NO. __
(COA NO. 39438-7-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BARCLAY BENNETT,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Barclay Bennett asks this Court for review.

B. COURT OF APPEALS DECISION

Mr. Bennett seeks review of the Court of Appeals's published opinion in *State v. Bennett*, No. 39438-7-III (Wash. Ct. App. Aug. 15, 2024).

C. ISSUE PRESENTED FOR REVIEW

The Confrontation Clause bars admission of testimonial hearsay absent an opportunity for cross-examination. An accused person may not "open the door" to testimonial hearsay merely by offering evidence that makes the hearsay relevant, but may waive the right to object on confrontation grounds by offering a portion of the hearsay themselves.

The divisions of the Court of Appeals have issued conflicting opinions on whether and when prosecutors may introduce testimonial hearsay to rebut defense evidence. Division Three's approach—deeming the

defense's introduction of testimonial hearsay "invited error," allowing the prosecution to offer any other relevant portion of the hearsay statement—hews closest to controlling U.S. Supreme Court precedent on the Confrontation Clause. However, Division Three departed from this approach in Mr. Bennett's case, effectively applying a broad "open the door" doctrine. The result is a dangerous potential for confusion around the scope of the confrontation right. This Court should grant review. RAP 13.4(b)(2), (b)(3).

D. STATEMENT OF THE CASE

Ralph Kinerson heard a knock on his door. RP 197. His friend Abbey Pearson was also in the house. RP 197. When Mr. Kinerson opened the door, he found himself in a struggle. RP 197–98. He testified he saw the other man's face for "a moment," and he recognized the man as Mr. Bennett. RP 200, 203. Mr. Kinerson

thought the man punched him, but later realized he was stabbed. RP 198–99.

Mr. Kinerson's neighbor, Cori Jackson, saw Mr. Kinerson wrestling with an unfamiliar man. RP 168–69. She later identified Mr. Bennett as the other man in a one-person police show-up. RP 175, 233–34. At the trial, Ms. Jackson did not identify Mr. Bennett as the man wrestling with Mr. Kinerson. RP 169, 178.

The prosecution charged Mr. Bennett with first-degree assault with a deadly weapon. CP 1.

During cross-examination of a police officer about the quality of the investigation, Mr. Bennett asked,

> So in your report, you had indicated that Mr. Kinerson indicated he believed this Abbey person had stolen some of his personal items; is that correct?
>
> A Correct.
>
> [PROSECUTOR]: Objection. Relevance and hearsay.

> THE COURT: I'll let you go a little further with it, Counsel.
>
> [DEFENSE COUNSEL]: Q As far as stealing some of his personal items, did she—did Mr. Kinerson indicate he suspected she stole his vehicle?
>
> A Yes.
>
> Q Going back to page 2 of 4, Mr. Kinerson's daughter, Malea, had indicated to you there was a stack of money that was exchanged that night?
>
> A Let me refer to the report. I remember—
>
> Q Sure.
>
> A —there being a statement about that. There is a statement about a third party that she spoke with, but I don't know who that is.

RP 290.

The prosecution began its redirect of the officer as follows:

> Q Detective Presta, page 2 of 4 of your May 17, 2022, report, middle paragraph, it starts with, "Malea believes"—
>
> A Okay.

> Q Can you read it to yourself. Do not read it out loud. Read that paragraph, and let me know when you're done.
>
> A Okay.
>
> Q Did Malea tell you that she believed the incident occurred—

RP 291. The trial court overruled Mr. Bennett's hearsay objection, and the prosecution continued,

> Q Just read this second sentence, the one that begins with "Malea believes".
>
> . . .
>
> A It states, "*Malea believes Robyn and her father are friends, and the suspect assaulted her father because of his relationship with Robyn.*"

RP 292 (emphasis added).

Robyn Roberts is Mr. Bennett's wife, and an acquaintance of Mr. Kinerson who visited him occasionally. RP 202–03.

Mr. Bennett moved the trial court to strike the highlighted statement as hearsay and a violation of his

right to confrontation. RP 295–96. The trial court denied the motion, holding Mr. Bennett "opened the door" by introducing Mr. Kinerson's and his daughter's statements about Ms. Pearson. RP 301–02.

Mr. Bennett appealed his conviction, arguing the trial court erred in holding he "opened the door" to unconfronted, testimonial hearsay. Br. of App. at 10–21. The Court of Appeals affirmed.

E. ARGUMENT

This Court should settle the question whether the confrontation clause permits admission of inadmissible, testimonial hearsay to rebut an admissible, non-hearsay out-of-court statement.

Under recent U.S. Supreme Court precedent, the accused may not "open the door" to evidence that violates the Confrontation Clause. The Court left open the possibility that the accused might impliedly waive a confrontation objection by introducing testimonial hearsay, allowing the prosecution to rebut with any

other portion of the hearsay statement that may be relevant. The divisions of the Court of Appeals have taken two different approaches to this issue. Division Three's approach is arguably compatible with the Confrontation Clause. Division One's is not.

In Mr. Bennett's case, Division Three purported to apply the approach it previously developed. It held that Mr. Bennett invited any error in admitting hearsay against him by introducing the same declarant's hearsay himself. However, the statements Mr. Bennett offered were not hearsay, and the statements the trial court permitted the prosecution to introduce did not complete or rebut them.

The Court of Appeals's struggle to articulate and apply a clear rule that safeguards the accused's right to confront prosecution witnesses calls for this Court's review. RAP 13.4(b)(2), (b)(3).

a. A party may not "open the door" to testimonial hearsay, but may waive or forfeit the confrontation right in limited circumstances.

"One of the bedrock constitutional protections" is the accused's right "to be confronted with the witnesses against him." *Hemphill v. New York*, 595 U.S. 140, 150, 142 S. Ct. 681, 211 L. Ed. 2d 534 (2022) (quoting U.S. Const. amend. VI). Our state constitution affords at least the same protection, guaranteeing the accused's right "to meet the witnesses against him face to face." Const. art. I, § 22.

A hearsay statement offends the Confrontation Clause if the circumstances under which it was spoken make it the practical equivalent of testimony. *Crawford v. Washington*, 541 U.S. 36, 51–52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A witness's statement to the police, for example, is testimonial if there was no "ongoing emergency" and its primary purpose is to

establish facts to be used in a prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Because the confrontation clause guarantees the right to test the reliability of evidence through cross-examination, testimonial hearsay that was not subject to cross-examination is not admissible. *Crawford*, 541 U.S. at 61.

In *Hemphill*, the U.S. Supreme Court held that an accused person cannot "open the door" to testimonial hearsay "merely by making evidence relevant to contradict their defense." 595 U.S. at 154. There, Mr. Hemphill was charged in connection with a stray 9mm bullet that killed a child. *Id.* at 144–45. He presented evidence police found 9mm rounds in another suspect's, Mr. Morris's, bedroom only hours after the shooting. *Id.* at 145. To rebut this evidence, the trial court allowed the prosecution to introduce Mr.

Morris's allocution during a plea hearing to show he also had .357 rounds on his nightstand and pleaded guilty to possessing a .357 revolver. *Id.* at 145–46.

The U.S. Supreme Court held that Mr. Hemphill did not "open the door" to unconfronted, testimonial hearsay to rebut the impression Mr. Morris possessed only 9mm bullets and not .357 bullets. 595 U.S. at 152–53. The Confrontation Clause did not allow the judge to determine Mr. Hemphill's evidence "was unreliable, incredible, or otherwise misleading," or to decide that admitting testimonial hearsay "was reasonably necessary to correct that misleading impression." *Id.* at 153. Reliability is for the jury to assess, and is to be challenged only through "the crucible of cross-examination." *Id.* at 152 (quoting *Crawford*, 541 U.S. at 61). "Courts may not overlook [this] command, no matter how noble the motive." *Id.* at 154.

In reaching this conclusion, the Court rejected the prosecution's argument that New York's "open the door" rule was "a mere 'procedural rule'" equating the introduction of misleading evidence with "failing to object to the confrontation violation." *Hemphill*, 595 U.S. at 151. Though states may draw procedural rules around the exercise of the confrontation right, New York's rule did not fall into that category. *Id.* at 151–52. Instead, it was a "substantive principle of evidence that dictates what material is relevant and admissible in a case." *Id.* at 152.

The Court acknowledged the prosecution's fear that accused persons may abuse the confrontation right but found it "overstated." *Id.* at 155. It noted that "hearsay rules" already "preclude all parties from introducing unreliable, out-of-court statements for the truth of the matter asserted," and other rules permit

exclusion of evidence whose potential for prejudice outweighs its value to the offering party. 595 U.S. at 155. The Court noted its opinion did not address whether state-law rules of completeness are compatible with the Confrontation Clause. *Id.* at 155–56.

A concurring justice suggested that, while the accused may not open the door to testimonial hearsay, the accused may impliedly waive any confrontation objection by acting in a manner inconsistent with it. *Id.* at 157 (Alito, J. concurring). Justice Alito suggested the rule of completeness as an example. *Id.* at 158. If the accused offers part of an unconfronted witness's statement for the truth of the matter asserted, the accused cannot complain if the prosecution offers the remainder of that statement. *Id.*

Three principles follow. First, states may not permit admission of testimonial hearsay against the

accused through a broad "open the door" doctrine. Second, hearsay rules and other rules of evidence will prevent abuse of the confrontation right in most cases. And third, by offering testimonial hearsay, the accused may waive the confrontation right and allow the prosecution to offer the rest of the hearsay statement.

b. The divisions of the Court of Appeals address the open door doctrine in opposite ways, and only Division Three's "invited error" approach comports with the Confrontation Clause.

Before the *Hemphill* decision, the divisions of the Court of Appeals developed two approaches to the question whether the prosecution may use hearsay to rebut a misleading impression created by defense evidence. *State v. Rushworth*, 12 Wn. App. 2d 466, 477–78, 458 P.3d 1192 (2020); *State v. Hartzell*, 156 Wn. App. 918, 934–95, 237 P.3d 928 (2010). Only one is arguably compatible with *Hemphill*.

In *Hartzell*, Division One of the Court of Appeals held the "open the door" doctrine superseded the right to confrontation. 156 Wn. App. at 934–35. There, Mr. Hartzell elicited a witness's hearsay statements to a police officer suggesting another man, not Mr. Hartzell, fired a gun on an earlier occasion. *Id.* at 933. The prosecution argued this testimony opened the door to the rest of the witness's statement to the police on the subject, which included remarks suggesting Mr. Hartzell was the shooter. *Id.* at 934.

Division One held that Mr. Hartzell's cross-examination opened the door to the prosecution's questioning, without regard for the Confrontation Clause. *Id.* Its holding was categorical: "A defendant may open the door to evidence that would otherwise be inadmissible, *even if constitutionally protected*, if the rebuttal evidence is relevant." *Id.* (emphasis added).

Hartzell's broad holding that a party may open the door even to testimonial hearsay is obviously not compatible with the Supreme Court's decision in *Hemphill*. Indeed, under Division One's reasoning, the New York trial court did not err—Mr. Hemphill's evidence about the 9mm bullets on Mr. Morris's nightstand would open the door to the testimonial hearsay about the .357 bullets in the same location.

Division Three, on the other hand, rejected the "open the door" doctrine in this context. ***Rushworth***, 12 Wn. App. 2d at 473–74. There, Ms. Rushworth elicited a witness's hearsay statement to the police that Ms. Rushworth received an allegedly stolen car from the witness. *Id.* at 471–72. As in *Hartzell*, the trial court held this cross-examination opened the door to the witness's further statement to the police that "He knew the car was stolen." *Id.* at 471.

Division Three held the "open the door" doctrine did not apply in this situation—not because of the Confrontation Clause, but because of the doctrine's nature. *Rushworth*, 12 Wn. App 2d at 473–74. "Put simply, the open door doctrine is a theory of expanded relevance." *Id.* at 473. It allows a party to explore an irrelevant or otherwise "forbidden topic" if the other party broaches that topic. *Id.* But relevance "is only one test for admissibility"—the evidence is still subject to "constitutional requirements, pertinent statutes, and the rules of evidence." *Id.* at 474.

The *Rushworth* court also considered the broad "curative admissibility doctrine," which "allows a party to introduce otherwise inadmissible evidence when necessary to counter the effect of improper evidence previously admitted by the other party." *Id.* at 475 (quoting *Wright v. Virginia*, 23 Va. App. 1, 7, 473

S.E.2d 707 (1996)). Division Three held this doctrine incompatible with due process and the prosecution's duty to safeguard a fair trial. 12 Wn. App. 2d at 476. Instead, the prosecutor's remedy for the defense's introduction of inadmissible evidence is to object. *Id.*

However, Division Three held the invited error doctrine allows the prosecution to offer otherwise inadmissible hearsay in certain circumstances. *Id.* at 477–78. If the accused offers inadmissible hearsay, and the trial court admits the evidence over the prosecution's objection, the prosecution may offer "the remaining portion of the statement in question, if relevant." *Id.* at 477–78. Then, "the invited error doctrine would prohibit the defendant from reversing course on appeal and claiming error in the admission of the evidence." *Id.* at 477. Because the prosecution did

not object in Ms. Rushworth's case, the remainder of the hearsay was not admissible. 12 Wn. App. 2d at 478.

To be clear, *Rushworth*'s invited error scenario applies only "where the defense induces the trial court to commit *evidentiary error*." *Id.* at 478 (emphasis added). If the out-of-court statement that the accused offered was admissible—say, because it was not hearsay—then the accused cannot be said to have "materially contribut[ed] to an erroneous application of law" by offering it. *In re Dep. of A.L.K.*, 196 Wn.2d 686, 694–95, 478 P.3d 63 (2020) (quoting *In re Det. of Rushton*, 190 Wn. App. 358, 372, 359 P.3d 935 (2015)).

Unlike *Hartzell*, Division Three's reasoning in *Rushworth* is arguably compatible with *Hemphill*. To say the accused invited error by offering part of a testimonial statement is not so different from saying the accused acted incompatibly with the right to

confrontation. *See Hemphill*, 595 U.S. at 157–58 (Alito, J. concurring). At least where the statement the accused offers is truly testimonial hearsay, allowing the prosecution to dispel any misleading impression by introducing "the remaining portion of the statement" may not violate the Confrontation Clause. *Id.*; *Rushworth*, 12 Wn. App. 2d at 477.

c. In this case, Division Three grossly expanded the circumstances where the accused "invites error" and waives a confrontation objection.

As noted, Division Three decided in *Rushworth* that the invited error doctrine may permit prosecutors to rebut the impression created by a hearsay statement by introducing the remainder of the statement. 12 Wn. App. 2d at 477. The prosecution's offer is admissible despite the hearsay rule—and the Confrontation Clause—only if the statement the defense offers is truly testimonial hearsay, the prosecution objected,

and the evidence the prosecution offers rebuts the specific impression the defense's improper evidence created. *Id.* at 477–78; *Hemphill*, 595 U.S. at 155–56; *id.* at 157–58 (Alito, J., concurring).

In Mr. Bennett's case, only one prerequisite was satisfied: the prosecution objected. RP 290. The other two—that Mr. Bennett introduced testimonial hearsay, and that the prosecution offered the remainder of that hearsay—were not.

First, the out-of-court statements Mr. Bennett offered were not hearsay. Br. of App. at 12–13; Reply at 5–7. An out-of-court statement is inadmissible hearsay only if offered "to prove the truth of the matter asserted." ER 801(c). If the statement is relevant regardless of its truth or falsity, it is not hearsay. *State v. Kelly*, 19 Wn. App. 2d 434, 449, 496 P.3d 1222 (2021).

The statements Mr. Bennett offered were relevant whether or not they were true because they implicated the quality of the police investigation. Mr. Bennett elicited from a police officer that Mr. Kinerson said Abbey Pearson stole property from him, and that Mr. Kinerson's daughter said "a stack of money" changed hands between Mr. Kinerson and Ms. Pearson. RP 290. Whether or not Mr. and Ms. Kinerson's statements about Abbey Pearson were true, they drew attention to the police's failure to investigate the possibility that Ms. Pearson had a reason to assault Mr. Kinerson.

The Court of Appeals did not conclude otherwise. It reasoned that the "apparent purpose of Bennett's cross-examination" was "to show that one of the other persons present may have a motive to hurt Kinerson, and *to suggest that law enforcement failed to follow up*

on this information as part of its investigation." Slip op. at 12 (emphasis added). Yet the Court of Appeals did not even address whether this purpose for offering the statement depended on the statement's truth. *Id.*

Because Mr. Kinerson's and his daughter's statements about Abbey impugned the police investigation regardless of whether they were true, admitting the statements was not error, invited or otherwise. *Kelly*, 19 Wn. App. 2d at 449. Eliciting the statements did not permit the prosecution to rebut them with testimonial hearsay. *Rushworth*, 12 Wn. App. 2d at 477–78.

Yet, to introduce testimonial hearsay is precisely what the prosecution did. The trial court allowed the prosecution to elicit from the officer that Ms. Kinerson said she "believes Robyn [Roberts, Mr. Bennett's wife] and her father are friends, and the suspect assaulted

her father because of his relationship with Robyn." RP 292. This statement's relevance turns on its truth—Mr. Kinerson's relationship with Ms. Roberts gave him a motive to attack Mr. Kinerson only if that relationship existed. The prosecution did not argue otherwise. Br. of Resp. at 18–22.

Ms. Kinerson's hearsay statement about Ms. Roberts was testimonial because she made it to a police officer under circumstances suggesting it would be used in a future prosecution. *Davis*, 547 U.S. at 822; *State v. Burke*, 196 Wn.2d 712, 726, 478 P.3d 1096 (2021). The prosecution did not dispute this point either. Br. of Resp. at 18–22.

Second, the testimonial hearsay the prosecution elicited in response did not rebut any impression Mr. Bennett created. The statements Mr. Bennett offered concerned whether the police had reason to believe Ms.

Pearson was a suspect in the assault on Mr. Kinerson. RP 290. The evidence the prosecution introduced in response fell within *Rushworth*'s rule only if it completed Ms. Kinerson's statement on this topic—for example, if it showed Ms. Pearson could not be responsible or otherwise addressed the police's failure to investigate her. 12 Wn. App. 2d at 477–78.

Rather than complete the portion of Ms. Kinerson's statement implicating the investigation, the prosecution offered her statement on another topic entirely: whether *Mr. Bennett* had a motive to commit the assault. RP 292. This statement did not rebut any impression created about *Ms. Pearson's* viability as a suspect based on the facts known to the police. The prosecution admitted its questioning "did not seek to expand on the subject broached by Mr. Bennett's questions." Br. of Resp. at 19.

In affirming the trial court's admission of the prosecution's rebuttal statement, Division Three expanded its invited error theory beyond what *Rushworth* envisioned, and what *Hemphill* allows. Mr. Bennett neither invited error nor waived his right to confront witnesses by offering an out-of-court statement for a non-hearsay purpose. And, by introducing a testimonial hearsay statement on a different topic, the prosecution did not rebut any impression Mr. Bennett created.

d. This important constitutional issue is properly preserved and makes a meaningful difference in Mr. Bennett's case.

The important constitutional issue in this case warrants this Court's review. The wide gulf between divisions, and the resulting risk of confusion over the scope of the "open the door" doctrine, alone calls for this Court's intervention. *Rushworth*, 12 Wn. App. 2d

at 473–74; *Hartzell*, 156 Wn. App. at 934–95; RAP 13.4(b)(2). That these decisions implicate the Confrontation Clause and come in tension with a decision of the U.S. Supreme Court further calls for this Court to settle the question. RAP 13.4(b)(3).

Mr. Bennett properly preserved the confrontation issue by objecting in the trial court. "No particular form of words or phrases [was] essential" to invoke the right, as long as Mr. Bennett objected "with fair precision and in due time." *Hemphill*, 595 U.S. to 148 (quoting *Street v. New York*, 394 U.S. 576, 584, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969)). For example, in *Hemphill*, it was enough to protest that admitting Mr. Morris's plea allocution "would be 'a *Crawford* violation.'" *Id.* at 148–49.

Here, Mr. Bennett's counsel complained that Ms. Kinerson "is not here as a witness," that "we can't cross

her on that," and also that "we can't cross-examine Robyn." RP 296. These objections to admission of Ms. Kinerson's statement without the opportunity for cross-examination were precise enough to inform the trial court and prosecution that the basis of the objection was the Confrontation Clause. *Hemphill*, 595 U.S. at 148–49. Mr. Bennett also raised the objection in a timely fashion, in support of a motion to strike immediately after the statement. RP 296.

The Court of Appeals addressed Mr. Bennett's confrontation argument without mentioning the prosecution's contention that it was not preserved. Slip op. at 12–13; *see* Br. of Resp. at 26–31.

Review will make a meaningful difference for Mr. Bennett because the trial court's error in permitting the prosecution to admit Ms. Kinerson's statement was not harmless. A violation of Mr. Bennett's right to

confrontation requires reversal unless it was harmless beyond a reasonable doubt. *Burke*, 196 Wn.2d at 739. The prosecution must show the error "did not contribute to the verdict." *Id.*; *State v. A.M.*, 194 Wn.2d 33, 41, 488 P.3d 35 (2019) (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

The prosecution cannot show beyond a reasonable doubt that Ms. Kinerson's statement Mr. Bennett was jealous of his wife's friendship with her father did not contribute to the verdict. Mr. Kinerson and Cori Jackson identified Mr. Bennett—in court and at a show-up, respectively—but both had credibility problems. Mr. Kinerson was offered immunity in another case in exchange for his testimony. RP 210. Ms. Jackson did *not* identify Mr. Bennett at the trial, saying the assailant "could be anybody." RP 177–78, 183. Further, two witnesses saw copious blood at the

scene, yet Mr. Bennett had no blood on his hands or clothing afterward. RP 175, 347, 380–81, 507–08.

It is reasonable to doubt whether the jury would have found Mr. Bennett was the attacker had it not heard Ms. Kinerson's statement that he was jealous of Mr. Kinerson's friendship with Ms. Roberts.

Ms. Kinerson's statement was the only evidence suggesting Mr. Bennett harbored strong enough enmity toward Mr. Kinerson to drive him to attack the man with a knife. Mr. Bennett did testify that he worried Ms. Roberts's friendship with Mr. Kinerson might lead her to start using drugs again, but also that he trusted her. RP 427–28. Absent Ms. Kinerson's statement, the jury may have concluded Mr. Bennett had no reason to assault Mr. Kinerson.

The Court of Appeals did not hold any error in admitting Ms. Kinerson's statement was harmless,

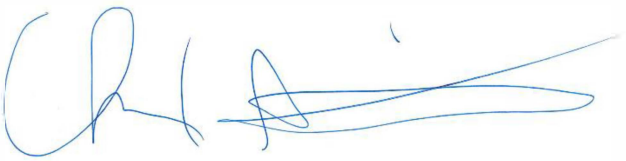
under the constitutional harmless error standard or any other. Slip op. at 8–13.

F. CONCLUSION

This Court should grant review of the issue whether the confrontation clause allows the admission of inadmissible, testimonial hearsay to complete or rebut an out-of-court statement properly admitted for a non-hearsay purpose.

Per RAP 18.17(c)(10), the undersigned certifies this petition for review contains 4,044 words.

DATED this 16th day of September, 2024.



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APPENDIX

FILED
AUGUST 15, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 39438-7-III
Respondent,	)	
	)	
v.	)	
	)	
BARCLAY DYLAN BENNETT,	)	PUBLISHED OPINION
	)	
Appellant.	)	

STAAB, J. — Barclay Dylan Bennett appeals his conviction for first degree assault, arguing the trial court erred by admitting inadmissible hearsay statements and violating his right to confrontation. We conclude that Bennett invited any error and therefore cannot raise it on appeal. We affirm Bennett's sentence and remand for the limited purpose of striking the victim penalty assessment (VPA) fee and DNA fee.

BACKGROUND

In the early evening of April 12, 2022, Ralph Kinerson was with his acquaintance, Abbey Pearson, at his home. Kinerson testified that he heard a knock at the door and could see a male with his head down through the peephole. When Kinerson unlocked the door, he was attacked by the individual. After the two were separated, Kinerson realized

that he had been stabbed. At trial, Kinerson testified that during the struggle, he recognized Bennett as the person who attacked him. Bennett is married to Robyn Roberts, an acquaintance of Kinerson, who visited him occasionally.

Cori Jackson, a neighbor, heard yelling and saw Kinerson wrestling on the ground with another man. Jackson watched the other man get up and walk toward the apartments across the street while Kinerson remained on the ground. Jackson called 911 when she realized that Kinerson had been stabbed. Jackson testified that she heard Kinerson say he had been stabbed and saw blood all over him. Later that evening, at a show up identification, Jackson identified Bennett as the person she saw wrestling with Kinerson.

Officers also spoke to Abbey Pearson who provided a brief description of the suspect but did not want to talk further.

Bennett was subsequently charged with one count of first degree assault with a deadly weapon.

Bennett's theory of defense was that police failed to investigate other suspects and that gaps in the evidence led to reasonable doubt. In opening statements, Bennett pointed out that other than Kinerson there were three people present during the struggle: himself, an unknown male, and Abbey Pearson. The police failed to investigate the two other people as suspects, and there was no direct evidence that Bennett was the one who stabbed Kinerson.

Bennett testified and his version of the events differed from the other witnesses. Bennett indicated that he was walking to a friend's house, when he was attacked by Kinerson, "a known drug dealer." Rep. of Proc. (RP) at 409. Bennett testified that during the struggle, a woman began spraying him with pepper spray while Kinerson was punching him. Bennett indicated an unknown male was also present during the scuffle. After the two separated, Bennett walked to his friend's apartment to wash off the pepper spray. Police contacted Bennett at the apartment and detained him. Bennett denied stabbing Kinerson during the altercation.

Procedural history

Prior to trial, Bennett filed a motion in limine to prohibit Kinerson from testifying as to why Kinerson believed Bennett was at his residence. Defense counsel indicated that Kinerson's belief about Bennett's motivation was based solely on a hearsay statement from Bennett's wife to Kinerson's daughter, Malea, that Bennett came there to attack Kinerson. Counsel noted that "obviously hearsay is not allowed." RP at 190. The State agreed, stating that it had advised Kinerson that he could only testify regarding information for which he had first-hand knowledge. That is, "what he said, what he did, what he heard, what he saw, [and] what he observed." RP at 191. The court stated that as long as neither party went into this, it should not come up and, if it did, the court would stop it.

During trial, Kinerson was asked about his relationship with a woman named Robyn and he explained she would occasionally stop to visit when she was visiting friends in his neighborhood. Kinerson explained that he knew Robyn was married to Bennett. He was able to identify Bennett in the courtroom. Additionally, Kinerson testified that when the incident occurred, as both men were struggling on the ground, he looked at the man's face and realized it was Bennett. Prior to this incident, he recalled seeing Bennett in his neighborhood two or three times.

Detective Devin Presta was called as a witness by the State. During direct examination, the State asked him questions about his investigation of the crime. During cross-examination, defense counsel asked Detective Presta about his follow-up investigation and statements made to him by witnesses.

> [DEFENSE COUNSEL]: Do you recall following up with—Malea Kinerson is her name.
>
> [DETECTIVE PRESTA]: I documented that in the report. I don't have independent recollection of talking to her.
>
> [DEFENSE COUNSEL]: So in your report, you had indicated that Mr. Kinerson indicated he believed this Abbey person had stolen some of his personal items; is that correct?
>
> [DETECTIVE PRESTA]: Correct.
>
> [PROSECUTOR]: Objection. Relevance and hearsay.
>
> THE COURT: I'll let you go a little further with it, Counsel.

[DEFENSE COUNSEL]: As far as stealing some of his personal items, did she—did Mr. Kinerson indicate he suspected she stole his vehicle?

[DETECTIVE PRESTA]: Yes.

[DEFENSE COUNSEL]: Going back to page 2 of 4, Mr. Kinerson's daughter, Malea, had indicated to you there was a stack of money that was exchanged that night?

[DETECTIVE PRESTA]: Let me refer to the report. I remember—

[DEFENSE COUNSEL]: Sure.

[DETECTIVE PRESTA]: —there being a statement about that. There is a statement about a third party that she spoke with, but I don't know who that is.

RP at 289-90.

On redirect, the State followed up on this line of questioning:

[PROSECUTOR]: Detective Presta, page 2 of 4 of your May 17, 2022, report, middle paragraph, it starts with, "Malea believes"—

[DETECTIVE PRESTA]: Okay.

[PROSECUTOR]: Can you read it to yourself. Do not read it out loud. Read that paragraph, and let me know when you're done.

[DETECTIVE PRESTA]: Okay.

[PROSECUTOR]: Did Malea tell you that she believed the incident occurred—

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: I don't know—

[DEFENSE COUNSEL]: Hearsay and a speculation.

THE COURT: Overruled.

RP at 291-92. The State then continued its question to Detective Presta:

> [PROSECUTOR]: Just read this second sentence, the one that begins with "Malea believes." [sic]
>
> [DEFENSE COUNSEL]: Objection. Reading from notes.
>
> THE COURT: I will allow him to do it, under the circumstances.
>
> [DETECTIVE PRESTA]: The one that starts, "Malea certainly believes Robyn"—
>
> [PROSECUTOR]: Yes.
>
> [DETECTIVE PRESTA]: It states, "Malea believes Robyn and her father are friends, and the suspect assaulted her father because of his relationship with Robyn."

RP at 292.

Motion to strike

Defense counsel then requested the court to strike the comments made by Officer Presta "regarding Robyn and [Kinerson], all of that" on the basis that the comments directly or indirectly violated the order in limine. RP at 295.

> [DEFENSE COUNSEL]: I know that we had objected at the time and a motion, and you did overrule it. I did want to just refer back to our motions in limine. That was something that we had specifically spoke about with Mr. Kinerson not saying anything about that relationship.
>
> I had thought it was applied towards all the witnesses who had knowledge of a particular relationship. I didn't think it was going to come in with Presa—Officer—sorry—Detective Presta until it was brought in.

> So I am asking for a motion to strike based on the fact that it is our motion in limine that there can't be any sort of relationship stuff because that is hearsay. We don't—we can't cross-examine Robyn nor can we cross-examine Makayla—or Malea—I'm not sure.

RP at 295-96.

The prosecutor responded that it was true the statements could be characterized as hearsay. However, it explained the problem was that defense opened the door when they began asking Detective Presta about comments made to him by other witnesses. The prosecutor reasoned these were all hearsay statements and "all the [S]tate did was complete the conversation." RP at 297. The prosecutor noted that defense counsel did not ask Detective Presta what else Malea told Detective Presta so the State sought to have that one final sentence read.

Defense counsel acknowledged that they "did open the door to hearsay with Malea, but specifically directed it at Abbey's actions, not at anything Abbey said." RP at 298. Counsel also argued that the State was not "just completing the record by having Detective Presta read the one statement that he read," but because there were two separate statements, and based on the motion in limine, the "whole story" did not need to come in. RP at 299.

The court denied the motion to strike, stating:

> So I am not going to strike the comments about Robyn and Malea, if you will, made by Detective Presta for a couple of reasons. But, primarily, I am satisfied that Defense opened [the] door here, and there's a couple

> ways to approach this, but one was is just to leave it alone. You know, one way is to let the [S]tate just sort of complete going through the door and ask to the extent they feel necessary.
>
> But, here, once the defense opened the door, I did allow the [S]tate to proceed. It was limited because that door has been opened. The general theory, if you look in Mr. Tegland's comments,[1] you don't get to open the door and shut it or partially shut it because you have allowed it to be opened.
>
> Defense did object, though. I will make that clear for the record though. Counsel did a good job of that when the [S]tate attempted to proceed, and I overruled that objection. So I overruled it because I thought the door had been opened.

RP at 301-02.

After the jurors were brought back into the courtroom, trial continued. Bennett was subsequently found guilty of the crime of first degree assault as charged. At sentencing, the court imposed the $500 VPA fee and the $100 DNA fee.

Bennett appeals.

ANALYSIS

1. HEARSAY STATEMENTS

Bennett assigns error to the trial court's decision to allow Detective Presta to testify regarding a statement made to him by Malea about her belief as to why Bennett attacked Malea's father, Kinerson. In doing so, Bennett contends that the court not only

[1] 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 64 (6th ed. 2016).

abused its discretion but also violated his right to confrontation. We conclude that any error in admitting the hearsay evidence was invited by Bennett and therefore we decline to review the assignment of error.

"We review de novo the trial court's interpretation of the evidentiary rules and its application of the rules for abuse of discretion." *State v. Rushworth*, 12 Wn. App. 2d 466, 470, 458 P.3d 1192 (2020) (citation omitted). "Abuse of discretion occurs when the trial court's ruling is manifestly unreasonable or based on untenable grounds or reasons." *State v. Rodriquez*, 187 Wn. App. 922, 939, 352 P.3d 200 (2015). Our review requires us to examine the appropriate legal doctrines and testimony in question.

A thorough review of the doctrines of open door, curative admissibility, and invited error was provided by this court in *Rushworth*. 12 Wn. App. 2d at 473. "Put simply, the open door doctrine is a theory of expanded relevance." *Id.* It permits a party to admit evidence "on a topic that would normally be excluded for reasons of policy or undue prejudice when raised by the party who would ordinarily benefit from exclusion." *Id.* This doctrine "recognizes that a party can waive protection from a forbidden topic" by discussing the subject. *Id.* The classic example is when a criminal defendant opens the door and testifies to their good character, thereby allowing the State to respond with evidence of prior bad acts to refute this testimony. *See Id.* at 473-74. While the open door doctrine expands the relevance of evidence, it does not expand the admissibility of evidence under other evidence rules.

Whereas the open door doctrine tends to expand relevance, the doctrine of curative admissibility "permits the introduction of evidence that is inadmissible for reasons *other than* relevance." *Id.* at 475 (emphasis added). "'Curative admissibility, in its broadest form, allows a party to introduce otherwise inadmissible evidence when necessary to counter the effect of improper evidence previously admitted by the other party *without objection*.'" *Id.* (emphasis added) (quoting *Wright v. Virginia*, 23 Va. App. 1, 7, 473 S.E.2d 707 (1996)).

In the context of a criminal trial, Washington does not allow the State to use curative admissibility to introduce its own inadmissible evidence when the State fails to object to inadmissible evidence introduced by a defendant. *Id.* at 476. Instead, "when a defendant does not merely open the door to a newly relevant topic, but attempts to introduce incompetent evidence such as hearsay, the prosecutor's recourse is to object." *Id.* If the objection is successful, nothing more is required to correct the record other than a possible motion to strike. *Id.* However, if unsuccessful, the prosecutor often has two options: (1) seek an interlocutory appeal, or (2) more realistically, "accept the trial court's ruling as the law of the case and introduce responsive evidence within the terms" of that ruling. *Id.* For the second option, the next doctrine—invited error—will often protect against reversal on appeal. *Id.*

The invited error doctrine is an appellate remedy that "'precludes a criminal defendant from seeking appellate review of an error [they] helped create, even when the

alleged error involves constitutional rights.'" *State v. Tatum*, 23 Wn. App. 2d 123, 128, 514 P.3d 763, *review denied*, 200 Wn.2d 1021, 520 P.3d 977 (2022) (alteration in original) (quoting *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014)). The invited error doctrine can apply to evidentiary rulings such as testimony elicited by the defense. *Rushworth*, 12 Wn. App. 2d at 477.

As noted in *Rushworth*, "[i]n the context of a criminal trial, the invited error doctrine provides the State redress for a defendant's evidentiary errors without condoning misconduct." *Id.* *Rushworth* goes on to provide a striking example:

> A defendant seeks to introduce a portion of a hearsay statement at trial. The State properly objects, but the defendant persists, arguing the statement is not hearsay. The trial court agrees with the defense and overrules the State's objection. Under these circumstances, it would likely not be misconduct for the State to acquiesce in the trial court's ruling and request introduction of the remaining portion of the statement in question, if relevant. Should the trial court admit the balance of the statement, the invited error doctrine would prohibit the defendant from reversing course on appeal and claiming error in the admission of the evidence.

Id. at 477.

While the doctrines of open door and invited error are distinct, they can still occur simultaneously. Here, the prosecutor objected to defense counsel's line of cross-examination on the grounds of hearsay (invited error) and relevance (open door). Defense counsel did not respond or explain. Instead, the court implicitly overruled the objection when it allowed defense counsel to continue. On redirect, the prosecutor asked

Detective Presta to read additional hearsay statements from the same conversation. Bennett moved to strike this additional hearsay, acknowledging that he had "open[ed] the door to hearsay with Malea," but arguing that the opening was limited. RP at 298. The trial court concluded that Bennett had opened the door and denied his motion to strike the statement introduced by the State.

The apparent purpose of Bennett's cross-examination was to introduce hearsay statements to show that one of the other persons present may have a motive to hurt Kinerson, and to suggest that law enforcement failed to follow up on this information as part of its investigation. This opened the door for the State to respond with evidence that its investigation was thorough and based on the information it had, including additional evidence pertaining to Bennett's motive. Any error in introducing the hearsay statements was invited by Bennett over the State's objection.

We conclude that Bennett's questions on cross-examination opened the door to the topic of whether the investigation was incomplete and then invited the court to admit hearsay evidence on this topic. Although we apply the invited error doctrine to the hearsay statements, rather then the open door doctrine, we can affirm a judgment on any ground within the pleadings and the proof. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997).

Bennett contends that regardless of error, Malea Kinerson's statements were testimonial and thus the admission of them violated his right to confrontation. But

invited error precludes review even when the alleged error involves a constitutional right. *Tatum*, 23 Wn. App. 2d at 128.

2. VPA AND DNA COLLECTION FEES

Bennett contends that the $500 VPA fee should be struck because he is indigent. He also asserts that the $100 DNA collection fee should be struck. The State concedes. We agree and remand for the court to strike the VPA and DNA collection fees from the judgment and sentence.

Under former RCW 7.68.035(1)(a) (2018), a judge was required to impose the $500 VPA fee for one or more felony or gross misdemeanor convictions. However, earlier last year, legislation amended this statute. *See* LAWS OF 2023, ch. 449, § 1(3). Effective July 1, 2023, this amendment included a provision instructing a court to not impose the VPA fee if the court found the defendant indigent at the time of sentencing. *See* RCW 10.01.160(3). Additionally, the legislature amended RCW 43.43.7541(2), instructing the court to waive any fee for the collection of DNA imposed prior to July 1, 2023, upon a motion by a defendant. Bennett is entitled to the benefit of these amendments because his case was pending on direct appeal. *See State v. Ramirez*, 191 Wn.2d 732, 735, 426 P.3d 714 (2018). This court should strike the $500 VPA fee because the sentencing court found Bennett indigent. Likewise, this court should strike the $100 DNA fee, which was imposed prior to July 1, 2023.

Affirmed but remanded to strike fees.

Staab, J.

WE CONCUR:

Cooney, J.

Lawrence-Berrey, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39438-7-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: September 16, 2024

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