NO. 103546-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICAL ROBERTS,

Petitioner.

STATE'S AMENDED ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Statutes

Washington State:

Other Jurisdictions:

Rules and Regulations

Washington State:

A. INTRODUCTION

Roberts was convicted of first-degree felony murder in a bench trial. He raised numerous challenges to his conviction and sentence on appeal, all of which were rejected except for his claim regarding legal financial obligations. He now asks this Court to accept review of multiple issues.

This Court should deny review. The Court of Appeals' opinion perceived a conflict among appellate authority governing the scope of review in sufficiency-of-the-evidence challenges, but a careful review of these cases reveals that no conflict exists.

Roberts also claims that the addition of a point to his offender score for his community-custody status raises an important issue of first impression, but his argument relies on an untimely-raised claim that the Court of Appeals did not address. Moreover, Roberts will be resentenced per the Court of Appeals' decision, and the trial court will have the opportunity to address his offender-score claim at that time.

As to all other issues, Roberts' petition addresses the standard for acceptance of review in a passing manner, largely failing to analyze how the decision below conflicts with similar decisions of this Court or other decisions of the Court of Appeals, or how the claims are significant enough as to call for this Court's review. Review should be denied as to all issues.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another 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).

C. ISSUES PRESENTED

1. Is caselaw clear that the standard of review for evidentiary sufficiency is the same whether a conviction results from a jury trial or a bench trial? If review is accepted, should this Court hold that a court reviewing evidentiary sufficiency can consider all the admitted facts and evidence in the light most favorable to the State, not just the facts and evidence explicitly mentioned in the trial court's written findings? Did the Court of Appeals correctly conclude that the evidence was sufficient to convict Roberts regardless of the standard applied?

2. The Court of Appeals refused to review, for the first time on appeal, Roberts' argument that in a bench trial, the court as factfinder was required to consider affirmative defenses that Roberts did not raise or argue at trial. Has Roberts failed to establish that this issue presents a significant question of constitutional law warranting this Court's review? If review is granted, should this Court conclude that requiring a trial court to consider unraised affirmative defense intrudes on a

defendant's constitutional right to control his defense and places an unfair burden on the prosecution to disprove unraised defenses? Should this Court reject Roberts' claim that the affirmative defense to felony murder bars his conviction when he did not raise or argue it at trial and when it was not supported by the evidence?

3. Has Roberts failed to establish a basis under RAP 13.4(b) for review of the Court of Appeals' conclusion that Roberts' trial lawyer was not constitutionally ineffective for not raising an affirmative defense that the evidence did not support?

4. Has Roberts failed to establish a basis under RAP 13.4(b) for review of the Court of Appeals' conclusion that the trial court properly admitted a detective's explanation of slang used in a music video and written in a notebook when the language was relevant to the crime and to Roberts' defense, and the elicitation of this evidence was not race-based misconduct?

5. Has Roberts failed to establish a basis under RAP 13.4(b) for review of the Court of Appeals' conclusion that the

trial court properly admitted evidence demonstrating the size of the space in which the shooting occurred, and that Roberts invited any error relating to opinion testimony about such evidence?

6. Should this Court deny review of Roberts' untimely raised statutory-construction claim that an offender score cannot be increased for committing a crime while serving community custody that was transferred from out-of-state? Has Roberts failed to establish a basis under RAP 13.4(b) for review of the Court of Appeals' determination that a point was properly included in Roberts' offender score because his out-of-state drug-possession convictions leading to community custody were not constitutionally void?

7. Has Roberts failed to establish a basis for review under RAP 13.4(b) of the Court of Appeals' decision to remand Roberts' case to correct the trial court's imposition of a concurrent firearm-enhancement term, which is statutorily prohibited for 24-year-old offenders like Roberts?

D. STATEMENT OF THE CASE

Roberts was charged with first-degree felony murder with a firearm enhancement, for the slaying of Ricardo Villa Senor[1] during the commission of a first-degree burglary. CP 1-6; RCW 9A.36.030(1)(c); RCW 9.94A.533(3). After a bench trial, the Honorable Ronald Kessler found Roberts guilty. CP 104-06. The trial court's written findings are attached as Appendix A.

On November 19, 2018, Villa Senor and his girlfriend, Jennifer Bolanos, were in Villa Senor's basement apartment. RP 105-06, 90-91, 170-71. The family who lived upstairs were not home. RP 105-06, 416, 431-32. Bolanos heard someone kick in the upstairs front door and then heard at least two people running from room to room. Ex. 22 (911 call); RP 106-07, 121-22. It sounded like they were looking for something.

[1] This spelling of the victim's name is in the charging document and the judgment. The State believes it is the correct spelling. CP 1, 172. The mother of the victim spoke at sentencing; her last name is Villa. RP 808.

RP 123. After about 40 seconds, Bolanos heard the interior door to the basement being kicked in and heard someone running down the stairs. RP 109-11.

Someone then kicked the door to Villa Senor's bedroom and began shooting through the door when it did not open; Villa Senor grabbed his own gun and returned fire. RP 110-12, 124. The gunfire lasted about 10 seconds. RP 112-13, 287. Villa Senor fell onto the bed, mortally wounded. RP 113, 118. Bolanos heard the intruders run upstairs, rummage around more, and then quickly leave. RP 115, 124. The intruders had been in the house only about two minutes. RP 115. Police found the upstairs front door kicked, with the door frame broken. RP 177-79. The door frame of Villa Senor's bedroom door was also broken. RP 198.

The upstairs residents, Abraham Madrigal and his family, arrived home shortly after the police arrived. RP 432-44, 459. Madrigal reported that the gun box for his .40 caliber handgun and some extended magazines had been stolen. RP 464-65.

Police collected samples from blood on the wall and a movie screen in a common area near Villa Senor's bedroom. RP 189-91. Another sample was collected from blood on the upstairs front steps to the house. RP 182-84.

On November 25, police received an anonymous tip implicating Sebastian Beltran in the crime, and they learned that a car associated with Beltran, a BMW, had been impounded on November 25. RP 329-30. On November 27, Beltran was arrested trying to recover the BMW from the tow lot; Madrigal's gun box and cartridge magazine were in the Toyota that Beltran arrived in. RP 310-15, 335, 343-46. Police found blood stains and documents bearing Beltran's name in the BMW. RP 351.

Blood from the front porch matched Roberts' DNA profile in the CODIS database. RP 356, 483-86. Detective Benjamin Wheeler attempted to locate Roberts. RP 357-59. The murder was profiled on the "Washington's Most Wanted" television program and information was released to other media

along with Roberts' picture. RP 525, 591-92, 615-17. Wheeler discovered a music video that Roberts had posted on a social media account in which he referred to the "Washington's Most Wanted" program and being charged with "murder 1." Ex. 162; Ex. 163; RP 526-30. In the video, Roberts says, "Find out where [someone/something] stays, kick his door, stick 'em up, now I got base rock." Ex. 162; Ex. 163 at 2; RP 530, 664-69. "Base rock" is crack cocaine. RP 531, 664-65.

Roberts was arrested on March 1, 2019. RP 535-36. He had a healed gunshot wound to his left hand. RP 539. A forensic scientist concluded that blood at the crime scene — on the movie screen, the basement wall, and the front porch — matched Roberts' DNA profile to an astronomical probability. RP 495-97. She also concluded that the DNA profile from blood on the rear passenger seat cushion of Beltran's BMW matched Roberts' DNA profile. RP 496-99. A crime scene analyst concluded that the blood-spatter and drip-pattern stains in the BMW showed that a person with blood on them (or an

item with wet blood on it) had been in the rear seat of the car. RP 409-10. Roberts testified that he did not know Beltran, had never been in Beltran's car, and never in his life hung out with Hispanic people. RP 646-47.

Roberts elicited evidence that Beltran was a Hispanic man who was associated with a gang and was known for committing house robberies. RP 575. Roberts theorized that everyone who lived in the victim's house was a drug dealer, and that Villa Senor's murder had been committed by Hispanic gang members. RP 650, 753, 756. Roberts testified that he went to Villa Senor's home to buy heroin and walked in through the already-kicked-in front door. RP 638-40. According to Roberts, the house was eerily silent as he walked through the dark upstairs and then down to the basement, where he saw a Hispanic man with a gun. RP 640-41, 654. Roberts claimed the man turned and shot him in the hand, and that Roberts heard multiple shots as he fled. RP 642-44.

E. ARGUMENT

1. THE STANDARD OF REVIEW FOR EVIDENCE-SUFFICIENCY CLAIMS IS THE SAME FOR BENCH TRIALS AND JURY TRIALS.

In its opinion affirming Roberts' conviction, the Court of Appeals highlighted what it perceived to be a conflict between the standard of review for sufficiency of the evidence as outlined in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), and *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992), versus the standard stated in *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014).

The Court of Appeals noted that *Jackson*, *Green*, and *Salinas* each require that *all* the evidence in the record be considered, in the light most favorable to the prosecution, to determine whether any rational factfinder could find the elements beyond a reasonable doubt. Slip op. at 10. But *Homan*, according to the Court of Appeals, "limits" appellate review of sufficiency claims in bench trials to a determination

of whether the court's written findings are supported by substantial evidence, and whether those findings — and only those findings — then support the bench's conclusions of law. Slip op. at 11.

The Court of Appeals believed these standards are inconsistent because *Jackson* sets forth an objective standard of whether any rational factfinder could find proof beyond a reasonable doubt, while *Homan*, according to the Court of Appeals, focused on the subjective result reached by the specific trial judge. Slip op. at 10-11 (citing *State v. Stewart*, 12 Wn. App. 2d 236, 246, 457 P.3d 1213 (2020) (Dwyer, J., concurring). Additionally, the Court of Appeals believed that *Homan* limits the evidence to be considered on review to that which was explicitly set forth in the trial judge's factual findings, even though *Jackson* is clear that the entirety of the evidence in the record is to be considered. *Id.* The Court of Appeals also believed that *Homan* limits the evidence that is to be viewed in the light most favorable to the State to those facts

found by the trial judge and supported by substantial evidence (or those facts that are unchallenged), rather than requiring *all* evidence be so favorably viewed. *Id.*

After discussing this perceived "conflict," the Court of Appeals analyzed and rejected Roberts' sufficiency claim under its interpretation of both supposed standards, "in the hopes of highlighting the need for resolution." Slip op. at 13.

The Court of Appeals correctly determined that sufficient evidence supports Roberts' conviction. However, the Court of Appeals was incorrect that *Homan* conflicts with *Jackson*. Review is unnecessary as there is no conflict.

Despite certain imprecise language in *Homan*, it is clear that the standard of review for a sufficiency claim is the same regardless of whether the conviction is by jury or by bench. *Homan* itself cited to *Salinas* and noted that it was required to "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable

doubt," and that all reasonable inferences were to be drawn in favor of the State. *Homan*, 181 Wn.2d at 105-06. Moreover, the defendants in both *Jackson* and *Salinas* were convicted in bench trials, and those cases do not distinguish between convictions by a jury and convictions by the trial court. *Jackson*, 443 U.S. at 313; *Salinas*, 119 Wn.2d at 201-02.

The Court of Appeals simply read *Homan* too expansively. *Homan* appropriately focused its sufficiency analysis on the written findings because the purpose of those findings is to facilitate efficient appellate review. It did not expressly *preclude* consideration of evidence not explicitly referred to in the court's written findings.

A judge is required to enter written findings of fact and conclusions of law following a bench trial. CrR 6.1(d); *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to facilitate appellate review. *State v. Head*, 136 Wn.2d 619, 621, 964 P.2d 1187 (1998). "Each element must be

addressed separately, setting out the factual basis for each conclusion of law." *Id.* at 623. The findings must state that an element has been met. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

Because detailed findings are required following a bench trial, *Homan* merely recognized that when a defendant raises a sufficiency claim, the reviewing court can look to those findings to easily dispose of the claim. It did not limit a sufficiency analysis to only the written findings.

Indeed, if the written findings fail to state an "ultimate" fact necessary to meet an element of the charged crime, but it is apparent from the record that the State met its burden of proof, remand for entry of proper findings is appropriate, rather than dismissal of the charges. *Alvarez*, 128 Wn.2d at 19; *see also State v. Avila*, 102 Wn. App. 882, 896, 10 P.3d 486, 493 (2000) (lack of findings requires remand for entry when the record contains facts supporting the missing findings).

In his petition for review, Roberts says that *Jackson* and *Homan* are consistent and describes the conflict discussed in the Court of Appeals' decision as "manufactured." Pet. for Rev. at 20. He correctly states that for both jury and bench trials a reviewing court must reverse if a rational trier of fact could not have found every essential element proven beyond a reasonable doubt. *Id.*

However, Roberts goes on to argue that *Homan* indeed limits a sufficiency analysis following a bench trial to the trial court's written findings: "the reviewing court must use the court's findings," and "the question is not what the court *could have found*." *Id.* (emphasis in original). According to Roberts, a reviewing court determines "whether, *given the court's findings of facts*, any rational trier of fact could have found every essential element proven beyond a reasonable doubt." *Id.* (emphasis added).

To the extent Roberts argues that credibility determinations cannot be reviewed on appeal and that the

factfinder resolves conflicting testimony and weighs the persuasiveness of the evidence, he is correct. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (reviewing courts will not reevaluate witness credibility, conflicting testimony, or the persuasiveness of the evidence). But Roberts appears to argue more. He claims that *Homan* precludes consideration of any evidence not specifically addressed by the trial court's written findings because "[t]his ensures appropriate deference to the trial court's role as factfinder in bench trials." Pet. at 21-22. According to Roberts:

> Only if any rational factfinder could find every essential element proven beyond a reasonable doubt, *based on the court's findings of fact*, then the evidence is sufficient. This properly credits the court's findings — *and absence of findings*.

Id. at 22 (emphasis added). But limiting the scope of review to only the evidence addressed in the court's written findings conflicts with *Jackson*'s requirement that *all* the evidence be considered.

Roberts cites nothing to support his argument that evidence not mentioned in the trial court's written findings cannot be considered on review of a sufficiency claim following a bench trial. In support of his argument that "the absence of findings is construed against the party with the burden," Roberts cites only to caselaw discussing findings of fact in suppression motions and in civil proceedings — not sufficiency of the evidence claims in criminal cases. Pet. for Rev. at 22 (citing *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997) and *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 222 P.3d 1217 (2009)).

Indeed, an individual trial judge might see no need to resolve a particular factual dispute in order to find the defendant guilty beyond a reasonable doubt and might simply leave such evidence out of the written findings altogether (or may inadvertently do so). But *Jackson* requires a reviewing court to consider *all* the evidence when determining evidentiary sufficiency and requires that evidence to be viewed in the light

most favorable to the State. 443 U.S. at 319. The *Jackson* standard exists to "give[] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

Just because an individual trial judge either inadvertently or intentionally does not address certain evidence in the written findings does not mean that the judge did not consider that evidence. And it does not mean that no reasonable factfinder, viewing the entire record in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt. As noted by the Court of Appeals, the *Jackson* standard is an objective one and asks whether any rational factfinder could find the elements beyond a reasonable doubt. It does not artificially limit appellate review to an assessment of an individual trial judge's subjective reasoning, just as the standard does not invade the subjective reasoning of individual jurors. Roberts' articulation of the standard of review for sufficiency of

the evidence following a bench trial improperly discounts properly admitted evidence and imports a subjective standard into a sufficiency review.

The Court of Appeals here read *Homan* too broadly. There is no conflict. The proper scope of review for sufficiency of the evidence claims is the same regardless of whether the conviction is by a judge or a jury. Review is unwarranted.

Regardless, because the Court of Appeals held that the evidence was sufficient to convict Roberts under either the *Jackson* standard or the standard it misperceived in *Homan*, this case is not appropriate for review. For all of the reasons argued by the State and outlined in the Court of Appeals' decision, if this Court accepts review of this issue, it should affirm the Court of Appeals' conclusion that sufficient evidence supports Roberts' conviction regardless of what standard is ultimately applied.

2. THE COURT OF APPEALS CORRECTLY DETERMINED THAT ROBERTS WAIVED ANY CLAIM ON APPEAL THAT THE TRIAL COURT WAS REQUIRED TO CONSIDER UNRAISED AFFIRMATIVE DEFENSES.

The Court of Appeals properly applied RAP 2.5(a) and refused to consider Roberts' claim, made for the first time on appeal, that a preponderance of the evidence established the statutory affirmative defense to felony murder. The decision below does not conflict with the constitution or established caselaw. Review of this issue is unwarranted.

RAP 2.5(a) generally precludes review of claims of error that the appellant did not raise at the trial level. To raise an error for the first time on appeal under RAP 2.5(a)(3), a defendant must demonstrate that the alleged error is "manifest" and truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To be "manifest," the alleged error must actually affect the defendant's rights at trial

— actual prejudice must be shown to allow for appellate review of new issues. *Kirkman*, 159 Wn.2d at 926-27.

Roberts attempts to characterize the issue as one of simple evidentiary insufficiency, since such claims are always addressable for the first time on appeal. But Roberts did not pursue the statutory defense to felony murder at trial — a defense he would have had to prove by a preponderance of the evidence. In fact, his chosen defense (that he did not participate in the crime) was contradictory to the evidence necessary to establish the affirmative defense (that he was a participant but had no reasonable grounds to believe that any other participant was armed with a deadly weapon or that any other participant intended to engage in conduct likely to result in death/serious injury).[2]

To warrant a sufficiency review relating to the statutory defense on appeal, Roberts had to *first* establish that the trial

[2] RCW 9A.32.030(c).

court had an obligation to consider an affirmative defense he never mentioned and did not rely on. Roberts' briefing on appeal made no attempt to explain why the trial court's failure to consider an unraised affirmative defense was manifest constitutional error. The Court of Appeals correctly pointed that out in its decision: "Roberts d[id] not address, let alone satisfy, RAP 2.5," nor did he "even allege that this was a manifest constitutional error." Slip op. at 9, n.3. And in his petition for review, Roberts still provides no argument that the trial court's failure to consider unraised affirmative defenses constitutes manifest constitutional error, doggedly insisting (without authority) that the issue is solely one of evidentiary sufficiency.

There was no manifest constitutional error. An affirmative defense imposes a burden of proof on the defendant, shaping the defense by introducing elements it must prove. *State v. Coristine*, 177 Wn.2d 370, 378, 300 P.3d 400 (2013). The decision to pursue an affirmative defense "may influence a

wide range of strategic decisions," including witnesses called, questions asked, and arguments. *Id.* There may be tension between an affirmative defense and the defendant's chosen defense. *Id.* Thus, it is well established that the Sixth Amendment places the strategic decision to offer an affirmative defense squarely into the hands of the defendant — not the prosecutor *and not the trial court*. *Coristine*, 177 Wn.2d at 378; *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013). The trial court did not commit constitutional error by not considering an unraised statutory defense to felony murder.

Moreover, any error would not be manifest. The trial court's consideration of unraised offenses deprives the State of the opportunity to develop evidence relevant to those defenses, through its own case or in cross-examination of defense witnesses. If the facts necessary to consider a claim are not in the record, the error cannot be "manifest." *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); *see also Kirkman*, 159 Wn.2d at 935 (if trial record is insufficient to determine the

merits of the constitutional claim, review is not warranted). The State had no opportunity to develop the record relating to the statutory defense to felony murder. The Court of Appeals had no basis upon which it could conclude that any error was manifest.

To the extent that Roberts asserts that an unraised affirmative defense should be part of an evidence-sufficiency challenge, that should be plainly rejected as well. As previously discussed, sufficiency review requires viewing all the evidence in the light most favorable to the State and most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. That means rejecting an interpretation of the evidence in which the affirmative defense was met.

Indeed, the Court of Appeals did consider — and reject — Roberts' claim that his trial counsel was ineffective for not raising the statutory defense to felony murder. The Court of Appeals concluded that trial counsel did not perform deficiently for multiple reasons, including that "the evidence presented at

trial did *not* establish the elements of this affirmative defense by a preponderance." Slip op. at 23 (emphasis added). The Court of Appeals explicitly concluded that viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that Roberts failed to prove the affirmative defense by a preponderance of the evidence.[3] *Id.* That conclusively establishes that the trial court did not commit manifest constitutional error when it did not *sua sponte* consider an unraised affirmative defense.

No "practical and identifiable consequences" resulted from the trial court's lack of consideration of the affirmative defense to felony murder. Roberts did not and cannot show that any error by the trial court was "manifest." "The policy behind RAP 2.5(a)(3) is simply this: Appellate courts will not waste

[3] Roberts also asks this Court to accept review of the Court of Appeals' rejection of his ineffective assistance of counsel claim relating to the same issue. But Roberts fails to establish the existence of a substantial question of constitutional law or any other basis for review under RAP 13.4(b). Review of that claim should also be denied.

their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits." *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). This Court's review of this issue is unwarranted.

If this Court accepts review of this issue and ultimately agrees with Roberts that issue was preserved, it should reject his claim that the trial court had an obligation to consider the unraised statutory defense to felony murder and conclude that the evidence was sufficient to convict Roberts regardless.

3. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT DETECTIVE WHEELER'S TESTIMONY ABOUT ROBERTS' LYRICS WAS RELEVANT, ADMISSIBLE, AND NOT RACE-BASED MISCONDUCT.

On appeal, Roberts argued that the trial court erroneously admitted testimony from Detective Wheeler explaining certain slang terms used by Roberts in a music video and written by Roberts in a notebook. Roberts argued that the State

improperly interjected issues of gangs and race in order to establish the relevancy of the evidence. The Court of Appeals properly affirmed the trial court's discretionary decision to admit the evidence and properly rejected Roberts' argument that introduction of this evidence constituted race-based prosecutorial misconduct. Roberts fails to establish a basis for review under RAP 13.4(b).

a. Roberts Interjected the Issue of Gang Involvement in This Crime.

As noted by the Court of Appeals' opinion, Roberts was the one to interject the issue of "Hispanic gang members" into the trial. Slip op. at 30-31. In his opening statement, Roberts argued that the presence of his blood in Beltran's car was not evidence that Roberts participated in the robbery because Beltran was Hispanic and Roberts, who is a Black man, would not have associated with him. Roberts then blamed the crime on a Hispanic gang. Specifically, he said:

> I asked the detectives in all … interviews whether they had any information that Hispanic criminal gangs included black African American people, and they all said, no, absolutely not.
>
> Mr. Roberts did not know Mr. Beltran, who is Hispanic. Mr. Roberts did not know [Villa Senor] except for the fact that he was a drug dealer. And so there is evidence in this case that the Mexican nationals in the case were members of the [Sureños] gang.

RP 78-79.

During cross-examination of Detective Wheeler, Roberts asked whether Beltran was a suspect in the murder, whether Beltran was Hispanic, whether Beltran was associated with a gang, and whether Beltran was known for committing "house robberies." RP 575. Wheeler responded in the affirmative to all four questions. *Id.*

During closing argument, Roberts argued that everyone in the victim's home was dealing drugs. RP 745, 751, 756. He said, "It's been stated during this trial that Mr. Beltran, who is Hispanic, was a known cartel gang member." RP 753. Roberts contended, "[T]he evidence does not show that Mr. Roberts was

an accomplice of anybody. And I think the evidence, if looked at carefully, will indicate there was one bad guy down there." *Id.* Roberts argued, "Beltran was and is still a suspect in this," and, "[I]t was either Detective Wheeler or the Tacoma detective that said, African-American individuals — [B]lack individuals do not hang out with Mexican gang members." RP 754; Slip op. at 31.

b. Testimony about the Music Video in Which Roberts Admitted Committing This Crime Was Highly Relevant and Did Not Include Any Reference to Race or Gangs.

Roberts posted a music video on social media referring to Washington's Most Wanted coverage of the crime and the fact that Roberts was sought for murder. Ex. 162; Ex. 163 p. 1; RP 530. During the video, Roberts himself raps: "Kick his door, stick 'em up. Now I got base rock." RP 530.

The Court of Appeals correctly concluded that the trial court did not err when it allowed Detective Wheeler to testify as to the meaning of the slang term "base rock," as well as the

words, “Kick his door, stick ‘em up. Now I got base rock” as referring to the act of robbing a drug dealer. Wheeler’s testimony about the music video included no reference to gangs. RP 526-31, 589. Roberts never suggested at trial that the video improperly invoked connotations of gangs or race or that it should be excluded on that basis.

A trial court’s ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Brockob*, 159 Wn.2d 311, 348, 150 P.3d 59 (2006). The trial court abuses its discretion if no reasonable person would take the view it adopted. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

A witness may testify as an expert using specialized knowledge based on their experience if the testimony will assist

the trier of fact. *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). Practical experience of police officers is sufficient to qualify a witness as an expert when their knowledge is beyond the understanding of the average person. *State v. Rodriguez*, 163 Wn. App. 215, 232, 259 P.3d 1145 (2011).

The Court of Appeals properly concluded that Detective Wheeler's testimony was relevant because Roberts' lyrics "describe[d] the alleged crime and appeared to be an admission of his participation." Slip op. at 28. There was only one term in the video that the judge needed to have explained — "base rock," a slang term for crack cocaine. RP 530. The State laid a proper foundation for Wheeler's interpretation because the term "base rock" was a matter beyond the understanding and common knowledge of a layperson. Wheeler based his testimony on his experience investigating drug crime. His

testimony was helpful to the trier of fact and not misleading.[4] The trial court did not err in allowing the evidence.

c. Detective Wheeler's Interpretation of a Single Sentence in Roberts' Notebook Was Properly Admitted Upon Sufficient Foundation and Was Relevant to Respond to Roberts' Theory That Hispanic Gang Members Committed the Murder.

A handwritten line from a notebook found in Roberts' apartment appeared to relate to this crime: "Need to get in touch wit my ese, I've been needin a lick." Ex. 168;[5] RP 547-48. This portion of the notebook was admitted without objection. RP 548.

Wheeler testified that "ese" is "Spanish slang roughly equivalent of saying "dude" or referring to a man. It's very

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[4] Roberts testified that *he knew* the term "base rock" means crack cocaine. RP 664-65. He conceded in his testimony that the detective had correctly understood the words in the video. RP 665.

[5] Although the exhibit is an entire page of writing, the State offered only three lines of text, this line (line 7) and two lines identifying Roberts' mother (lines 11-12) and only they were admitted. RP 547-49.

heavily used in Hispanic gang speech." RP 549. Wheeler also testified that he had heard the phrase "a lick" many times, "sometimes it means theft in general, but it typically means robbery." RP 549-50. Wheeler explained the term "lick" without any reference to gangs. The trial court overruled Roberts' objection as to foundation because Wheeler had spent years investigating narcotics and gang cases, had investigated many street-level crimes and interviewed many people, and had heard the term "ese" countless times, and the term "lick" many times. RP 548-49.

The Court of Appeals concluded that Wheeler's explanation of the terms "ese" and "lick" was relevant because the words appeared to relate to the charged crime. Slip op. at 31. Moreover, Wheeler's explanation of the term "ese" was properly admitted in response to Roberts' express assertion that he could not have had any connection to a person in a Hispanic gang (suspect Beltran) because he was a Black man. *Id.* Finally, the Court of Appeals concluded that Wheeler's years of

experience in narcotics and gang work provided a proper foundation for his interpretation of the words "ese," and "lick." Slip op. at 31.

Roberts argued on appeal and in his petition for review that the State's reliance on Detective Wheeler's "gang expertise" to interpret the word "ese" was irrelevant unless the State established that Roberts, as the author of the lyrics, was himself a gang member or that he understood the word as a gang member would. This argument should be easily rejected. Roberts did not need to be a gang member to understand or use the term "ese." Indeed, Roberts conceded during his testimony that *he knew* "ese" was a Spanish term. RP 647. Instead, he claimed that was not what was written in the notebook at all. RP 672. Recognizing the need to distance himself from anyone Hispanic, Roberts insisted the notebook said "use," which he claimed was a Samoan word.[6] RP 672.

[6] It was then the court's province in this bench trial to weigh the contradictory evidence and the credibility of the witnesses to

The Court of Appeals' conclusion as to the admissibility of the evidence was proper. Review is unwarranted.

d. An Objective Viewer Could Not View the Detective's Testimony as Race-Based Misconduct.

On appeal, Roberts argued for the first time that the prosecution relied on race-based stereotypes to establish the necessary connection to make Detective Wheeler's opinion relevant. "[T]he relevance of the testimony depend[s] on the unspoken assumption that Mr. Roberts, a young Black musician, understood gang references and used them in his rap lyrics." The Court of Appeals rejected this claim, determining that no objective observer could view the prosecutor's questions or comments — within the context of the trial as a whole — as an appeal to the judge's potential prejudice, bias, or stereotypes. Slip op. at 32-34.

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determine the weight of the evidence:
get in touch wit my 'Ese', 'I've been needin a lick

Roberts asks this Court to accept review of this issue, arguing that the Court of Appeals' opinion reflects a "profound misunderstanding of the required analysis of race-based prosecutorial misconduct." Pet. for Rev. at 48-49. But Roberts' disagreement with the Court of Appeals' conclusion does not mean the Court of Appeals failed to properly consider the issue or applied the wrong standard.

When a claim of alleged prosecutorial misconduct is based on racial bias, a heightened standard of review applies. *State v. Bagby*, 200 Wn.2d 777, 788, 522 P.3d 982 (2023). To prevail on this claim "the defendant must demonstrate that the prosecutor's conduct was both improper and prejudicial by showing that they *flagrantly or apparently intentionally* appealed to racial bias in a manner that undermined the defendant's credibility or the presumption of innocence." *Id.* at 790 (emphasis in original). If the defendant meets that burden, the conduct is considered per se prejudicial, and reversal is required. *Id.*

The standard applied is "whether an objective observer could view the prosecutor's questions and comments as an appeal to jurors' potential prejudice, bias, or stereotypes in a manner that undermined the defendant's credibility or the presumption of innocence." *Id.* at 793 (footnote omitted). An "objective observer" is one "who is aware of the history of race and ethnic discrimination in the United States and that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State." *Id.* at 793 n.7.

This Court has outlined a four-point framework for this analysis: "(1) the content and subject of the questions and comments, (2) the frequency of the remarks, (3) the apparent purpose of the statements, and (4) whether the comments were based on evidence or reasonable inferences in the record." *Id.* at 794 (citing *State v. Zamora*, 199 Wn.2d 698, 718-19, 512 P.3d 512 (2022)). The Court of Appeals properly applied this framework.

As to the content and subject of the questions and testimony, the prosecutor asked Detective Wheeler, based on his experience, what the words "ese" and "lick" meant — slang terms that had been used by Roberts. Slip op. at 33. Wheeler responded that "ese" is "Spanish slang roughly equivalent of saying 'dude' or referring to a man. It's very heavily used in Hispanic gang speech." RP 549. The State then asked Wheeler, based on his experience, what "needin a lick" meant." Detective Wheeler testified that he had heard the phrase "a lick" many times, "sometimes it means theft in general, but it typically means robbery." RP 549-50.

Second, as to frequency, Wheeler referred to "Hispanic gangs" just once and the phrase was not repeated by the prosecutor. Slip op. at 31.

Third, the apparent purpose for the State's elicitation of the testimony was because the lyrics in the notebook contradicted the defense theory and described the crime in a way that fit the State's presentation of the case. Slip op. at 34.

A core element of the defense theory was that because Roberts is a Black man he would not associate with members of a Hispanic gang, and he argued that Hispanic gang members committed the crime. RP 78-79, 575, 647, 753-54. But the language in the notebook suggested otherwise. These facts relating to race, ethnicity, and gangs were all elicited by the defense. *Id.* Fourth, the testimony was specifically tied to statements made by the defendant that were admitted into evidence. Slip op. at 34.

All four factors demonstrate that the testimony that Roberts claims was race-based misconduct specifically related to the crime and the defense that was raised. It was not an appeal to racial bias. The Court of Appeals did not err and did not misapply the legal standard. Review is unwarranted.

4. EVIDENCE ABOUT THE SPACE IN WHICH THE SHOOTING OCCURRED WAS PROPERLY ADMITTED AND ANY ERROR WAS INVITED BY ROBERTS.

The trial court admitted testimony regarding Detective Wheeler's investigation of how a man of similar stature as Roberts could be positioned in the area outside Villa Senor's bedroom door, be shot in the hand, but *not* have been the person who shot into Villa Senor's room. The detective did not draw any conclusions from the demonstration until Roberts elicited those opinions on cross-examination. RP 586.

The Court of Appeals correctly concluded that the admission of this demonstration was well within the trial court's discretion and that Roberts had invited any error regarding Detective Wheeler's opinions to be drawn from the evidence because Roberts himself elicited them. Slip op. at 37-39.

Roberts seeks this Court's review merely by stating baldly that the Court of Appeals' opinion "contradicts" this

Court's cases regarding reenactment evidence and misapplies the invited error doctrine. Roberts cites to no cases or presents any reasoned argument as to why this is so. He fails to establish that review of this issue is warranted under RAP 13.4(b).

Use of demonstrative evidence is encouraged and is admissible if the experiment was under substantially similar conditions as the event at issue. *State v. Finch*, 137 Wn.2d 792, 816, 975 P.2d 967 (1999). Determining whether the similarity is sufficient is a matter of trial court discretion. *Id.* If the similarity justifies admission, any lack of similarity goes to the weight of the evidence. *Id.* The evidence must "tend[s] to enlighten the jury and to enable them more intelligently to consider the issues presented." *Id.* The evidence should be excluded if it is more prejudicial than probative. *Id.* Demonstrative evidence need not exactly duplicate the events that are at issue. *Id.*

The demonstration here did not pretend to reenact the shooting of Villa Senor. The demonstration was conducted in the home where the shooting occurred, in the area outside the victim's bedroom door, using a detective the approximate stature of the defendant. RP 551. Detective Wheeler testified that it was to visualize the theory that a third person could be between two people having the gunfight. RP 552.

The trial court determined that the demonstration was relevant to "the size of the hallway outside the door for which the gunfight was."[7] RP 552. Roberts has not shown any unfair prejudice inherent in the demonstration. The model detective stood in a variety of positions in the hallway, from the threshold of the victim's bedroom, then in the hallway, and finally stood in the bathroom across the hallway; he held a rubber dummy gun in a variety of positions in one hand, the other hand, and

[7] The detective, when asked by Roberts his opinion of the position of the shooter on cross-examination, testified that the shooter could have been in the hallway or just inside the bathroom. RP 586.

both hands. RP 552-60. A photographer took pictures and some of those photos were admitted. Ex. 170-82. The photos are not graphic as the demonstration was performed and photographed over a year after the crime. RP 551.

The testimony describing the demonstration included no opinion or conclusion drawn from the demonstration. RP 552-60. The photographs showing the model in many different positions included no text or other indication of a conclusion. Ex. 170-82. If there was any error in admission of that testimony, it was harmless. On review of a bench trial, an appellate court will presume that the judge did not consider inadmissible evidence in rendering its verdict. *State v. Read*, 147 Wn.2d 238, 244-45, 53 P.3d 26 (2002). That presumption is reinforced here by the trial court's discussion of the demonstration in its findings. The court noted that the photographs were in support of a theory that the defendant was shot in the hand while holding a pistol; it found, "This is not conclusive." CP 101.

Roberts elicited Wheeler's opinions about the evidence on cross-examination. RP 584, 586. Because Roberts asked the detective to state his opinions — reading the opinions to the detective from the detective's report — he cannot complain on appeal about the testimony he elicited. A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). To determine whether the invited error doctrine is applicable to a case, courts consider whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. *Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

As the Court of Appeals properly found, the invited error bars his claim of error in the opinions that Roberts elicited. Roberts cites nothing to support his claim that the decision below conflicts with this Court's precedent. Review is unwarranted.

5. THIS COURT SHOULD NOT REVIEW UNTIMELY RAISED ISSUES THAT WERE NOT CONSIDERED BY THE COURT OF APPEALS.

The trial court included a point in Roberts' offender score for the fact that he was on community custody at the time of the murder. In his opening brief to the Court of Appeals, Roberts argued that inclusion of the point was improper because "he was on community custody for two void possession of controlled substances offenses, which also voided his community custody status." Brf. of App. at 82. Roberts argued that because his out-of-state convictions were not comparable to a valid Washington offense, his community custody status

pursuant to those convictions could not be considered. *Id.* at 84.

However, in his reply brief, Roberts argued for the first time that "only community custody imposed pursuant to the SRA, not pursuant to other [state's] sentencing schemes scores." Reply Brf. at 31. The State had no opportunity to respond to this new argument and the Court of Appeals' opinion did not address it.

Now, in his petition for review, Roberts asks this Court to "grant review to address the issue of first impression" of whether community custody status in Washington, pursuant to an out-of-state non-comparable offense, can increase an offender score. Pet. for Rev. at 51.

An appellate court does not err in failing to consider a basis for relief that the appellant did not timely raise. *See, e.g.*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding that issue raised in a reply brief is raised "too late to warrant consideration"). This Court reviews

decisions made by the Court of Appeals; it does not review the merits of issues the Court of Appeals did not reach. *E.g.*, *State v. Slert*, 181 Wn.2d 598, 609, 334 P.3d 1088 (2014) (remanding for Court of Appeals to consider issue it did not originally reach); *cf.* RAP 13.1 (addressing review "of decisions of the Court of Appeals"). This Court does not generally review issues raised for the first time in a petition for review. *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993).

This Court should refuse to consider the new issue of whether Washington community custody pursuant to an out-of-state conviction can increase an offender score because (1) it was untimely raised and (2) because resentencing is required anyway. *See* Sec. E.7, *below*. The trial court can address Roberts' newly raised claim at resentencing.

This Court should also deny review of the offender score issue that was decided by the Court of Appeals, because as outlined in the opinione, below, Roberts fails to establish a basis for review.

6. THE TRIAL COURT PROPERLY INCLUDED A POINT IN ROBERTS' OFFENDER SCORE BECAUSE HE COMMITTED MURDER WHILE ON COMMUNITY CUSTODY IN WASHINGTON FOR VALID TEXAS CONVICTIONS.

It was undisputed that Roberts was on community custody in Washington at the time of this offense. CP 43. His supervision had been transferred from Texas, where Roberts had been convicted of possession of controlled substances (cocaine and heroin). CP 171; Tex. Health & Safety Code §§ 481.102, 481.115(b).

a. *Blake* Did Not Invalidate Roberts' Community Custody Point.

In *State v. Blake*, this Court invalidated the former Washington drug possession statute because it imposed strict liability, holding that the lack of a *mens rea* element violated due process. 197 Wn.2d 170, 182-86, 481 P.3d 521 (2021). Even applying that analysis to the Texas law Roberts was convicted of violating, his convictions would be upheld because

the Texas statute includes a *mens rea* element requiring possession with knowledge or intent. Tex. Health & Safety Code § 481.115(b).

RCW 9.94A.525(19) provides that "[i]f the present conviction is for an offense committed while the offender was under community custody, add one point." Our appellate courts have held that a point should not be added where the offender was on community custody for a conviction for possession of a controlled substance that was invalidated by *Blake*, reasoning that because the prior conviction was unconstitutional, adding a point to the current crime amounted to additional punishment for the unconstitutional conviction. *State v. French*, 21 Wn. App. 2d 891, 893, 508 P.3d 1036 (Div. I, 2022); *State v. Rahnert*, 24 Wn. App. 2d 34, 518 P.3d 1054 (Div. II, 2002). *See also State v. Shannon*, No. 55816-5-II, 2022 WL 16945010 (Wash. Ct. App. Nov. 15, 2022) (unpublished, cited for its persuasive value only).

French treated the additional point as a "penalty imposed pursuant to an unconstitutional law." 21 Wn. App. 2d at 895. The court opined that the term of community custody is part of an offender's sentence, is punitive, and amounts to part of the penalty imposed by the sentencing court, so punishing an offender because he was on community custody perpetuates an unconstitutional conviction. *Id.* at 896. But that analysis does not apply here, where the Texas convictions that resulted in Roberts' supervision were for possession of controlled substances (cocaine and heroin) under a Texas statute that was not invalidated by *Blake*. CP 171; Tex. Health & Safety Code §§ 481.102, 481.115(b).

The Texas convictions are not included in Roberts' offender score because there was no valid comparable crime in Washington at the time of those convictions. *See State v. Markovich*, 19 Wn. App. 2d 157, 174, 492 P.3d 206 (2021). But they remain valid convictions and the resulting supervision

here in Washington remained in effect after the *Blake* decision. *See* CP 43-44.

A person who commits a crime while on supervision is more culpable than other offenders. The offender has been released from any confinement but still commits crime while subject to the control of the court and a corrections officer. "It is reasonable to conclude that a defendant who commits a crime while on community [custody] is more culpable than one who is not on community [custody] when the crime is committed." *State v. Miles*, 66 Wn. App. 365, 368, 832 P.2d 500 (1992). Re-offense while on probation shows that the offender cannot readily be deterred from committing additional crimes. In the interests of public safety, the penalty for such crimes should therefore be increased.

The reasoning behind imposing longer sentences for crimes committed while on community custody is similar to the logic behind the rapid-recidivism aggravator. RCW 9.94A.535(3)(t) provides that a defendant is more culpable if

"[t]he defendant committed the current offense shortly after being released from incarceration."); *State v. Butler*, 75 Wn. App. 47, 876 P.2d 481 (1994). Rapid recidivism "reflects a disdain for the law so flagrant as to render [the offender] particularly culpable in the commission of the current offense." *Butler*, 75 Wn. App. at 54; *see also State v. Saltz*, 137 Wn. App. 576, 154 P.3d 282 (2007) and *State v. Combs*, 156 Wn. App. 502, 506, 232 P.3d 1179 (2010) ("the gravamen of the offense is disdain for the law").

There is no logical basis to exclude a point for community supervision imposed for valid Texas convictions, under a statute that was not invalidated by *Blake*, directly or by application of its logic. The underlying convictions are constitutionally valid, although they cannot be included in Roberts' offender score, and the legally imposed community supervision was correctly included as an additional point because this crime was committed while under supervision. This Court should deny review.

7. CONSECUTIVE TIME FOR THE FIREARM ENHANCEMENT WAS REQUIRED AND THE COURT OF APPEALS PROPERLY REMANDED.

Roberts argues that the sentencing court had discretion to order his firearm enhancement term to run concurrently to his base sentence for murder. He further argues that the Court of Appeals' decision disagreeing and remanding his case to impose a sentence conforming to proper statutory bounds constitutes an "improper advisory opinion." Pet. for Rev. at 57-58. This is so, Roberts says, because the State did not ask for remand when it argued on appeal that consecutive time for the firearm enhancement was required.

Review would be improper. Roberts' assertion that the SRA permitted the trial court to impose his firearm enhancement term concurrently to his base murder sentence is defeated by this Court's recent decision in *State v. Kelly*, __ Wn.3d __, __ P.3d __, No. 102002-3 (consolidated w/102003-1), 2024 WL 5162058 (2024). And Roberts does not provide

any reasoned argument or authority to support his claim that "due process" authorizes concurrent sentences. His claim is unreviewable in the absence of any reasoned argument or persuasive authority to support it. *State v. Sublett*, 156 Wn. App. 160, 186, 231 P.3d 231 (2010), *aff'd on other grounds,* 176 Wn.2d 58, 292 P.3d 715 (2012). ***See also*** *State v. Gossage*, 165 Wn.2d 1, 9, 195 P.3d 525 (2008) ("Absent argument and authority, review is not proper."). Moreover, "[p]arties ... raising constitutional issues must present considered arguments to this court." *State v. Johnson,* 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). "'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *Id.* (quoting *In re Rosier,* 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

Roberts also claims that the Court of Appeals improperly reached this issue, alleging the State is not an "aggrieved party" because it did not advocate on appeal for remand despite the sentencing error. This argument should be rejected.

Sentences that are outside the authority of the trial court are "illegal" or "invalid." *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985). Courts have the duty and power to correct an erroneous sentence upon its discovery. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 331, 28 P.3d 709 (2001). This is true "even where the parties not only failed to object but agreed with the sentencing judge." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The Court of Appeals properly remanded the matter upon concluding that the sentencing court acted outside of its discretion when imposing a concurrent firearm enhancement term.[8] Review is unwarranted.

[8] Resentencing is appropriate on remand. The court imposed an exceptionally lenient sentence totaling 384 months. CP 2, 4. Had the court realized that it was required to impose consecutive time for the firearm enhancement, it might have further reduced the base sentence for murder.

F. CONCLUSION

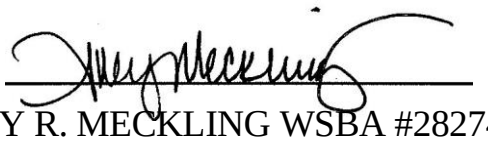
For all of the foregoing reasons, this Court should deny the petition for review.

I certify this document contains 9,139 words, excluding those portions exempt under RAP 18.17.

DATED this 21st day of January, 2025.

Respectfully submitted,

LEESA MANION (she/her)
King County Prosecuting Attorney

By: 
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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICAL DARION ROBERTS, Defendant.	)	No. 18-1-06217-5 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on for trial from October 11, 2021 -October 18, 2021 before the undersigned judge in the above-entitled court,; the State of Washington having been represented by Senior Deputy Prosecuting Attorney Mary H. Barbosa and Deputy Prosecuting Attorney David Bannick, the defendant, Mr. Roberts, appearing in person and having been represented by his attorney, John Henry Browne. The court heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

The court finds the following facts beyond a reasonable doubt:

I. In November 2019 Ricardo Villaseñor was living at a residence on 1st Avenue SW in White Center, unincorporated King County. There was an apartment above that was rented by Abraham Madrigal and Anna Lugo Rivera. The basement apartment had a separate entrance from the upstairs apartment. There is an internal staircase leading from the basement to the upstairs. Occasionally Mr. Villaseñor would go upstairs to use the kitchen.

II. On the evening of November 19, 2018 visiting Mr. Villaseño was Jennifer Bolanos. Ms. Bolanos came to the residence with a take-away meal and, upon arrival, joined

Ronald Kessler
Judge *pro tempore*
King County Superior Court

Mr. Villaseñor on the bed of his basement apartment. No one else was in the residence.

III. A short time after her arrival Ms. Bolanos heard someone break in the front door of the upstairs apartment, and heard what appeared from the sound to be more than one person running from room to room. She then heard the someone kick the door to the internal staircase, the door slammed, one or more people ran downstairs. She heard kicking at the door to Mr. Villaseñor's bedroom.

IV. Mr. Villaseñor grabbed a pistol, locked the bedroom door, another kick to the door, there was an exchange of gunfire, Mr. Villaseñor fell on the bed shot, Ms. Bolanos hid in the bedroom closet and called 911, remaining there until the police arrived when she exited the apartment. Ms. Bolanos had heard at least two people who had broken in.

V. When the police were satisfied that the home was cleared they entered. Deputy Sheriff Broderson discovered Mr. Villaseñor who was unresponsive. He was moved off the bed and, after futile CPR, declared dead. She observed numerous gunshot wounds and gunshot holes in the bedroom and the bathroom.

VI. Other sheriffs deputies and detectives observed bullet holes in the door to the bedroom in both directions, drops of blood on the front porch on the concrete steps of the entrance, blood drops on the street, blood on the wall and a movie screen in the apartment living area.

VII. After speaking with Abraham Madrigal and Anno Lugo Rivera, the tenants of the upstairs apartment, police found $83,530 in currency. Later Mr. Madrigal reported that a gun case that had been in the upstairs apartment had been stolen.

VIII. Later, Detective Benjamin Wheeler received an anonymous tip that Sebastian Beltran might have been involved. Police discovered that his car was in a private tow lot. An employee of the tow lot, Sara Barnes, reported that Mr. Beltran had come to the lot to recover the car, didn't have enough money to pay the towing fees, with permission

Ronald Kessler
Judge *pro tempore*
King County Superior Court

went to the car to recover belongings. She did not observe him take anything away from the car.

IX. Detective Wheeler and others went to the tow lot, staked it out, observed Mr. Beltran arrive with Melissa Stoughton in a Prius. The police were aware of a no contact order prohibiting Mr. Beltran from having contact with Ms. Stoughton and arrested him. Pursuant to a search warrant they seized the car from the tow lot, observing blood in the passenger area and bullet casings. They also seized the Prius.

X. Blood samples were taken from the apartment and Mr. Beltran's vehicle. Credible witnesses testified that some of the blood samples matched Mical Darion Roberts. These included blood smears on a movie screen in the bedroom, on the wall next to a light switch, on the sidewalk in the front of the house and in the back seat of Beltran's vehicle.

XI. The police prepared and released to the media, via Washington's Most Wanted, a report seeking information on the whereabouts of Mr. Roberts. The information released to the media stated that Mr. Roberts was wanted for murder 1°, and contained some details of the homicide including that the door had been kicked in.While there was testimony that the detail that the door had been kicked in was not in the press release this has been shown to be false.

XII. Researching social media, police discovered a video in which the defendant was pictured rapping, acknowledging that he knew he was wanted, and mentioned "kick his door stick him up now I got base rock."

XIII. Defendant was arrested on March 1, 2019. During routine arrest and booking questions he stated that he had a gunshot wound to his left hand. Detective Wheeler oberved an entry and exit wound on Mr. Roberts' hand. A year later the police, using a model of approximately defendant's size, photographed him in positions at the victim's door, theorizing that he was shot in the hand while holding a pistol. This is not conclusive.

Ronald Kessler
Judge *pro tempore*
King County Superior Court

XIV. Detective Wheeler discovered that the residence where the shooting occurred had been the subject of an investigation by the Tacoma Police Department, who had posted a video camera outside. Det. Wheeler observed the video taken that night which was of poor quality. The video itself was not offered into evidence, but Wheeler testified that he was able to observe two people leaving the area immediately after the shooting.

XV. Twenty-three cartridge casings were found in and outside of the bedroom where Mr. Villaseñor died. Analysis done by forensic scientist Brian Smelser established that the casings were from two different firearms, some of which matched the weapon that was recovered from Mr. Villaseñor's bedroom.

XVI. Det. John Hawkins searched the Beltran vehicle and found, *inter alia*, the gun box that had been stolen from the apartment; this was established by Mr. Madrigal. Also seized was a shell casing in the trunke. Forensic scientist and crime scene analyst Kim Duddy processed the vehicle in question, found bloodstains in various places in the car, mostly on the passenger side and the rear seat area.

XVII. Forensic scientist and DNA analyst Amy Jagmin compared the various blood samples. The blood from the porch, from outside the victim's apartment, from the movie screen in the apartment, from the wall by the lightswitch and from the rear passenger seat of the vehicle all matched Mical Darion Roberts.

XVIII. A medical examiner testified. Mr. Villaseñor died of his gunshot wounds.

XIX. Mr. Roberts testified that he came to the residence on 1st Avenue SW in order to buy heroin from Mr. Villaseñor. He noticed the upstairs front door open which was unusual since he previously used the outside stairs. He walked down the stairs noting that it was eerily quiet. He did not hear shuffling, slamming, kicking, running nor did he see anyone upstairs. He called out "Ricky" and descended the staircase. As he turned into the living area he saw a Hispanic person standing by the door holding what appeared to be a gun.He testified that he raised his hands, heard a loud noise that he assumed was a gunshot, he realized he had been shot, he stumbled around the

Ronald Kessler
Judge *pro tempore*
King County Superior Court

apartment for moment, then fled up the stairs and out. As he was fleeing he heard many gunshots. He left the apartment, ran into a trash can, recovered and left on foot.He knew he had a warrant for his arrest on an unrelated matter and he chose to avoid being arrested on that warrant. He ran to a location away from the apartment, called for a ride and was picked up. At some point he discovered that there was publicity naming him a suspect in the murder of Mr. Villaseñor. He composed a rap song which he posted on social media stating that door was kicked in and stick him up. He testified that the video was mockery, a satire of what the police and media said happened. He testified that he does not know that "stick him up" means armed assault. This evidence was not credible.

XX. The evidence of the defendant's blood in the apartment and defendant's blood in a car associated with Beltran, and the fact that a car associated with Beltran contained the fruits of the burglary establish that Mr. Roberts was one of at least two people who entered the building on 1st Avenue SW by kicking in the upstairs front door, kicking at the door in which Mr. Villaseñor was present. Viewing the blood on the screen and by the light switch, ex. 49-51, the court is not persuaded that the blood in the car was transferred by someone other than Mr. Roberts having picked it up by inadvertently touching Mr. Roberts' blood on the screen or the wall by the light switch in the deceased's living room. While one could argue that another person brushed against the smear on the screen and wall which resulted in the appearance of the blood in the photographs and then deposited it on the rear seat area of the car, the court does not find that to be pursuasive. Mr. Roberts entered the building intending to steal. He or another fired through the bedroom door, killing Mr. Villaseñor.Whether or not this was a drug house doesn't change these facts that I find are true beyond a reasonable doubt. He is thus guilty of felony murder.

XXI. The court finds that the state has not proved beyond a reasonable doubt that Mr. Roberts wa the shooter. The state has not proved beyond a reasonable doubt that Mr. Roberts knew that the other person was armed until the shooting began.

Ronald Kessler
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King County Superior Court

And having made those Findings of Fact, the Court also now enters the following:

CONCLUSIONS OF LAW

I. The following elements of the crime charged have been proven by the State beyond a reasonable doubt:

a. On November 19, 2018 Mr. Roberts committed burglary in the first degree;

b. Mr. Roberts or an accomplice caused the death of Ricardo Villasenor in the course of, in furtherance of, or in immediate flight from such crime;

c. Ricardo Villasenor was not a participant in the crime of burglary in the first degree;

d. These acts occurred in the State of Washington.

II. Mr. Roberts is guilty of the crime of Murder in The First Degree (Felony Murder) as charged.

a. While the State did not prove beyond a reasonable doubt that Mr. Roberts was the shooter or that he knew that the other person was armed before the shooting began, Mr. Roberts is guilty of Murder in the First Degree, predicated on Burglary in the First Degree, as an accomplice.

b. RCW 9A.08.020 provides that a person is guilty of a crime if he is an accomplice of the person that committed the crime. A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it.

c. An accomplice does not have to have knowledge of each element of a crime to be convicted. General knowledge by an accomplice that a principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. However, the Supreme Court of Washington has held that an accomplice need not have knowledge of each element of the principal's crime to be convicted

Ronald Kessler
Judge *pro tempore*
King County Superior Court

under RCW 9A.08.020. General knowledge of "the crime" is sufficient. *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000).

d. An accomplice who agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality. In other words, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault and need not have known that the principal was going to use deadly force or that the principal was armed." *State v. Davis*, 101 Wn.2d 654 (1984), *Pers. Restraint of Sarausad*, 109 Wn. App. 824 (2001)

e. This case is analogous to *State v. McChristian,* 158 Wn. App. 392 (2010). The court held that the State was not required to prove that McChristian had knowledge that the principal intended to assault the victim with a deadly weapon, *id*. Instead, the State needed to prove only that McChristian knew that the principal intended to commit an assault generally. By facilitating the assault on Williams, McChristian ran the risk that an accomplice would elevate the assault to a first-degree offense.

III. Mr. Roberts was armed with a firearm at the time of the commission of the murder.

a. RCW 9.94A.533(3) provides a sentencing enhancement if an offender or an accomplice was armed with a firearm at the time of the commission of the crime. This is strict liability on an accomplice, supplanting *State v. McKim*, 98 Wn.2d 111 (1982).

b. Either Mr. Roberts or another participant was armed with a firearm at the time of the offense.

c. While there is insufficient evidence to prove beyond a reasonable doubt that Mr. Roberts was himself armed with a firearm at the time of the crime, he is deemed to have been armed at the time of the offense because he was an accomplice to the crime.

IV. Judgment should be entered in accordance with Conclusions of Law I, II and III.

Ronald Kessler
Judge *pro tempore*
King County Superior Court

In addition to these written findings and conclusions, the Court hereby incorporates its oral findings and conclusions as reflected in the record.

DONE INCHAMBERS this 11th day of July, 2021.

RONALD KESSLER,
Judge *pro tempore*

Ronald Kessler
Judge *pro tempore*
King County Superior Court

KING COUNTY PROSECUTING ATTORNEYS OFFICE, CRIMINAL/APPELLATE UNIT

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Appellate Court Case Number:	103,546-2
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