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Supreme Court No. (to be set)
Court of Appeals No. 38848-4-III

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

v.

KYLE ANTHONY JOHNSON-CLARK,
Appellant.

PETITION FOR REVIEW BY THE APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY
THE HONORABLE DAVID L. PETERSEN, JUDGE

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I. IDENTITY OF PETITIONER

Kyle Anthony Johnson-Clark, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Johnson-Clark seeks review of the unpublished opinion of the Court of Appeals, Division III, issued on April 30, 2024, attached. App. at 1-37. Division III declined to reconsider this opinion in an order dated June 11, 2024. App. at 38.

III. ISSUES PRESENTED FOR REVIEW

Should this Court grant review and reverse when:

1. The prosecutor told the jury information outside the record that he knew or should have known was false?
2. Division III sanctioned the prosecutor's misconduct, effectively holding that a prosecutor may relay false information to the jury if the evidence to rebut that falsehood may be inadmissible?

IV. STATEMENT OF THE CASE

This case arises out of a confrontation between Kyle Johnson-Clark and Daniel Rice. On May 3, 2019, Mr. Johnson-Clark shot Mr. Rice three times. RP at 679-80, 743-44. Mr. Rice later died of his injuries. RP at 716. Mr. Johnson-Clark said that he saw Mr. Rice draw a gun and that he acted in self-defense. RP at 1317-18. A jury disagreed and convicted him of first degree murder with a firearm enhancement. RP at 1566-69.

Kyle Johnson-Clark and Bethany Fristed¹ began dating in early 2019. RP at 1279. Bethany was a heavy drug user, particularly methamphetamine. RP at 608, 611. Mr. Johnson-Clark became concerned about her drug use and tried to get her to stop. RP at 1283.

¹ Brittney Firsted, Bethany Fristed, and Ashley Fristed all testified at trial. Bethany's legal name is Justice Bethany Fristed, but she generally goes by Bethany. To avoid confusion, this brief will use each woman's full name or her first name. No disrespect is intended.

In late April 2019, Bethany disappeared for several days with Daniel Rice, a neighbor. RP at 1293, 1233-34. Bethany told police that she and Mr. Rice had a sexual relationship, and Mr. Rice gave her methamphetamine. RP at 1233-34, 1238.

The first time Bethany spoke with police, she said that she left Mr. Rice and went back to Mr. Johnson-Clark. RP at 1235. According to Bethany, Mr. Rice texted her, “Don’t be scared of my next move”. *Id.* Bethany said that Mr. Rice had 7 guns. *Id.* She said that Mr. Rice threatened Mr. Johnson-Clark with a gun. RP at 625-26.

Mr. Johnson-Clark had seen Mr. Rice around the neighborhood. RP at 1290. Mr. Rice frequently appeared to be under the influence and had a large swastika tattoo on his chest. *Id.* Mr. Johnson-Clark saw that he had firearms. RP at 1292.

In April 2019, an incident occurred between Mr. Rice and a friend of Mr. Johnson-Clark’s, Michael Burress. RP at 1249. Mr. Burress was borrowing Bethany’s car. *Id.* He noticed that another vehicle was following closely behind. RP at 1250. He

pulled over and the car stopped next to him. *Id.* Mr. Rice was driving, and his friends, Sarah Morse and Jeramie Vannauker, were passengers. RP at 1116, 1146, 1251. According to Mr. Burress, Mr. Rice seemed anxious and appeared to have a gun. RP at 1251, 1254. Mr. Rice said something like, “Oh, I thought you were Kyle”, and then relaxed. RP at 1252. Mr. Burress told Mr. Johnson-Clark about this. RP at 1254-55.

After this incident, Mr. Johnson-Clark stole a gun from his cousin and replaced it with a BB gun. RP at 473-74, 1305-06. He was afraid of Mr. Rice and wanted a weapon for protection. RP at 1305. Mr. Johnson-Clark and Bethany moved in with Bethany’s sister, Brittney Fristed, at Columbia Park Apartments. RP at 1306-07, 785.

On May 3, 2019, Mr. Rice drove his stepfather’s truck to Columbia Park Apartments with Mr. Vannauker and Ms. Morse. RP at 1097. They were moving some belongings into storage at Mr. Vannauker’s daughter’s apartment. RP at 1095-96. Mr. Rice’s toxicology report showed that he had extremely high

levels of amphetamine and methamphetamine in his system. RP at 700-01.

Bethany initially told police that she saw Mr. Rice in the parking lot of the apartment complex. RP at 1236. He smiled at her and pulled up his shirt, showing her a gun in his waistband. *Id.* She perceived this as a threat. RP at 1237. Bethany was very clear with police and repeatedly said that Mr. Rice had a gun; she was “positive” about this. RP at 1237-38.

According to Mr. Johnson-Clark, Bethany came home and told him that Mr. Rice was downstairs in the parking lot with a gun. RP at 1310. Mr. Johnson-Clark went downstairs. RP at 1311. He brought his gun for protection but left it holstered. RP at 1311, 1313.

Mr. Johnson-Clark testified that Mr. Rice was in the back of his pickup truck in the parking lot. RP at 1313. Mr. Rice got out of the truck as the conversation progressed. RP at 1315. He appeared under the influence and acted aggressively. RP at 1316. Mr. Rice drew what looked like a gun. RP at 1317-18. Mr.

Johnson-Clark pulled out his own gun and shot towards Mr. Rice. RP at 1318. He said that he did not aim; he was trying to provide cover so that he could run away. RP at 1318-19.

One witness told police that he heard someone say, “Did you hide the gun?”, or something similar. RP at 764. At trial, he was not sure if he really heard this statement. RP at 760. Police found seven cartridge casings, all fired by the same gun. RP at 1170, 1174. Police also found four bullets, but the State’s expert could not tell if the bullets were fired from the same gun. RP at 1189.

Jeramie Vannauker and Sarah Morse were upstairs when they heard the gunshots. RP at 1104. They ran down to the parking lot and yelled for help. RP at 1105-08; 1137-39. The two of them were alone with Mr. Rice until law enforcement arrived. RP at 1108-09.

Both Ms. Morse and Mr. Vannauker denied moving or hiding a gun. RP at 1124, 1149. However, Mr. Vannauker testified that before police arrived, he went to the truck. RP at

1109-10, 1122. He took a meth pipe and other items from the truck and threw it away in a dumpster. RP at 1109.

Police searched the truck Mr. Rice was driving. RP at 860. They found a realistic-looking pellet gun in the driver's side door. RP 862, 982-83; Ex.s 12, 112. Police did not test the pellet gun for fingerprints. RP at 999.

After the shooting, Mr. Johnson-Clark met up with Brittney Fristed and her boyfriend, Ricco Garza. RP at 1320. According to Mr. Johnson-Clark, Brittney disposed of the gun and his clothes. RP at 1321. Brittney contradicted this version of events. She said that Mr. Johnson-Clark asked her to stop at a boat launch. RP at 788. Police later found the gun in the water by the boat launch. RP at 481, 493.

Brittney testified that Mr. Johnson-Clark asked her to say that he was in Spokane on the night of the shooting. RP at 793. In October 2021, she also received a letter from Mr. Johnson-Clark, telling her that no one could make her do anything. RP at 794. She interpreted this as an instruction not to testify. *Id.*

Only two witnesses testified that they saw the shooting itself: Mr. Johnson-Clark and Bethany Fristed. RP at 564, 1317-19. Bethany's version of events changed many times. RP at 639. She spoke with police the day after the shooting, May 4, 2019. RP at 1231. At this first interview, she told police that Mr. Johnson-Clark acted in self-defense. RP at 1236. Police talked to Bethany about arresting her for her involvement in this case. RP at 1238.

After that first interview, Bethany spoke with two of Mr. Rice's friends, Mr. Vannauker and Ms. Morse. RP at 639. She said that Mr. Vannauker was one of "multiple retaliators" who threatened her. *Id.*

Bethany went back to the police on May 9, 2019. RP at 1239. This time, she told police a totally different story. She said that Mr. Johnson-Clark did not act in self-defense. RP at 1241-42. Bethany told police where they could find various pieces of evidence. RP at 875-76. Police recovered each of these items at the location she specified. RP at 544, 546, 551, 1153.

Bethany also showed police Facebook messages sent by Mr. Johnson-Clark. RP at 877. Under different usernames, he threatened to kill Mr. Rice and claimed an affiliation with the Aryan Brotherhood. Ex. 132D at 1, 9; Ex. 132E at 26, 29. At trial, Mr. Johnson-Clark acknowledged sending these messages. RP at 1296-97.

After May 2019, Bethany disappeared. She testified that she “was hiding from a lot of people for the last couple years.” RP at 608. She used drugs during this time. *Id.* Bethany was arrested on a material witness warrant in January 2022. RP at 74. She was appointed an attorney, who was present in the courtroom when she testified. RP at 75, 581.

During her testimony, Bethany repeatedly looked to the back of the courtroom at her attorney before answering questions. RP at 581. She agreed to testify so long as the State agreed that she “would not be charged” for her conduct after the shooting “if she testified consistently with the police reports.”

RP at 649. Bethany testified that Mr. Johnson-Clark coached her to give her first statement to police. RP at 641.

Bethany testified that the evening of the shooting, Mr. Johnson-Clark went downstairs to smoke. RP at 563. She stayed in the apartment. *Id.* She heard gunshots and then ran to the window. RP at 564. Bethany testified that she saw Mr. Rice by his truck. RP at 564. Mr. Johnson-Clark followed Mr. Rice, who was trying to run away. RP at 565. Mr. Rice collapsed near the laundry room door. RP at 567-68. Mr. Johnson-Clark ran away. RP at 568.

Bethany was unclear in her testimony about who had a weapon. She said that Mr. Rice held one hand out and had nothing in that hand. RP at 565-66. She did not know what Mr. Rice was doing with his other hand. RP at 565. She did not remember if Mr. Johnson-Clark had anything in his hands when the shots were fired. RP at 568.

Bethany could not remember basic things about this time period. She remembered little about the events in the weeks

leading up to the shooting. RP at 615, 618, 619, 624. She did not remember if she told Mr. Johnson-Clark that Mr. Rice had guns. RP at 621-22, 635. She did not remember most of what happened after the shooting, including where she went and how she got there. RP at 580, 582, 585, 587, 635. Bethany remembered almost nothing about her interviews with police. RP at 583, 585, 614-15, 623, 625, 627, 629-33, 636.

The State brought charges against Mr. Johnson-Clark in May 2019. CP 1-2. Prior to trial, Mr. Johnson-Clark pled guilty to possessing a stolen firearm and to second degree unlawful possession of a firearm. RP at 129-30, 377.

This case proceeded to trial in January 2022. RP at 90. That same month, the Benton County Prosecuting Attorney's Office sent a criminal history summary to trial counsel representing Mr. Johnson-Clark. CP 833-41. The purpose of this document was to "disclose to the defendant any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends

to call as witnesses”. CP 833. This document was signed by Deputy Prosecuting Attorney Julie Long. CP 841. Ms. Long and Andy Miller, the Prosecuting Attorney for Benton County, were co-counsel prosecuting Mr. Johnson-Clark’s case at trial. RP at 1; CP 796. The criminal history summary showed that several of the State’s witnesses had prior convictions for crimes of dishonesty. CP 833-41.

At the conclusion of testimony, the court instructed the jury about Mr. Johnson-Clark’s prior conviction for possession of a stolen firearm. CP 735. During cross-examination, the State impeached Mr. Johnson-Clark with this conviction. RP at 1342. The court instructed the jury that it could consider this conviction when considering Mr. Johnson-Clark’s credibility. CP 735.

During closing, the prosecutor told the jury: “the defendant has been convicted of a crime of dishonesty”. RP at 1467. This meant that, “the defendant has less credibility than all the other witnesses”. *Id.* He told the jury that none of the

other witnesses had convictions for crimes of dishonesty. RP at 1467.

This was false. In fact, four of the State's witnesses who testified at trial have convictions for crimes of dishonesty. CP 833-41. Other than Mr. Johnson-Clark, none of the witnesses testified about their criminal history. Defense counsel did not object to any of the prosecutor's statements. RP at 1467-68.

The jury found Mr. Johnson-Clark guilty of first degree murder with a firearm enhancement. RP at 1566. He was sentenced to the high end of the standard range, a total of 407 months. CP 802. Division III affirmed and declined to reconsider its decision. App. at 1, 38. Mr. Johnson-Clark seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

During closing arguments, the prosecutor told the jury that Mr. Johnson-Clark had "less credibility than all the other witnesses" because of his conviction for a crime of dishonesty.

RP at 1467. He told the jury that none of the other witnesses had “a crime of dishonesty”. *Id.*

This was false. Four of the State’s witnesses had prior convictions for crimes of dishonesty. CP 833-41. The prosecutor knew or should have known that his statement was false because shortly before trial, his office provided defense counsel a list of “prior criminal convictions known to the prosecuting attorney”, including these convictions. CP 833.

This Court grants review of a Court of Appeals decision under four circumstances:

- (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). Here, review is appropriate under all four subsections.

Division III's opinion contradicts prior decisions by this Court and the Court of Appeals requiring candor to the tribunal, especially for prosecutors. RAP 13.4(b)(1), (2). This misconduct affects the constitutional right to a fair trial. RAP 13.4(b)(3). Clarifying that prosecutors cannot tell falsehoods to the jury is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). This Court should grant review, reverse, and remand for a new trial.

A. The Prosecutor Committed Misconduct by Urging the Jury to Decide this Case Based on False Information Outside the Record.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of this right.

State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met here.

1. Attorneys—especially prosecutors—have a duty to relay only truthful information to the jury.

A prosecutor is a “quasi judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice.” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). As such, “[a] prosecutor has a duty to refrain from using statements which are not supported by the evidence and which tend to prejudice the defendant.” *State v. Grover*, 55 Wn. App. 923, 936, 780 P.2d 901 (1989).

Attorneys “have no right to mislead the jury.” *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). In closing argument, attorneys have “wide latitude to draw reasonable inferences from the evidence and to express those inferences to

the jury.” *State v. Markovich*, 19 Wn. App. 2d 157, 170, 492 P.3d 206 (2021). “Counsel may not, however, mislead the jury by misstating the evidence.” *State v. Guizzotti*, 60 Wn. App. 289, 296, 803 P.2d 808 (1991).

This is particularly true for the prosecutor, “who has a duty to see that the defendant receives a fair trial.” *Id.* (citing *Reeder*, 46 Wn.2d at 892). “Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

2. The prosecutor misled the jury about the witnesses’ criminal histories.

During closing argument, the prosecutor, Mr. Miller, discussed crimes of dishonesty at length. He told the jury that Mr. Johnson-Clark was not credible due to his conviction for possession of a stolen firearm:

We have a different story, a story by the way from somebody [Mr. Johnson-Clark] who has a motive to

lie, and not only does he have a motive to lie, but you heard the Court's instruction: We do know that ***the defendant has been convicted of a crime of dishonesty***, and you can consider the fact that the defendant has been convicted of a crime of dishonesty, ***you can consider that in assessing the defendant's credibility***.

RP at 1467 (emphasis added). He used this conviction to argue that Mr. Johnson-Clark was less credible than the State's witnesses:

In other words, ***the defendant has less credibility than all the other witnesses because of his prior conviction***, and that's what the Court just instructed you. That you can consider that. Not that you have to, but it's something for you to consider.

Id. (emphasis added).

The prosecutor specifically told the jury that none of the State's witnesses had convictions for crimes of dishonesty. RP at 1467. He used this alleged fact to argue that the State's witnesses were "honest" people "telling the truth":

Ask yourself, was there any other witness -- all these other witnesses, by the way, who contradict the defendant's testimony, ***did any of these other witnesses who testified have a crime of dishonesty?*** ***Nope.***

Let's start with Brittney Fristed. Nope, she didn't.
And let's look at their actions. The next day . . .
what does Brittney Fristed do? She actually calls
the police. ***Isn't that what an honest person who's***
telling the truth is gonna do? Call the police.

RP at 1467-68 (emphasis added).

The prosecutor again contrasted Mr. Johnson-Clark with
the State's witnesses, stating:

Now, let's compare that to the defendant's story. ***A***
story that we can examine for credibility due to the
fact that he has a conviction for a crime of
dishonesty and a motive to lie, and a continuing
story that is contradicted again and again and again
by ***every other witness who testified in this trial.***

RP at 1468 (emphasis added). He discussed each witness's
testimony, explaining why they were credible, and Mr. Johnson-
Clark was not. *Id.* at 1458-90.

This argument was improper because it was (1) false and
(2) based on facts not in evidence. It was false because four of
the State's witnesses had prior convictions for crimes of
dishonesty. CP 833-41. Brittney Fristed, Sarah Morse, and
Ricco Garza all had theft convictions. CP 836-38. Jeramie
Vannauker has seven theft convictions, as well as convictions for

witness tampering, forgery, possession of a stolen firearm, taking a vehicle without permission, and false reporting.² CP 839-40.

In its Opinion, Division III questioned the nature of the prosecutor's statements, writing: "According to Mr. Johnson-Clark, the way in which the prosecutor argued credibility *could have been interpreted to suggest* that none of the witnesses besides Mr. Johnson-Clark had ever been convicted of a crime of dishonesty, regardless of inadmissibility." App. at 20 (emphasis added). To reiterate, the prosecutor stated verbatim: "did any of these other witnesses who testified have a crime of dishonesty? Nope." RP at 1467. The jury did not need to "interpret" a

² All of these convictions are for crimes of dishonesty. See *State v. Brown*, 113 Wn.2d 520, 552-53, 782 P.2d 1013 (1989) (theft is a crime of dishonesty under ER 609(a)(2)); *State v. Bankston*, 99 Wn. App. 266, 270, 992 P.2d 1041 (2000) (witness tampering); *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003) (forgery); *State v. McKinsey*, 116 Wn.2d 911, 913, 810 P.2d 907 (1991) (possession of stolen property); *State v. Trepanier*, 71 Wn. App. 372, 381, 858 P.2d 511 (1993) (taking a vehicle without permission); *State v. Pfeifer*, 42 Wn. App. 459, 463, 711 P.2d 1100 (1985) (conviction that involves a false statement).

“suggestion”— the prosecutor plainly stated that no other witness had a crime of dishonesty, *id.*, a statement that was demonstrably false, CP 833-41. The prosecutor committed misconduct by telling false information to the jury. *Reeder*, 46 Wn.2d at 892 (attorneys “have no right to mislead the jury”).

The prosecutor’s statements were also based on facts outside the record. Brittney Fristed, Sarah Morse, Ricco Garza, and Jeramie Vannauker did not testify about their criminal histories. RP at 775-82, 785-804, 1094-1126, 1128-1150. The evidence did not establish that they had no convictions for crimes of dishonesty. *Id.* In fact, each of them had at least one such conviction. CP 836-40. The prosecutor’s false statement misled the jury and prejudiced the defendant. *Grover*, 55 Wn. App. at 936; *Reeder*, 46 Wn.2d at 892.

Division III sanctioned the prosecutor’s false statements because many of the witnesses’ prior convictions were likely inadmissible. App. at 21. In this case, most of the witnesses’ convictions were more than 10 years old, and some were juvenile

adjudications, affecting their admissibility under ER 609 (b) and (d). CP 836-40.

Regardless of admissibility, the prosecutor committed misconduct by misleading the jury. He did not limit his argument to the evidence: Mr. Johnson-Clark's conviction for a crime of dishonesty. He broadly claimed that none of the State's witnesses had any such convictions—a falsehood based on evidence that was never admitted.

Attorneys do not get to misrepresent facts to the jury just because evidence is inadmissible. RPC 3.3(a)(1) states that: “A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal”. This rule does not distinguish between admissible and inadmissible facts. RPC 3.3(a)(1). “A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal.” *State v. Talley*, 143 Wn.2d 176, 183 n.6, 949 P.2d 358 (1998).

Here, the prosecutor chose to go beyond the evidence presented and make an affirmative assertion about the State's witnesses. That assertion was false. The prosecutor knew or should have known that his statement was false based his office's own criminal history summary, which listed convictions "***known to the prosecuting attorney***". CP 833 (emphasis added). Mr. Miller, the prosecutor who delivered this closing argument, was "the prosecuting attorney" for Benton County at the time. *Id.*

The truth matters. Attorneys should not be allowed to tell false information to the jury just because the evidence to rebut that falsehood may be inadmissible. Division III sanctioned this misconduct, contradicting decisions in *Reeder*, 46 Wn.2d at 892, *Grover*, 55 Wn. App. at 936, and *Guizzotti*, 60 Wn. App. at 296. RAP 13.4(b)(1), (2). This Court should grant review and reverse.

B. The Prosecutor's Misconduct Requires Reversal.

The prosecutor's misconduct in this case requires reversal, for two reasons. First, the misconduct was prejudicial. Second, regardless of prejudice, this Court should apply the constitutional

harmless error standard and conclude that the misconduct was not harmless.

1. The prosecutor's misconduct was prejudicial and incurable by an instruction.

Prejudice “is not a matter of whether there is sufficient evidence to justify upholding the verdicts.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). “Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict.” *Id.* A prosecutor “commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.” *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

Defense counsel did not object to the prosecutor’s statements. Thus, Mr. Johnson-Clark must show that the misconduct is “so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction.” *In re Pers. Restraint of*

Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017) (internal quotation marks omitted).

The prosecutor's false statement was prejudicial because it impacted the central issue in this case: credibility. Mr. Johnson-Clark admitted to shooting Mr. Rice, the question was whether he acted in self-defense. If the jury believed Ricco Garza and Brittney Fristed, then Mr. Johnson-Clark disposed of evidence in this case. If the jury believed Jeramie Vannauker and Sarah Morse, then Daniel Rice did not have a weapon on his person during this shooting, and Bethany Fristed testified freely, without coercion from Mr. Rice's friends. Bolstering these witnesses undermined Mr. Johnson-Clark's testimony that he acted in self-defense.

The prosecutor's bolstering was especially impactful with respect to Mr. Vannauker. Mr. Vannauker has a prior conviction for witness tampering. CP 840. Bethany testified that he was one of many retaliators that she feared when giving statements to the police. RP at 639-41. Mr. Vannauker admitted to tampering

with evidence in this case by going to the truck and throwing away drug paraphernalia. RP at 1109. He could have easily disposed of a gun or moved the realistic pellet gun from Mr. Rice to the truck when tampering with other evidence in the truck before police arrived.

These facts, coupled with the witnesses' criminal histories, raise reasonable doubts about what happened in this case. The prosecutor improperly vouched for these witnesses by arguing facts outside the record. Bolstering these witnesses likely changed the jury's verdict in this case, prejudicing Mr. Johnson-Clark.

This misconduct was not curable by an instruction. This was not a brief or passing reference. The prosecutor argued extensively that Mr. Johnson-Clark was less credible than the State's witnesses *specifically because* he had a prior conviction for a crime of dishonesty and they did not. RP at 1467-68. As explained above, this was not true. This falsehood was integral to the prosecutor's credibility argument, and the credibility

argument was integral to his closing overall. Viewed in full, this argument was prejudicial and incurable by an instruction.

2. The prosecutor’s misconduct was not harmless error.

Regardless of prejudice, this Court should hold that the prosecutor’s misconduct requires reversal. Washington courts review prosecutorial misconduct that violates a constitutional right for constitutional harmless error. *State v. French*, 101 Wn. App. 380, 4 P.3d 857 (2000) (holding that if misconduct violates a constitutional right, it is subject to constitutional harmless error); *see also Monday*, 171 Wn.2d at 680 (applying the constitutional harmless error standard to racial bias), *abrogated on other grounds by State v. Bagby*, 200 Wn.2d 777, 803, 522 P.3d 982 (2023). This Court should apply that test here.

Under the constitutional harmless error standard, courts “will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict.”

Monday, 171 Wn.2d at 680. The burden of proving harmlessness rests with the State. *Id.*

“The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial.” *Glasmann*, 175 Wn.2d at 703-04 (internal citations omitted).

A prosecutor violates the right to due process by presenting falsehoods to the jury during closing argument. *Eun Suk Joo v. Cate*, 328 Fed. Appx. 662, 625 (9th Cir.2010). “In *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967), the Supreme Court held that the Due Process Clause was violated by the prosecutor’s summation expressly relying on evidence he introduced that he knew to be false.” *Id.* The *Miller* Court wrote:

More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from

that established principle. There can be no retreat from that principle here.

Miller, 386 U.S. at 7 (internal citations omitted).

Here, like in *Miller*, the prosecutor “rel[ie]d on evidence” during closing argument that “he knew to be false.” *Eun Suk Joo*, 328 Fed. Appx. at 625 (discussing *Miller*, 386 U.S. at 7); CP 833-41. This violated Mr. Johnson-Clark’s constitutional right to due process. *Miller*, 386 U.S. at 7. This Court should only affirm his conviction if the State proves constitutional harmless error. *Monday*, 171 Wn.2d at 680.

The State cannot meet this burden in this case. In *Monday*, the State presented a videotape proving the defendant was the shooter. *Id.* at 680 n.4. The Court still reversed, holding that the error was not harmless beyond a reasonable doubt. *Id.* The video “clearly establishes that Monday was the shooter,” but “it does not by itself establish premeditation, nor does it rule out some defenses.” *Id.*

The State's evidence in this case was not nearly so strong. Mr. Rice was shot in the back, but that does not tell us what he was doing just prior—he could have drawn first and then turned away. RP at 717-18. Mr. Rice had access to a realistic-looking pellet gun, found in the driver's side door. RP 862, 982-83; Ex.s 12, 112. His friend, Mr. Vannauker, admitted to going to the truck and disposing of evidence. RP at 1109.

Without the prosecutor's misconduct, the jury would likely have concluded that Mr. Johnson-Clark acted in self-defense. At most, the jury would have concluded that he acted in unreasonable or excessive self-defense and convicted him of manslaughter. This Court should grant review and reverse because this misconduct contravened Mr. Johnson-Clark's constitutional right to a fair trial and raises issues of substantial public interest. RAP 13.4(b)(3), (4).

VI. CONCLUSION

Mr. Johnson-Clark respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains 4961 words, excluding the title page, tables, declarations, and appendix (word count by Microsoft Word).

RESPECTFULLY SUBMITTED on July 10, 2024.



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VII. APPENDIX

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

STATE OF WASHINGTON,)	No. 38848-4-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
KYLE ANTHONY JOHNSON-CLARK,)	
)	
Appellant.)	

PENNELL, J. — Kyle Anthony Johnson-Clark appeals his conviction for first degree murder with a firearm enhancement. We affirm.

BACKGROUND

On May 3, 2019, Kyle Anthony Johnson-Clark shot and killed Damien Rice following a series of events that occurred between Mr. Johnson-Clark, Mr. Rice, and a woman named Bethany Fristed.¹ The facts surrounding the shooting are contested, so

¹ Bethany Fristed and her sister, Brittney Fristed, were both witnesses in this case. To avoid confusion, we refer to the women by their given names. No disrespect is intended.

we first summarize the facts gathered by the State prior to Mr. Johnson-Clark's arrest. Then we address the trial process and trial. Finally, we briefly summarize information gathered by Mr. Johnson-Clark's attorney after trial.

Pre-arrest facts

Mr. Johnson-Clark and Bethany started dating in early 2019. At some point during the relationship, Bethany also had a romantic relationship with Mr. Rice. Bethany and Mr. Rice were heavy drug users, and Mr. Rice provided her with drugs. Mr. Rice lived next door to Bethany and her father in West Richland.

On April 25, 2019, Bethany and Mr. Johnson-Clark engaged through a series of Facebook messages regarding their relationship and Mr. Johnson-Clark's suspicion that Bethany was seeing another man. Mr. Johnson-Clark had two Facebook accounts under the usernames "Michael Peterson" and "Yourè Psychö." 1 Rep. of Proc. (RP) (Jan. 20, 2022) at 474; 2 RP (Jan. 20, 2022) at 574.² Mr. Johnson-Clark addressed the man he suspected of having a relationship with Bethany and wrote, "I'm gonna kill him." Ex. 132E at 26. Initially, Mr. Johnson-Clark indicated he suspected the other man was

² During the State's case-in-chief at trial, counsel for Mr. Johnson-Clark objected to the authenticity of the messages. But during his testimony, Mr. Johnson-Clark admitted that he had authored the messages sent from the "Michael Peterson" and "Yourè Psychö" accounts.

someone named “Jared.” *Id.* at 26-27. But then he wrote that he recognized it was “Da iel,” i.e., Daniel Rice, explaining, “I put 2n2 together.” *Id.* at 28. Mr. Johnson-Clark instructed Bethany to “End it.” *Id.* Mr. Johnson-Clark repeatedly wrote that Mr. Rice was “green lit.” *Id.* at 29-30. He also wrote, “He’s dead.” *Id.* at 30. The term “green lit” means a permission has been given to kill a specific target. 2 RP (Jan. 24, 2022) at 894.

On the same date as Mr. Johnson-Clark’s messages with Bethany, he also sent some Facebook messages to Mr. Rice. Mr. Johnson-Clark threatened Mr. Rice, stating:

Damn homie so u tried to snake me for my bitch??? Ur green lit by ab^[3] so the joint is all bad for u an when would watch over ur shoulder player. Keep that shit on u an watch every car the silver bmw is gone tonight it’s being sold ima catch us with u plater.

Ex. 132D at 1. And he continued in another message:

Smh u should have just took my advice fam this was the worst decision u could of made I see u aint no punk an I’m glad homie u don’t have to be a punk tho to get hollered at by my bros. Idgaf if us pop me ur threw fam. Idk what all y know about the brand but I promise you are gonna know more here shortly it’s piece of shit white boys like u that are the issue now days I hope that pussy was worth it.

Id.

³ At trial, Detective Hyrum Stohel of the Richland Police Department testified “ab” means “Aryan Brotherhood.” 2 RP (Jan. 24, 2022) at 899-900.

At around the same time as the Facebook Messenger exchanges, Mr. Johnson-Clark stole a 9mm handgun from his cousin. Also around this time, Mr. Johnson-Clark and Bethany left West Richland and began staying with Bethany's sister Brittney at the Columbia Park Apartments in Richland.

On May 3, 2019, Mr. Johnson-Clark and Bethany were together at Brittney's apartment. Mr. Rice was also at the apartment complex helping his friends, Jeramie Vannauker and Sarah Morse, move some belongings into Mr. Vannauker's daughter's apartment. The trio had arrived in a truck that was owned by Mr. Rice's stepfather.

While Mr. Vannauker and Ms. Morse were upstairs inside the daughter's apartment, they heard gunshots. Mr. Vannauker hurried downstairs and ran around, looking for Mr. Rice. Mr. Vannauker found Mr. Rice laying on the ground, with "blood [coming] out of his head." 3 RP (Jan. 24, 2022) at 1108. He yelled for someone to call 911. By that point, Ms. Morse had come downstairs. She called 911 while trying to comfort Mr. Rice. Several neighbors also came outside and were contacting the authorities. No one at the scene reported seeing the shooting, although one of the neighbors said they noticed a male running in the direction of Chief Joseph Middle School and others heard car tires squealing from that same general direction. 1 RP (Jan. 20, 2022) at 447; 2 RP (Jan. 20, 2022) at 534, 734.

Before the authorities arrived, Mr. Vannauker removed a methamphetamine pipe from Mr. Rice's truck and disposed of it in a nearby dumpster. The police later found the pipe during a search, and Mr. Vannauker explained that he had been using methamphetamine earlier in the day and did not want to get in trouble. 3 RP (Jan. 25, 2022) at 1109-10.

When emergency responders arrived, they found Mr. Rice to be largely nonresponsive. He had suffered three gunshot wounds, one each to the head, arm, and shoulder. According to the autopsy report, all three shots had entered Mr. Rice's body from behind. Law enforcement recovered seven shell casings from the area. According to a forensic analysis, all seven casings were expelled from the same firearm. Law enforcement did not find any guns or weapons on Mr. Rice's body. A pellet gun was recovered from Mr. Rice's truck. Mr. Rice was found to have significant levels of amphetamine and methamphetamine in his system.

The day after the shooting, Brittney and Bethany went to the police. Brittney reported that she had received a call from Mr. Johnson-Clark the night before, asking her to pick him up at Chief Joseph Middle School. Brittney acceded to this request and drove to the school with her boyfriend and children. Once Brittney got to the school, Mr. Johnson-Clark jumped into her car and directed her to drive to the Snyder boat

launch. At the boat launch, Mr. Johnson-Clark got out of the car and disappeared from view. Mr. Johnson-Clark then got back into the car and asked Brittney to take him to Walmart. 2 RP (Jan. 21, 2022) at 788. Brittney dropped Mr. Johnson-Clark off at the Walmart, then drove home to her apartment, and then went to her father's house in West Richland. While at her father's, Brittney received a call from Bethany, asking if Brittney could help buy some "stuff for laundry soap." *Id.* at 789. Brittney went to Walmart and found Bethany together with Mr. Johnson-Clark. The group bought some bleach and then Brittney left to go back to her father's house. According to Brittney, she did not learn about the shooting until the next day. *Id.* at 791.

Bethany then met with the police. She provided information suggesting Mr. Johnson-Clark had shot Mr. Rice in self-defense. She claimed she had received a message from Mr. Rice shortly before the shooting saying words to the effect, "'Don't be scared of my next move.'" 3 RP (Jan. 26, 2022) at 1235. Bethany also said that she saw Mr. Rice the day of the shooting. During this interaction, Mr. Rice looked at Bethany, smiled, and raised his shirt to show "he had a gun in [his] waistband." *Id.* at 1236. Bethany claimed Mr. Rice had numerous guns in his truck and that she had advised Mr. Johnson-Clark of her observations.

Bethany returned to talk to the police on May 9, 2019. *Id.* at 1239.⁴ She told the authorities she wanted to tell the truth and that her previous statement was essentially comprised of “the words of Kyle Johnson-Clark.” *Id.* at 1239-40. Bethany said she was afraid of Mr. Johnson-Clark because he was abusive and had not yet been apprehended. She explained that while she did not witness the shooting, she did hear gunshots and then saw Mr. Rice attempting to run toward the laundry room of the apartment complex. She said that the bleach purchased from Walmart had been used to clean gun residue from Mr. Johnson-Clark’s hands. She also said Mr. Johnson-Clark had directed her to drive around so she could hide the bleach bottle, his cell phone, and various items of clothing.

After talking to Brittney and Bethany, law enforcement recovered several pieces of evidence. Officers found a bleach bottle, cell phone, and clothing in the areas that had

⁴ Mr. Johnson-Clark asserts “Bethany testified she was pressured by [Jeramie] Vannauker to ‘give a different story.’” Reply Br. of Appellant at 12. This is inaccurate. During cross-examination, Bethany agreed with defense counsel that she ran into Mr. Vannauker after her initial police interview. 2 RP (Jan. 21, 2022) at 639. She did not specify whether this was before her second police interview. Bethany agreed that Mr. Vannauker was one of her “retaliators.” *Id.* But she never agreed that Mr. Vannauker threatened her or told her what to say. During cross-examination, Bethany explained that she went back to the police to “give [them] a different story,” specifically “[i]t wasn’t a story that was being coached.” *Id.* at 641. Law enforcement explained that when Bethany came in on May 9 she wanted to “give [them] the truth.” 3 RP (Jan. 26, 2022) at 1239. She said the “interview she provided on May 4th were the words of Kyle Johnson-Clark, and she wanted to give [law enforcement] hers, the real story.” *Id.* at 1239-40.

been identified by Bethany during her May 9 interview. And, consistent with Brittney's statement, a handgun and magazine were located in the vicinity of the Snyder boat launch. The handgun was determined to be the one stolen from Mr. Johnson-Clark's cousin. It was also consistent with the gun used to shoot and kill Mr. Rice.

Mr. Johnson-Clark fled the area after the shooting. A warrant was issued for his arrest and he was eventually located during July 2019 in St. Louis, Missouri.

Pretrial procedure and trial

The State charged Mr. Johnson-Clark with first degree murder with a firearm enhancement, possession of a stolen firearm, and unlawful possession of a firearm in the second degree. Prior to trial, Mr. Johnson-Clark pleaded guilty to the two firearm charges.

During the pretrial and trial process, the court addressed three legal issues pertinent to this appeal. First, the trial court admitted the Facebook messages attributed to Mr. Johnson-Clark through the "Michael Peterson" and "Yourè Psychö" accounts. Second, the trial court ruled the State could impeach Mr. Johnson-Clark with his stolen firearm conviction because it was admissible "as a crime of dishonesty." 3 RP (Jan. 26, 2022) at 1337. And third, the trial court issued an initial aggressor instruction under

WPIC 16.04.⁵ 3 RP (Jan. 27, 2022) at 1424-25.

At trial, the State’s evidence was largely consistent with the foregoing summary. None of the State’s witnesses testified to ever seeing Mr. Rice with a gun. According to Bethany’s testimony, she heard gunshots on May 3 and then looked through a window to see Mr. Rice outside the truck, being followed by Mr. Johnson-Clark. 2 RP (Jan. 20, 2022) at 564-65. Mr. Rice’s hands were up and he was stumbling as he tried to run away. *Id.* at 565. Bethany did not see anything in Mr. Rice’s hands, although his hands were not entirely visible to her. It appeared to Bethany that Mr. Rice was trying to get to the laundry room door of the apartment complex. Bethany heard gunshots as she saw Mr. Johnson-Clark walking toward Mr. Rice. *Id.* at 566-67.

Several neighbors testified at trial. One of them said he thought he heard the sounds of two different firearms and that he heard someone say something like, “‘Did you hide the gun?’” 2 RP (Jan. 21, 2022) at 764. However, this neighbor was uncertain about his memory and his statements were not corroborated by any other witness or by an audio recording captured by the Nest doorbell system of one of the neighbors.

⁵ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 256 (4th ed. 2016).

Mr. Johnson-Clark presented testimony from his friend, Michael Burress, who testified that he had an interaction with Mr. Rice several days before the shooting. According to Mr. Burress, he was driving Bethany's car when he was approached by a vehicle driven by Mr. Rice with Mr. Vannauker and Ms. Morse riding as passengers. Mr. Rice approached Mr. Burress's car and seemed agitated. But then he relaxed when he saw Mr. Burress, commenting, "'Oh, I thought you were [Mr. Johnson-Clark].'" 3 RP (Jan. 26, 2022) at 1252. Mr. Burress testified that he alerted Mr. Johnson-Clark to this interaction with Mr. Rice. According to Mr. Burress, he told Mr. Johnson-Clark that Mr. Rice was looking for Mr. Johnson-Clark and that Mr. Rice appeared to be armed. *Id.* at 1254-55.

Mr. Johnson-Clark also testified on his own behalf. He claimed he was not jealous of Mr. Rice and Bethany. Instead, he was simply concerned that Mr. Rice was supplying Bethany with methamphetamine. According to Mr. Johnson-Clark, he became fearful of Mr. Rice after an incident where Mr. Rice tried to sell him a gun. Mr. Johnson-Clark testified that friends had told him Mr. Rice was a violent gang member. *Id.* at 1304. Mr. Johnson-Clark testified he stole his cousin's gun and moved with Bethany into Brittney's apartment in order to avoid Mr. Rice. According to Mr. Johnson-Clark, Mr. Rice would drive by Brittney's apartment in an apparent effort to show that he

knew where Bethany and Mr. Johnson-Clark were staying. On the day of the shooting, Mr. Johnson-Clark testified that Bethany told him Mr. Rice was at the apartment complex and was armed with a gun. *Id.* at 1310.

Mr. Johnson-Clark testified that he armed himself with his gun and went outside to find Mr. Rice in order to “diffuse the situation.” *Id.* at 1315-16. When Mr. Johnson-Clark encountered Mr. Rice, he saw that Mr. Rice was clenching his jaw, rolling his shoulders, sweating, and his pupils “were the size of quarters.” *Id.* at 1316. According to Mr. Johnson-Clark, Mr. Rice was agitated and pulled out what Mr. Johnson-Clark believed was a gun. Mr. Johnson-Clark then fired a shot and ducked. He saw Mr. Rice turn away, but he claimed Mr. Rice’s gun arm was still pointed at him. So Mr. Johnson-Clark turned and shot and then ran away.

Mr. Johnson-Clark agreed Brittney had picked him up at Chief Joseph Middle School, but he claimed that Brittney took the gun away from him. Mr. Johnson-Clark denied ever going to the Snyder boat launch. Mr. Johnson-Clark admitted he was with Bethany and Brittney at Walmart when they purchased some bleach. But he claimed he did not know what the bleach was for and he denied using it to clean his hands. According to Mr. Johnson-Clark he fled the area because he was scared.

Mr. Johnson-Clark denied he had ever been abusive to Bethany and he denied sending any threatening messages to Mr. Rice. According to Mr. Johnson-Clark, the language used in his Facebook messages to Mr. Rice was just puffery. He claimed he did not know what “green lighting” meant. *Id.* at 1299. He merely used the term because he had heard it in the movies. *Id.* He also denied being associated with the Aryan Brotherhood. *Id.* at 1300.

During summation, the State’s prosecuting attorney argued the case was about credibility. The State pointed out that the testimony from its witnesses had been corroborated, but the same was not true for Mr. Johnson-Clark. The State also argued Mr. Johnson-Clark was less credible than other witnesses due to his criminal history. The prosecutor repeatedly pointed out that Mr. Johnson-Clark was the only witness who had a prior conviction for a “crime of dishonesty.” 3 RP (Jan. 27, 2022) at 1467-68. The prosecutor also argued Brittney testified credibly because she called the police, noting “[i]sn’t that what an honest person who’s telling the truth is gonna do?” *Id.* at 1468. Defense counsel did not object to the prosecutor’s arguments.

The jury found Mr. Johnson-Clark guilty of first degree murder with a firearm enhancement. The trial court sentenced Mr. Johnson-Clark to 407 months in prison, the high end of the standard range.

Posttrial developments

At some point after trial, Mr. Johnson-Clark’s appellate attorney discovered that several of the State’s witnesses had previously been convicted of crimes of dishonesty, including Brittney Fristed, Sarah Morse, and Jeramie Vannauker. Based on the dates of conviction, none of the witnesses’ prior crimes were recent enough to be admissible under ER 609(b). However, further investigation revealed that Jeramie Vannauker had been released from custody on one of his offenses during the 10-year period of admissibility set forth under ER 609(b). This meant Mr. Vannauker could have been impeached under ER 609 with his prior conviction. The record is silent as to whether trial counsel for either the State or Mr. Johnson-Clark had been aware of the admissibility of Mr. Vannauker’s prior conviction.

ANALYSIS

Facebook messages

Mr. Johnson-Clark argues that the Facebook messages from the “Michael Peterson” and “Yourè Psychö” accounts should not have been admitted into evidence because they were not authenticated. We disagree.

“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). An electronic message may be authenticated through the testimony of a person with knowledge that: (1) the message purports to have been authored by the sender, (2) the message purports to be sent from an account associated with a particular sender, and (3) the characteristics of the message, together with other circumstances, support finding the message is what the proponent claims. *See* ER 901(b)(1). We review a trial court’s decision to admit evidence for abuse of discretion. *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010).

The trial court did not abuse its discretion in admitting the Facebook messages over an authenticity objection. Bethany Fristed testified Mr. Johnson-Clark used the “Michael Peterson” and “Yourè Psychö” accounts to communicate with her. Mr. Johnson-Clark’s cousin also identified the “Michael Peterson” account as one used by Mr. Johnson-Clark. Notably, the “Michael Peterson” account was the one used to communicate with Mr. Rice. The content of the “Michael Peterson” and “Yourè Psychö” accounts supported the conclusion that both were used by Mr. Johnson-Clark. The accounts included photographs of Mr. Johnson-Clark. The messages on the accounts were consistent with Mr. Johnson-Clark communicating with Bethany Fristed about their relationship and his jealousy of, and anger toward, Mr. Rice. Ample evidence supports the trial court’s decision to admit the Facebook messages.

We note that there is no serious dispute on appeal that the messages from both Facebook accounts were actually authored by Mr. Johnson-Clark. During his testimony, Mr. Johnson-Clark admitted that he wrote the messages attributed to him by virtue of the two accounts. The parties do not address whether Mr. Johnson-Clark waived his authenticity objection by agreeing to authenticity during his testimony. Accordingly, we do not address this issue.

Prosecutorial misconduct

Mr. Johnson-Clark contends the prosecutor committed misconduct in his closing argument by (1) misleading the jury about the witnesses' criminal histories, (2) vouching for Brittney Fristed's credibility, and (3) mischaracterizing the trial court's jury instruction that prior crimes could only be considered in deciding credibility. Mr. Johnson-Clark did not object to the prosecutor's statements at trial. Thus, relief on appeal requires him to show that the prosecutor's actions were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). We reject these arguments and address each claim in turn.

(1) Witnesses' criminal histories

Mr. Johnson-Clark contends the State's prosecutor misled the jury when they

argued Mr. Johnson-Clark was the only witness who had a previous conviction for a crime of dishonesty. Referring to information gathered postconviction, Mr. Johnson-Clark points out that several of the State’s witnesses had prior crimes of dishonesty on their records. Mr. Johnson-Clark appears to acknowledge that, for most of the State’s witnesses, the prior crimes were too old to be admissible under ER 609(b).⁶ However, one of the State’s witnesses—Jeramie Vannauker—was incarcerated for a crime of dishonesty during the 10-year period prior to his testimony. Thus, even though no one impeached Mr. Vannauker with his prior conviction at trial, evidence of his prior conviction could have been elicited under ER 609(b).

We first note there is no evidence the State’s prosecutor was aware Mr. Vannauker had been incarcerated for his prior conviction within the 10-year time period contemplated by ER 609(b). Mr. Vannauker’s incarceration appears to have been

⁶ Mr. Johnson-Clark makes this acknowledgment in his opening brief. But in his reply brief he argues all of the witnesses’ prior convictions were admissible, despite being over 10 years old, because the trial court could have admitted the convictions under ER 609(b). This argument, made for the first time in the reply brief, mischaracterizes the applicable rule. Under ER 609(b), “evidence of a conviction more than 10 years old . . . *is not admissible*” unless the proponent provides pretrial notice and the trial court makes a finding that the probative value of the conviction “substantially outweighs its prejudicial effect.” *Id.* (emphasis added). Here, there was no pretrial request for admission. Nor is there any reason to think that the trial court would have admitted the convictions had a request been made. The convictions were not admissible under ER 609.

attributable to the revocation of a drug offender sentencing alternative (DOSA) in 2013. This was less than 10 years before the 2022 trial date. But there is no evidence the prosecutor was aware at the time of trial of the DOSA revocation. We will not assume the State's prosecutor was aware of the DOSA revocation or the potential admissibility of Mr. Vannauker's prior conviction. Rather, we assume that the prosecutor believed Mr. Vannauker's prior conviction, like those of the other State witnesses, was inadmissible under ER 609(b). If Mr. Johnson-Clark has evidence outside the record on review that the prosecutor was aware of the admissibility of Mr. Vannauker's prior conviction, he may raise that issue in a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).⁷

At trial, Mr. Johnson-Clark was the only witness who was impeached with a prior crime of dishonesty pursuant to ER 609. Before impeaching Mr. Johnson-Clark, the prosecutor addressed the issue with the court and sought permission to impeach Mr. Johnson-Clark with his stolen firearm conviction. Mr. Johnson-Clark's trial attorney

⁷ For this reason, we also reject Mr. Johnson-Clark's claim that his trial attorney performed deficiently by failing to impeach Mr. Vannauker with evidence of his prior conviction. There is nothing in the record suggesting Mr. Vannauker's trial counsel knew, or should have known, that Mr. Vannauker's prior conviction would have been admissible under ER 609. If Mr. Johnson-Clark has evidence to the contrary, that can be developed through a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

agreed that the conviction appeared to be a crime of “dishonesty” and was “fair game.” 3 RP (Jan. 26, 2022) at 1337. The court concurred with the parties’ assessment and ruled the conviction “comes in as a crime of dishonesty” and that the prosecutor could impeach Mr. Johnson-Clark with his stolen firearm conviction. *Id.*

The trial court instructed the jury on the issue as follows:

You may consider evidence that [Mr. Johnson-Clark] has been convicted of a crime only in deciding what weight or credibility to give to [Mr. Johnson-Clark]’s testimony. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Clerk’s Papers at 735 (jury instruction 5).

In arguing the State’s case to the jury, the prosecutor pointed out that Mr. Johnson-Clark was the only witness with a prior crime of dishonesty and that this fact should be used in assessing Mr. Johnson-Clark’s credibility. The prosecutor argued:

In other words, *[Mr. Johnson-Clark] has less credibility than all the other witnesses because of his prior conviction*, and that’s what the Court just instructed you. That you can consider that. Not that you have to, but it’s something for you to consider.

3 RP (Jan. 27, 2022) at 1467 (emphasis added).

Ask yourself, was there any other witness—all these other witnesses, by the way, who contradict [Mr. Johnson-Clark]’s testimony, *did any of these other witnesses who testified have a crime of dishonesty? Nope. Let’s start with Brittney Fristed. Nope, she didn’t.*

Id. at 1467-68 (emphasis added).

Now, let's compare that to [Mr. Johnson-Clark]'s story. *A story that we can examine for credibility due to the fact that he has a conviction for a crime of dishonesty* and a motive to lie, and a continuing story that is contradicted again and again and again by *every other witness who testified in this trial.*

Id. at 1468 (emphasis added).

A prosecutor has “wide latitude in making arguments to the jury” and to draw reasonable inferences therefrom. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). A prosecutor is also allowed to argue their case and explain how the trial court's jury instructions support their theory of conviction. Nevertheless, neither the prosecutor nor any other attorney may misuse the trial process to mislead the jury about facts not in evidence. *See State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955); RPC 3.3(a)(1).

Here, it is uncontested that Mr. Johnson-Clark was the only witness who had been impeached with a prior crime of dishonesty. And the court's instructions stated that Mr. Johnson-Clark's prior conviction was relevant to assessing his credibility. Given these circumstances, the prosecutor was absolutely entitled to argue Mr. Johnson-Clark's credibility and point out ways in which he was different from other witnesses.

Mr. Johnson-Clark points to no authority suggesting otherwise.

Mr. Johnson-Clark’s criticism stems from the wording of the prosecutor’s argument. According to Mr. Johnson-Clark, the way in which the prosecutor argued credibility could have been interpreted to suggest that none of the witnesses besides Mr. Johnson-Clark had ever been convicted of a crime of dishonesty, regardless of inadmissibility.⁸ This would have been improper, he argues, because it would have been a misstatement of fact and it would have referenced facts outside the record.

To the extent Mr. Johnson-Clark believed the prosecutor’s comments referenced inaccurate facts outside the record, it could have been cured by a timely objection. We recognize that prosecutorial misconduct can be deemed incurable if repeated. *See State v. Loughbom*, 196 Wn.2d 64, 73-78, 470 P.3d 499 (2020). But here, the prosecutor’s statements were confined to summation; they did not frame the entire case *Cf. id.* at 75 (The “prosecutor’s improper framing of [Mr.] Loughbom’s prosecution as *representing* the war on drugs, and his reinforcing of this theme throughout, caused incurable prejudice.”). Furthermore, the prosecutor’s comments here were aimed at a proper purpose. Mr. Johnson-Clark was the only witness who had been impeached at trial with

⁸ In his reply brief, Mr. Johnson-Clark takes a stronger stance arguing, “This was a lie, the prosecutor knew it was a lie, and he said it anyway.” Reply Br. at 5-6. This attempt to impugn the prosecutor’s integrity is not supported by the record and the rhetoric used does not support the persuasive value of Mr. Johnson-Clark’s brief.

a prior crime of dishonesty. And, according to what the parties apparently knew at the time of trial, Mr. Johnson-Clark was the only witness who *could* have been impeached with a prior crime of dishonesty.

Mr. Johnson-Clark appears to believe that the inadmissibility of the other witnesses' convictions did not render them materially different from Mr. Johnson-Clark's conviction. To the extent this is Mr. Johnson-Clark's position, it is mistaken. At their essence, the rules of evidence are aimed at marshalling the admissibility of relevant and irrelevant information. Evidence of a witnesses' prior bad acts, including prior crimes, is often deemed irrelevant and not admissible. *See* ER 404(a). But there are some limited exceptions. The rules recognize evidence of a prior crime can be relevant to assess a witness's credibility. *See* ER 609. But the older a conviction, the less probative weight it carries. *See* ER 609(b). People change, often for the better. After 10 years, criminal convictions are generally classified as irrelevant to credibility and therefore inadmissible. *Id.* Here, based on the evidence known at trial, Mr. Johnson-Clark was the only witness with a crime of dishonesty recent enough to be deemed relevant under the rules of evidence. This was a material distinction and the proper subject for the prosecutor during summation.

Mr. Johnson-Clark's posttrial disagreement with the words chosen by the prosecutor to emphasize the difference between Mr. Johnson-Clark and the other witnesses does not support a claim of flagrant and ill-intentioned misconduct. His claim of prosecutorial misconduct fails.

(2) *Vouching*

Vouching occurs when a prosecutor provides personal assurances about the credibility of a witness or the merits of a case. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (plurality opinion). It can also happen when the prosecutor suggests information outside the record supports its theory of the case. *Id.* The prohibition on vouching does not prevent the prosecutor from arguing their case. The prosecutor can argue witness credibility, including explaining why a witness should or should not be believed. Especially when there is no objection at trial, relief based on improper vouching is unwarranted unless it is “‘clear and unmistakable’” that a prosecutor is inserting their personal opinion into the case. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Mr. Johnson-Clark contends two types of vouching happened here. First, he claims the prosecutor vouched for the credibility of Brittney Fristed by arguing, “what does Brittney Fristed do? She actually calls the police. Isn't that what an honest person who's

telling the truth is gonna do? Call the police.” 3 RP (Jan. 27, 2022) at 1468. Second, similar to the argument addressed above, he argues the prosecutor improperly suggested that there were facts outside the record showing that none of the State’s witnesses had convictions for crimes of dishonesty.

We reject both vouching claims. First, the prosecutor’s statement regarding Brittney Fristed consisted of an argument for why the jury should find her credible. It was not a personal assurance of Brittney Fristed’s credibility. Second, as set forth above, we interpret the prosecutor’s statement regarding criminal history to be an observation about the evidence elicited at trial. There was no evidence admitted that any witness other than Mr. Johnson-Clark had been convicted of a crime of dishonesty. By pointing out this fact, the prosecutor was not improperly suggesting to the jury that there were facts outside the record supporting its theory of the case.

(3) Mischaracterized court’s jury instructions

Mr. Johnson-Clark concedes his prior conviction was admissible under ER 609. However, he argues the prosecutor’s use of the term “crime of dishonesty” in referring to the conviction was overly prejudicial and exceeded the scope of admissible evidence under ER 609(a). Further, he argues the prosecutor improperly mischaracterized the trial court’s jury instruction by making it appear as if the court endorsed the phrasing.

Mr. Johnson-Clark cites no authority for his criticisms of the prosecutor's argument. The reason Mr. Johnson-Clark's conviction was admissible was because it qualified as a "crime of dishonesty" under ER 609. The trial court specifically ruled the conviction was admissible as a "crime of dishonesty." 3 RP (Jan. 26, 2022) at 1337. We find no misconduct.⁹

First aggressor jury instruction

Mr. Johnson-Clark's final argument is that the trial court erroneously issued a first aggressor jury instruction. Again, we disagree.

Washington law specifies that the right of self-defense does not apply to someone who acts as a first aggressor to a confrontation. The jury may be provided a first aggressor instruction in circumstances where "(1) the jury can reasonably determine from the evidence that the defendant provoked the fight, (2) the evidence conflicts as to whether the defendant's conduct provoked the flight, or (3) the evidence shows that the defendant made the first move by drawing a weapon." *State v. Anderson*, 144 Wn. App. 85, 89,

⁹ Because the prosecutor did not engage in misconduct, we reject Mr. Johnson-Clark's argument that his trial counsel was ineffective for failing to object to the prosecutor's conduct. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (A claim of ineffective assistance of counsel requires proof of prejudice.).

180 P.3d 885 (2008). Words alone are not sufficient to justify a first aggressor instruction.
State v. Riley, 137 Wn.2d 904, 910-11, 976 P.2d 624 (1999).

The propriety of a first aggressor jury instruction in a particular case is “highly fact-specific.” *State v. Grott*, 195 Wn. 2d 256, 267, 458 P.3d 750 (2020). In reviewing whether a trial court erred in issuing a first aggressor instruction, an appellate court “must carefully consider the specific evidence presented at trial in the light most favorable to the requesting party.” *Id.*

The State’s primary theory at trial was that Mr. Johnson-Clark shot Mr. Rice unprovoked. Under this theory, the first aggressor instruction was unnecessary. It only became necessary if the jury believed Mr. Johnson-Clark’s story that Mr. Rice was behaving aggressively and pulled out what appeared to be a gun.

Reviewing the facts in the prosecution’s favor, there was a tenable basis for issuing the first aggressor instruction. The uncontested evidence was that, prior to May 3, Mr. Johnson-Clark had threatened to kill Mr. Rice. On May 3, Mr. Johnson-Clark decided to leave Brittney Fristed’s apartment and go outside to confront Mr. Rice. Before doing so, he armed himself with a loaded handgun and waited until Mr. Rice was alone. Given the totality of the circumstances, a jury could find that Mr. Johnson-Clark’s conduct, beyond merely his words, was sufficiently threatening to place Mr. Rice in reasonable


fear of a deadly assault. To the extent the jury found Mr. Rice was the first to pull out a weapon, it could have concluded Mr. Johnson-Clark was not entitled to assert self-defense because he was the initial aggressor.

The trial court properly issued the initial aggressor instruction.

CONCLUSION

The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Pennell, J.

I CONCUR:



Staab, A.C.J.

FEARING, J. (concurring) — I conclude, contrary to the majority, that the State's attorney misspoke during closing argument. Nevertheless, I concur in the affirmation of Kyle Johnson-Clark's conviction because counsel did not engage in flagrant or ill-intentioned misconduct and because the overwhelming evidence, including Kyle Johnson-Clark's own testimony during a withering cross-examination, supports the jury's finding that Johnson-Clark did not shoot Daniel Rice in self-defense.

The prosecuting attorney, during closing, commented:

When she [Brittney Fristed] learns—well, let's compare. We have a different story, a story by the way from somebody who has a motive to lie, and not only does [Kyle Johnson-Clark] have a motive to lie, but you heard the Court's instruction: We do know that the defendant has been convicted of a crime of dishonesty, and you can consider the fact that the defendant has been convicted of a crime of dishonesty, you can consider that in assessing the defendant's credibility.

In other words, the defendant has *less credibility than all the other witnesses* because of his prior conviction, and that's what the Court just instructed you. That you can consider that. Not that you have to, but it's something for you to consider. Ask yourself, was there any other witness—all these other witnesses, by the way, who contradict the defendant's testimony, *did any of these other witnesses who testified have a crime of dishonesty?* Nope.

Let's start with Brittney Fristed. Nope, she didn't. And let's look at their actions. The next day when she realizes that there's been a murder, and it was Daniel Rice, and Daniel Rice is dead, and then the later events, what does Brittney Fristed do? She actually calls the police. Isn't that what an honest person who's telling the truth is gonna do? Call the police.

And what does she tell the police? She tells them exactly where she drove the defendant to and the police follow up on the information. They get Dive and Rescue, and what do the police find? They find the gun that the defendant stole from his cousin in virtually the exact place where Brittney Fristed said that she dropped the defendant off.

Now, let's compare that to the defendant's story. *A story that we can examine for credibility due to the fact that he has a conviction for a crime of dishonesty* and a motive to lie, and a continuing story that is contradicted again and again and again by every other witness who testified in this trial.

3 Report of Proceedings (RP) (Jan. 27, 2022) at 1467-68 (emphasis added).

ER 609 declares:

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted . . . only if the crime (1) was punishable by . . . imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Kyle Johnson-Clark appends to his opening brief Judicial Information System (JIS) records that list Brittney Fristed's, Sarah Morse's, Ricco Garza's, and Jeramie Vannauker's involvement in the criminal justice system as victims, witnesses, accused, and offenders. To our knowledge, neither party reviewed these records before this appeal. The State does not challenge the accuracy of the appendix.

State witnesses Brittney Fristed, Sarah Morse, Ricco Garza, and Jeramie Vannauker all maintain convictions for crimes of dishonesty. Brittney, Morse, and Garza all garnered theft convictions. The State convicted Vannauker seven times for theft and one time each for witness tampering, forgery, possession of a stolen firearm, taking a vehicle without permission, and false reporting. Theft is a crime of dishonesty under ER 609(a)(2). *State v. Brown*, 113 Wn.2d 520, 552-53, 782 P.2d 1013, 787 P.2d 906 (1989). So too is witness tampering. *State v. Bankston*, 99 Wn. App. 266, 270, 992 P.2d 1041 (2000). Forgery qualifies as a crime of dishonesty under the evidence rule. *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003). So also does possession of stolen property. *State v. McKinsey*, 116 Wn.2d 911, 913, 810 P.2d 907 (1991). Taking a vehicle without permission falls within the purview of ER 609(a)(2). *State v. Trepanier*, 71 Wn. App. 372, 380-81, 858 P.2d 511 (1993). Finally, any conviction for uttering a false statement, almost by definition, entails a crime of dishonesty. *State v. Pfeifer*, 42 Wn. App. 459, 463, 711 P.2d 1100 (1985).

All but one of the convictions of the four witnesses escaped use for impeachment because of an age exceeding ten years. Defense counsel could have employed one conviction of Jeramie Vannauker because authorities released him from prison for the conviction within the last ten years.

The majority writes that the State's attorney did not misspeak because all but one of the crimes for dishonesty lay within ten years. But the prosecutor unequivocally stated that none of "these other witnesses who testified have a crime of dishonesty."

3 RP (Jan. 27, 2022) at 1467. The State’s attorney did not qualify his declaration with “within the last ten years,” “recently,” “or that could be used for impeachment.”

Tempering the statement with the additional language would lessen the impact of the argument, but such a qualification was needed to render the assertion true.

The majority implies that the prosecuting attorney’s declaration was literally true because the jury never heard any testimony during trial that any of the witnesses suffered convictions of dishonesty. The law must not be so narrow as to deem the boundaries of truth being drawn only from courtroom testimony. Kyle Johnson-Clark’s jury did not know that any evidence rule precluded impeachment by aged convictions. The jury instead would have concluded that none of the State’s witnesses had, during each’s respective lifetimes, been convicted of a crime of dishonesty despite this assertion being untrue.

Neither counsel, particularly the prosecutor, may mislead the jury. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). The prosecutor commits error by misstating the evidence. *State v. Monday*, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); *State v. Meza*, 26 Wn. App. 2d 604, 620-21, 529 P.3d 398 (2023).

The majority writes that the record does not reflect that the prosecuting attorney knew of the convictions of the witnesses, an observation with which I agree. Still, the State should have known of the convictions. The prosecuting attorney’s office and law enforcement had access to the records showing the prior convictions of their witnesses.

The State has a constitutional obligation to disclose evidence favorable to the defendant whether or not the defendant requests it. *Brady v. Maryland*, 373 U.S. 83, 87-89, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This includes evidence that may be used to impeach a witness's credibility. *United States v. Bagley*, 473 U.S. 667, 682-83, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). One way to impeach a witness is by introducing evidence of a prior criminal conviction of that witness. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The duty of the State to disclose information to the defense extends to information known to the police. *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1985); *State v. Davila*, 184 Wn.2d 55, 71, 357 P.3d 636 (2015).

The government has greater resources including access to databases. *State v. Durant*, 430 S.C. 98, 109-10, 844 S.E.2d 49 (2020). The government must disclose to the defense the criminal background of its witnesses. *United States v. Hemphill*, 514 F.3d 1350, 1360 (D.C. Cir. 2008); *State v. Durant*, 430 S.C. 98, 109-10, 844 S.E.2d 49 (2020); *In re Watkins*, 369 S.W.3d 702, 706 (Tex. App. 2012). One court even held that the government must disclose to the criminal defense uncharged alleged crimes of a witness. *DeCiantis v. State*, 24 A.3d 557, 572-73 (R.I. 2011).

Once a defendant establishes that a prosecutor's statements are improper, the court determines whether the defendant suffered prejudice under one of two standards of review. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, he must show that the prosecutor's misconduct "resulted in prejudice

that had a substantial likelihood of affecting the jury’s verdict.” *State v. Emery*, 174 Wn.2d 741, 760 (2012). Alternatively, if the defendant did not object at trial he “waives any error, unless the prosecutor’s misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d 741, 760-61 (2012). “If the latter standard applies, the defendant must show that no curative instruction would have prevented any prejudicial effect and that the prejudice had a substantial likelihood of affecting the jury verdict.” *State v. Restvedt*, 26 Wn. App. 2d 102, 126, 527 P.3d 171 (2023). Kyle Johnson-Clark did not object to the closing argument of the prosecuting attorney.

The closing argument of the State’s counsel was not flagrant or ill intentioned. I agree with the majority that Kyle Johnson-Clark overstates his argument when accusing the prosecutor of lying.

Regardless of the misstatement of the State’s attorney, the jury would have convicted Kyle Johnson-Clark. All witnesses, even those who one might expect to support him, contradicted Johnson-Clark’s testimony in key areas. The physical evidence contradicted Johnson-Clark’s assertion of self-defense. Johnson-Clark’s own words plastered in a plethora of electronic messages destroyed his defense. Common sense contradicted Johnson-Clark’s narrative.

Kyle Johnson-Clark in instant messages leading to May 3, 2019, wrote to Bethany Fristed: “I’m gonna kill him.” Ex. 132E at 26.

End it. . . . An he will be left alone. . . . He's green lit. . . .
He is green lit he goes to any prison in america he is getting stabbed up.

Ex. 132E at 28-29. The last message before Daniel Rice's death read: "He's dead."

Ex. 132E at 30.

Kyle Johnson-Clark sent Facebook messages to Daniel Rice: "Damn homie so u tried to snake me for my bitch??? Ur green lit by ab so the joint is all bad for u an when would watch over ur shoulder player." Ex. 132D at 1. Daniel Rice sent no responding messages.

Kyle Johnson-Clark stole from his cousin the gun he used to shoot Daniel Rice. He contradicted his own cousin about his permission to use the gun. When the cousin opened the gun case the day after the shooting, he noticed a BB gun in its place. If Johnson-Clark borrowed the gun with permission, the replacement gun was superfluous.

The forensic pathologist testified to all three bullet wounds suffered by Daniel Rice entering his body through the back. The pathologist testified that Rice could not have run more than a few steps after the bullet went through his head. The deceased body's location near the laundry room shows an attempt by Rice to hide from Kyle Johnson-Clark. Johnson-Clark contends that Rice aimed a gun at him and immediately turned his back, an event highly improbable. Bethany Fristed observed Johnson-Clark walk toward Rice as she heard gunshots.

No gun was found on or near the body of Daniel Rice. No witnesses, including disinterested witnesses who exited apartments after hearing gunshots, testified to seeing

Rice with a firearm. The only bullets found in the vicinity of the crime came from the gun handled by Kyle Johnson-Clark. All bullet casings matched the gun.

Kyle Johnson-Clark's conduct after the shooting confirmed a consciousness of guilt. He immediately ran from the scene rather than await arrival of law enforcement in order to tell his side of the story. Brittney Fristed gave Johnson-Clark a ride from a nearby school and he declined to tell Brittney of the earlier shooting. Johnson-Clark directed Brittney to drive to the Columbia River without informing Brittney of his purpose. He disappeared into brush and hurled the gun into the water outside the viewing of Brittney.

Kyle Johnson-Clark and Bethany Fristed purchased bleach to clean Johnson-Clark's hands of gunshot residue. The two enlisted Brittney Fristed and Ricco Garcia to purchase the bleach without informing them of the reason. Bethany and Johnson-Clark disposed of the bleach container, Johnson-Clark's phone, and his clothes in rural Franklin County. Law enforcement found the possessions in the locations identified by Bethany.

On the evening of May 3, Kyle Johnson-Clark fled to Spokane. That night he called Brittney Fristed and asked her to lie to law enforcement by stating he was in Spokane all evening. He eventually scurried to St. Louis to hide from law enforcement. Before trial, Johnson-Clark wrote to Brittney Fristed advising her that no one can force her to testify.

Kyle Johnson-Clark's sometimes girlfriend, Bethany Fristed, protected Johnson-Clark at first. She helped to purchase bleach for his hands. She rode with him to dispose

of his phone, clothes, and the bleach bottle. After telling a false statement to law enforcement, she returned to tell the truth.

Kyle Johnson-Clark and his trial counsel legitimately concluded that Johnson-Clark likely needed to testify in order to possess a chance of acquittal. Nevertheless, the brandishing cross-examination by the State's counsel of Johnson-Clark proved his guilt beyond a reasonable doubt. A reading of the crushing examination leads a reviewing judge to yearn for a return to the vocation of trial attorney.

Throughout his direct examination, Kyle Johnson-Clark protested that he never meant any harm to Daniel Rice and sent Rice messages in an attempt to quell any hostility resulting from each man pursuing the same woman. The State's attorney emphasized, during cross-examination, the implausibility of Johnson-Clark being a peacemaker when he left Brittney Fristed's apartment to confront Rice, who lacked any reason to know of the presence of Johnson-Clark in the apartment complex. Rice went to the apartment complex not to see Johnson-Clark but to help friends. Johnson-Clark sometimes insisted that he needed to act threatening in order to appear equal to Rice. At other times, Johnson-Clark averred that he acted docilely in order to reduce any tension between him and Rice. When the State's counsel posed whether the numerous threatening messages sent to Rice sought to diffuse the animosity, Johnson-Clark insisted they did. Johnson-Clark implausibly avowed that his messages to Bethany Fristed of Rice being green lit and dead meant nothing. He incredibly disclaimed any jealousy of Rice having a sexual relationship with Bethany.

During cross-examination, Kyle Johnson-Clark denied that his use of “ab” in a message to Daniel Rice referenced the “Aryan Brotherhood.” Nevertheless, he provided no alternative explanation for his use of the acronym. He denied knowing the extreme meaning of “green lit,” despite employing it in messages. Johnson-Clark first insisted he borrowed his cousin’s gun. After additional questioning, he reluctantly conceded to stealing the gun.

Kyle Johnson-Clark testified he did not know whether any of the shots he fired struck Daniel Rice as he left the apartment complex parking lot. Johnson-Clark improbably avowed that, when Brittney Fristed retrieved him from a school lot, she took his gun from him and he never went to the Columbia River. Johnson-Clark implausibly asserted that Bethany Fristed decided to go to the Walmart to purchase bleach at 10:00 p.m. in order to do laundry despite overwhelming evidence that he consistently controlled the relationship. He also fantastically asserted that he wanted to speak with police but Bethany and Brittney convinced him otherwise. He could not explain why law enforcement found the Clorox bottle, that Bethany allegedly wished to use for laundry on the night of May 3, in rural Franklin County. During the questioning by the prosecutor, Johnson-Clark persistently avoided answering pertinent questions thereby destroying any remaining credibility.

Kyle Johnson-Clark also argues that his trial counsel performed ineffectively because of a failure to impeach Jeramie Vannauker with the earlier conviction that ER 609 permitted to be introduced. The majority writes that the record does not show

that counsel knew or should have known of the conviction. I disagree. Trial counsel could have accessed records to learn of the conviction. Trial counsel could have demanded that the State disclose convictions of its witnesses. Nevertheless, I reject Johnson-Clark's assignment of ineffective assistance of counsel because of the lack of prejudice. In addition to showing a performance that fell below an objective standard of reasonableness, the defendant must show any deficient representation prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, the accused must establish a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). I have already outlined the overwhelming evidence of guilt.

I concur:


Fearing, J.

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

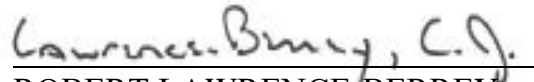
STATE OF WASHINGTON,)	
)	No. 38848-4-III
Respondent,)	
)	ORDER DENYING MOTION
v.)	FOR RECONSIDERATION
)	
KYLE ANTHONY JOHNSON-CLARK,)	
)	
Appellant.)	

THE COURT has considered appellant Kyle Anthony Johnson-Clark's motion for reconsideration of this court's April 30, 2024, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Fearing, and Staab

FOR THE COURT:


ROBERT LAWRENCE-BERREY
Chief Judge

Supreme Court No. (to be set)
Court of Appeals No. 38848-4-III

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On July 10, 2024, I filed a true and correct copy of the **Petition for Review by the Appellant**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document to:

Terry Jay Bloor,	(X) via email to:
Benton County	terry.bloor@co.benton.wa.us,
Prosecuting	prosecuting@co.benton.wa.us
Attorney's Office	

SIGNED in Tacoma, WA, on July 10, 2024.



STEPHANIE TAPLIN
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Attorney for Appellant, Kyle
Johnson-Clark

HARRIS TAPLIN LAW OFFICE

July 10, 2024 - 2:16 PM

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