of bias." *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 809-810, 425 P.3d 807 (2018).

Here, Stone merely reiterates the argument that he made to the Court of Appeals. Brief of Appellant at 58-69; Pet. Rev. 19-26. Of course, the State does not dispute the efficiency of such a course and similarly and liberally takes advantage of the tactic throughout this brief, but Stone claims that review of this claim "is appropriate under RAP 13.4(b)(1)-(4)" without addressing the review criteria.

For example, the Court of Appeals concluded that Stone "fails to show that this challenge[[6]] constitutes manifest error" and, thus, that he could not raise this issue for the first time on appeal. *Stone*, 2024 WL 2753334 at *15. But Stone does not at all explain where the Court of Appeals went wrong, let alone discuss the way this particular holding of the Court of Appeals is in conflict with decisions of this Court or published decisions of the Court of Appeals. *See* Pet. Rev. 19-26[7]. Stone's treatment of the attendant ineffective assistance of counsel claims suffers from the same infirmity; he only offers a conclusory claim that "Counsel's failure to challenge the racial and ethnic prejudice which invaded the jury venire undermines confidence in the

[6] To the trial court's decision to not sua sponte dismiss the jury venire.

[7] Mere citations to *State v. Irby*, 187 Wn. App. 183, 347 P.3d 1103 (2015) and *State v. Strange*, 188 Wn. App. 679, 354 P.3d 917 (2015) without argument are insufficient. And even a cursory review of the cases evinces no conflict between the holdings of those cases and that of the decision of the Court of Appeals. The State previously addressed the persuasiveness of these citations. Br. of Resp. at 61-62.

outcome of this case," but fails to address the overwhelming evidence of his guilt or the reasoning of the Court of Appeals. Pet. Rev. at 26. And as the Court of Appeals concluded in finding that Stone could not establish prejudice, "there was not proof that any individual member of the venire had actual bias, much less the entire venire." *Stone,* 2024 WL 2753334 at *15. This Court should decline to grant review of this issue. The unpublished decision of the Court of Appeals appropriately applied existing case law, and Stone has not met his burden to satisfy any of the review criteria.

III. The decision of the Court of Appeals rejecting Stone's claims of prosecutorial misconduct, and of ineffective assistance of counsel for failing to object to the same conduct, straightforwardly applied existing precedent.

Stone alleges that the prosecutor committed misconduct during the direct examination of a police witness, during the cross-examination of a defense witness, and during closing argument. Stone did not object to any of these instances during trial. RP 421-22, 455-56, 524-25. The Court of Appeals

concluded that the direct examination of the police witness did not "constitute[] eliciting improper vouching testimony" and that the cross-examination of the defense witness did not involve improper questioning or rise to the level of becoming an expression of the prosecutor's personal opinion. *Stone*, 2024 WL 2753334 at *9-11. The Court of Appeals also opined that "even assuming that [the direct examination] line of questioning was improper, a curative instruction that admonished the members of the jury that they are the sole judge of credibility could have obviated any prejudicial effect" and "even assuming that the [cross-examination] question was improper under the circumstances" "that a curative instruction could have obviated the prejudicial effect and the prosecutor's question did not have a substantial likelihood of affecting the verdict." *Id.* at *10-11.

As to the closing argument, the Court of Appeals held that while the prosecutor's argument "was improper," the argument was not flagrant and ill-intentioned and "that a

curative instruction could have obviated any resulting prejudice." *Id.* at *12. Furthermore, the Court of Appeals "conclude[d] that Stone does not establish there was a substantial likelihood the prosecutor's misconduct affected the verdict when viewed in the context of the whole argument, the issues of the case, the evidence presented, and the instructions given to the jury." *Id.* As a result, it held that Stone failed to "meet his burden to overcome the waiver of this prosecutorial misconduct claim." *Id.*

When a defendant does not object to purported prosecutorial misconduct at trial, the defendant waives that claim

> unless the defendant shows (1) that comments were improper, (2) that the prosecutor's comments were both flagrant and ill-intentioned, (3) that the effect of the improper comments could not have been obviated by a curative instruction, and (4) a substantial likelihood the misconduct affected the verdict.

State v. Gouley, 19 Wn. App. 2d 185, 201, 494 P.3d 458 (2021); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). In assessing prosecutorial misconduct claims, when "a nonobjecting defendant fails to show that the improper remarks were incurable, the claim necessarily fails, and [a court's] analysis need go no further" and that in other situations a "defendant might succeed in showing incurable prejudice from the improper statements and yet fail to demonstrate a substantial likelihood that the misconduct affected the verdict." *Gouley*, 19 Wn. App. 2d at 201.

Here, Stone reiterates why he thinks each particular instance amounted to misconduct and asserts that "[c]ontrary to the Court of Appeals reasoning, the misconduct here was not the type to be remedied by curative instructions," but he fails to establish, in the context of the evidence in this case, "a substantial likelihood the misconduct affected the verdict" or

examine or explain how his arguments meet the requisite review criteria. Pet. Rev. at 37-38; *Gouley*, 19 Wn.App.2d at 201. Even assuming error and that curative instructions could not have remedied the effect of the improper comments or questions—neither of which the State concedes—the decision of the Court of Appeals correctly held "that Stone does not establish there was a substantial likelihood the prosecutor's misconduct affected the verdict when viewed in the context of the whole argument, the issues of the case, the evidence presented, and the instructions given to the jury." *Stone*, 2024 WL 2753334 at *12. This holding follows, in part, from the overwhelming evidence of Stone's guilt that included: evidence that Stone was initially at the Minit Mart and getting into a physical fight with Kedalo, giving him a motive to return and further harm Kedalo; (2) video evidence of that fight; (3) an eyewitness who knew and was friends with Stone that was present during the crimes and testified that Stone was the person who dumped gasoline on Kedalo; (4) Stone's DNA

being found on the the reflective jacket that the fire-starter wore, which tied Stone to the crime and the crime scene; (5) scientific evidence that tied gasoline to the reflective jacket, Stone, Kedalo, and the crime scene; and (6) video of the actual crimes Stone committed, which corroborated the eyewitness testimony and scientific evidence. Stone's case was not a close one. Moreover, the Court of Appeals's resolution of the purported misconduct in an unpublished decision in a manner that does not conflict with any of this Court's decisions or published decisions of the Court of Appeals, does not warrant this Court's review. For these same reasons, Stone's related ineffective assistance of counsel claim does not warrant review. Stone's petition for review should be denied.

CONCLUSION

This Court should deny Stone's petition for review.

This document contains 5,398 words based on the word count calculation of the word processing software used to prepare this motion, excluding the parts of the document exempted from the word count by RAP 18.17(b). Additionally, I certify that all text appears in 14 point serif font equivalent to Times New Roman. RAP 18.17(a)(2).

DATED this 21st day of October, 2024.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: 
_____
Aaron T. Bartlett, WSBA #39710
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

October 21, 2024 - 2:28 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,194-7
Appellate Court Case Title:	State of Washington v. Rick Left Handed Wolf Stone
Superior Court Case Number:	21-1-00109-9

The following documents have been uploaded:

- 1031947_Answer_Reply_20241021142650SC528697_4255.pdf
  This File Contains:
  Answer/Reply - Answer to Motion for Discretionary Review
  The Original File Name was Response to Petition to Review.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- steedj@nwattorney.net

Comments:

Sender Name: Amber Lyon - Email: amber.lyon@clark.wa.gov
Filing on Behalf of: Aaron Bartlett - Email: aaron.bartlett@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (564) 397-2261 EXT 5686

Note: The Filing Id is 20241021142650SC528697