IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DENNIS M. BAUER,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 86608-7-I
Clallam County Superior Court No. 19-1-00032-05

STATE'S PETITION FOR REVIEW

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SERVICE	Devon Knowles Washington Appellate Project 1511 Third Avenue, Suite 610 Seattle, Washington 98101 devon@washapp.org wapofficemail@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 10, 2025, Port Angeles, WA Jesse Espinoza **Original e-filed at the Supreme Court; Copy to counsel listed at left.**

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I. IDENTITY OF RESPONDENT

The State of Washington asks this Court to accept review of the Court of Appeals, Division I, decision terminating review designated in section II of this petition.

II. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals decision in *State v. Bauer*, No. 86608-7-I (Dec. 12, 2024), a copy of which is attached as Appendix A and cited herein as "Slip Op." The State's timely filed motion for reconsideration filed on Jan. 6, 2025, was denied on Feb. 6, 2025. A copy of the order denying reconsideration appears in Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals held that the trial court improperly allowed overly extensive evidence through Alexandrea Earley, to rebut Bauer's testimony he would never shoot a person, because Earley's testimony portrayed Bauer as "muscle" for a drug dealer and described how he

organized a meeting with another drug user who was behind on a debt.

The issue presented is whether the Court of Appeals decision was based upon an inaccurate understanding of the facts and whether the trial court properly allowed evidence proving Bauer shot at another person to rebut Bauer's testimony that he would never shoot at another person under any circumstances?

2. The Court of Appeals held Bauer unequivocally requested a lawyer during his interview, yet detectives continued questioning Bauer making his interview inadmissible.

The issue presented is whether Bauer's interview was admissible at trial because his statement, "I would rather speak with a lawyer, I think," understood by Agent Halla as a question of what to do, was an equivocal request for a lawyer?

3. The Court of Appeals held the admission of Bauer's interview at trial was not harmless because Bauer's inconsistencies before the jury stemmed from his inadmissible interview.

    The issue presented is whether the admission of Bauer's interview at trial was harmless because Bauer's inconsistencies also stemmed from admissible jail phone calls in which Bauer suggested the evidence showed that he was working the night of the shooting?

4. The Court of Appeals held that cumulative error denied Bauer a fair trial.

    The issue presented is whether Bauer is not entitled to a new trial on the firearm charges because Bauer never met his burden to show how cumulative error affected the verdicts on the firearm charges for which there was overwhelming evidence of guilt?

5. The issue presented is whether the Court of Appeals decision on cumulative error should be reviewed because

the Court of Appeals multiple decisions finding evidence to be erroneously admitted rested upon a mistaken understanding of the facts and did not take the State's argument on constitutional harmless error into account?

6. The Court of Appeals held that it could not review the State's cross-appeal challenging the trial court's evidentiary ruling excluding Ryan Ward's recorded statement because the State, having prevailed at trial, was not an aggrieved party under RAP 3.1, and evidentiary rulings do not fall within the criteria of RAP 2.2(b).

The issue presented is whether this Court should review the Court of Appeals decision because it conflicts with this Court's decision in *State v. Bergstrom*[1] as to what constitutes an aggrieved party and *State v. Brown*[2] regarding what issues the State may raise on appeal and the decision conflicts with RAP 2.4(a)?

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[1] 199 Wn.2d 23, 34 n.10, 502 P.3d 837 (2022).
[2] 132 Wn.2d 529, 539–41, 940 P.2d 546 (1997)

IV. STATEMENT OF THE CASE

Early in the morning the day after Christmas, 2018, there were six people at 52 Bear Meadows Rd. near Port Angeles. RP 1206, 1211–12, 4331–32. Darrell Iverson and his son Jordan, and Jordan's girlfriend, Tiffany May lived there. Slip op. at 2. Kallie LeTellier, Ryan Ward, and the defendant, Dennis Bauer were visitors. *Id.*

The three residents were found dead, riddled with bullets, in the driveway and in a storage shed. RP 2221–1225, 1228–29, 1238, 1243–45, 4336–38, 4341, 4343. Prior to leaving, the visitors spent about 45 minutes collecting firearms from the residence. RP 4342–43, 4346, 4351.

Bauer's statement he would not use a firearm to shoot someone

During the trial, Bauer testified that he would never shoot someone, regardless of the circumstances. RP 4479–80; Slip op. at 8. The State presented rebuttal testimony, through Alexandrea Earley, that Bauer shot at Gabe Drum a few weeks earlier. RP 4662, 4665, 4670–4678.

Earley testified Ward requested that she set up a meeting with Drum because Drum owed Darrell Iverson money. RP 4670–71. Then Bauer drove Earley and Ward to Deer Park Cinema where Earley got into the driver's seat and Ward and Bauer got into the back where they covered themselves with a blanket. RP 4671–72. Earley drove to a rest stop nearby and Drum came over and got into the van. RP 4672. When Drum noticed Bauer and Ward, he got out and ran and Bauer shot at him. RP 4673.

Cross examination

On cross examination (RP 4679), defense counsel elicited from Earley that she told law enforcement Iverson contacted Ward to go find Drum. RP 4682. Earley believed Iverson wanted Ward to find Drum in order to talk. RP 4682.

Defense counsel elicited from Earley that she told law enforcement that Ward was an enforcer (RP 4682–83) and that Ward enforced drug debts for Iverson (RP 4683).

Then defense counsel repeatedly referred to Ward again as Darrell Iverson's enforcer and elicited testimony from Earley that Ward was "hired muscle" who takes care of debts which could involve violence, and that Ward asked Earley to set up the meeting with Drum because he owed money to Iverson. RP 4683–84, RP 4689, RP 4690–91.

Bauer was convicted of three counts of aggravated murder in the first degree. CP 527–30. Bauer was also convicted of six counts of possessing stolen firearms, and seven counts of unlawful possession of firearms in the first degree alleged to have occurred about a month after the murders. *Id.*

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V. ARGUMENT

1. The Court of Appeals decision, resting upon factual inaccuracy, conflicts with this Court's decision in *State v. Warren*[3] permitting a prior conviction to rebut the defendant's claim that he was not the type of person to molest a child.

The Court of Appeals decision declared that far more evidence through Alexandrea Earley's testimony was admitted than was appropriate to rebut Bauer's repeated testimony that he would never shoot anyone. Slip op. at 8. The evidence the Court references included the following:

> Ms. Earley's testimony "detailed Bauer's role as the "muscle" for a drug dealer and described how he organized a meeting with another drug user who was behind on a debt, lay in wait, and shot at him."

Slip op. at 8–9.

The Court of Appeals stated, "Instead of simply evidencing Bauer's willingness to shoot, the testimony created an image of Bauer as a hardened criminal, fully entrenched in the drug trade." Slip op. at 9.

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[3] 165 Wn.2d 17, 35, 195 P.3d 940 (2008).

The record shows that the testimony regarding "hired muscle" for Darrell Iverson was elicited directly *by defense counsel* on cross examination, not the prosecution. *See* RP 4683–4. Furthermore, the testimony was that *Ryan Ward was the hired muscle* and Ryan Ward collected debts for Darrell Iverson, *not Bauer*. *Id.*

Additionally, testimony on both direct and cross examination shows that Earley testified that it was also Ryan Ward, not Bauer, who initiated organizing the meeting by having Earley contact Gabe Drum. *See* RP 4690–91.

Thus, the Court of Appeals' decision mistakenly attributed facts elicited by the defense on cross examination regarding hired muscle and enforcer to the prosecution. Further, those facts pertained to *Ryan Ward* and not Bauer. If such facts erroneously exceeded what was appropriate, the error was invited by the defense, and it cannot serve as a reason to find error on the part of the trial court or the State. *See State v. Summers*, 107 Wn. App. 373, 381–82, 28 P.3d 780 (2001)

(citing *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)).

In *State v. Warren*, the Washington Supreme Court stated the trial court was within its discretion to admit Warren's prior conviction for child molestation to rebut Warren's testimony suggesting he was not the type of person who would sexually abuse a child. *Warren*, 165 Wn.2d 17, 35, 195 P.3d 940 (2008); *see also State v. Warren*, 134 Wn. App. 44, 64, 138 P.3d 1081 (2006). The prior conviction carried the full force of a finding of guilt beyond a reasonable doubt.

Here, the Court of Appeals was concerned about what amount of evidence the State could introduce to rebut Bauer's claim he would never shoot at anyone. *See* Slip op. at 9.

However, the State's rebuttal evidence, lacking a conviction such as in *Warren*, could not reach the level of a conviction carrying the weight of a finding of guilt beyond a reasonable doubt. The State had to prove the incident and

provide corroborating evidence as Earley's credibility was at issue.

The Court of Appeals opinion finding the trial court erred by allowing overly extensive testimony from Earley because it painted Bauer as hired muscle was based upon a mistaken understanding of the facts. Further, the decision, conflicting with *Warren* which allows evidence of a prior conviction to rebut false impressions, severely limits the State's ability to rebut Bauer's testimony on an issue that goes to the heart of the case: whether Bauer would use a firearm to shoot a person. RAP 13.4(b)(1).

Therefore, the State respectfully requests this Court to review the Court of Appeals decision on this issue.

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2. Court of Appeals decision that Bauer made an unequivocal request for a lawyer should be reviewed because it conflicts with the U.S. Supreme Court's decision in *State v. Davis,*[4] the Washington Supreme Court's decision in *State v. Radcliffe,*[5] and the Court of Appeals, Division 2, decision in *State v. Gasteazoro-Paniagua*.[6]

The Court of Appeals held that Bauer's statement, "I'd much rather speak to a lawyer I think" was rendered unequivocal by his initial refusal to sign a waiver of rights and his explanation "noting that he found that people who start talking usually end up in trouble." Slip op. at 23–24.

The findings of fact by the trial court include the following (Supp. CP 587–90):

> 9. Waterhouse then stated, "Not anything else. This is just so we can talk. So your rights, your constitutional rights, they never go away. So if you get to a point where you're

[4] 512 U.S. 452, 461–62, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362 (1994).
[5] 164 Wn.2d 900, 906–08, 194 P.3d 250 (2008).
[6] 173 Wn. App. 751, 760, 294 P.3d 857 (2013).

uncomfortable, you can go hey. Don't want to answer that, done."

10. The defendant stated, "I've found that usually people that start talking end up in kind of trouble, they don't even know what they're getting into so I'd much rather speak to a lawyer I think."

The detectives then sought to clarify and Bauer stated, "Um." Then the detectives explained his rights further and Bauer stated, "Okay, I guess. I don't, I don't know what to do, man." RP 280.

Halla testified that he understood Bauer's statement of "I'd much rather speak to a lawyer, I think" as posing a question of what to do and so the officers sought to clarify. RP 282–83.

Bauer's request for a lawyer

"[L]aw enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation." *Davis v. U.S.*, 512 U.S. 452, 454, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362

(1994) (citing *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)); U.S. Const. amend. V.

A request for an attorney must be unequivocal, if not then officers may continue questioning. *Davis v. U.S.*, 512 U.S. 452, 461–62, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362 (1994). "*Davis* is the law under the federal constitution." *State v. Radcliffe*, 164 Wn.2d 900, 907, 194 P.3d 250 (2008) (citing *Davis*, 512 U.S. 452, 114 S.Ct. 2350).

"To be unequivocal, the defendant 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, 756, 294 P.3d 857 (2013) (quoting *State v. Nysta*, 168 Wn. App. 30, 41, 275 P.3d 1162 (2012)). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not

require the cessation of questioning." *Davis*, 512 U.S. at 459 (citation omitted) (emphasis added).

Here, the officers ended the interview when Bauer stated, "I need to talk to a lawyer." RP 282. Agent Halla was asked what the difference was between that statement and the first one. RP 282. Agent Halla understood Bauer's words "I'd much rather talk to a lawyer, I think" "*as a question of what to do*." RP 282. That Bauer expressed it like a question is evidenced by the follow up and Bauer's statements that he did not know what to do and explains why the detectives tried to clarify. RP 280, 283; *See Davis*, 512 U.S. at 461 (noting that it may be good practice to seek clarification in the face of uncertain requests).

The *Bauer* Court's decision disregards Halla's testimony. Slip op. at 24; *See State v. Carter*, 74 Wn. App. 320, 324 n. 2, 875 P.2d 1 (1994) (noting the appellate court's duty to affirm the trial court upon any ground supported by the record) (citations omitted).

Further, "I think" is far closer to "I guess" which has been held to be equivocal and not an expression leaving no doubt, only one meaning, or finality. *Gasteazoro-Paniagua*, 173 Wn. App. at 756. "'[M]aybe [I] should contact an attorney'" is clearly equivocal and not an unequivocal request. *Radcliffe*, 164 Wn.2d at 907–08 (citing *Davis*, 512 U.S. at 455).

This Court should accept review the Court of Appeals decision because it is inconsistent with *Davis v. U.S.*, *State v. Radcliffe*, and *State v. Gasteazoro-Paniagua* and involves a significant question of constitutional law. RAP 13.4(b)(1), (2), (3).

Constitutional harmless error

Bauer told law enforcement during the interview that he was working the night of the shooting, and he consistently denied being present at the shootings. Slip op. at 25; Ex. 167.

The *Bauer* Court stated that Bauer's statement he was working the night of the shooting and his consistent denial he was present contradicted his defense of mere presence. Slip op.

at 25. The *Bauer* Court stated, "At no point elsewhere in the trial did Bauer assert that he was not at the Iverson property the night of the shooting." *Id.*

The *Bauer* Court concluded that the admission of Bauer's interview was not harmless in this case in which the credibility of witnesses was central because "*Bauer's inconsistencies before the jury stemmed from inadmissible testimony*." Slip op. at 26 (emphasis added).

This is inaccurate because Bauer repeatedly brought up the claim that he was at work during the shootings in his jail calls:

> I got a paycheck saying I was working that day, but my lawyer says (Imitating woman's voice) but you already told me you were there?
>
> I said yes, but the evidence shows that I was not. That's what I told you. That's not what I told any . . . body else.
>
> If it shows that I was at work, you need to bring that evidence to light. So that the jury can see it and decide for themselves whether I was there or at work. . . .
>
> Well, I guess when I go before the jury, I won't say I wasn't there, I guess.

RP 3157–59, Ex. 153, June 3, 2019 (summarized excerpts in

phone call with Chelsea).

> And the fact that there's two fucking drug addicts, drug addicts are the only ones that even say anything about me being there . . . .
>
> Plus the fact that I was on the clock. I'm, . . . clocked in and paid for the time . . . that I'm supposed to have been out there . . . killing these . . . .
>
> Because there's proof that I was at work.

RP 3163, Ex. 159, July 5, 2019 (to Phyllis Smith).

> you were working Xmas night right, because if you were, then I was, see;

RP 3160–62, Ex. 157, July 2, 2019 (to son Jared Bauer).

Bauer's son Jared testified he used his father's clock in number and worked the night of the murders *as Dennis Bauer* and his dad was not at Safeway on the night of the murders. RP 2422, 2426, 2440–41.

These jail calls and Jared's testimony shows Bauer's inconsistencies before the jury did not stem only from his interview with detectives. Thus, the Court of Appeals decision that the State could not prove constitutional harmless error

involves a significant question of constitutional law because the decision rested upon an incomplete view of the record. RAP 13.4(b)(3).

Therefore, the State seeks review of this issue.

3. The Court of Appeals decision conflicts the decision in *In re Cross*[7] requiring a defendant to establish prejudice from cumulative error and significant issues of constitutional law are raised as to whether a retrial is required on all counts or only counts in which prejudice has been established.

The Court of Appeals ordered a new trial because the cumulative effect of the errors denied Bauer a fair trial. Slip op. at 28–29.

"The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless." *In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192

[7] 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)

Wn.2d 1, 427 P.3d 621 (2018), (citing *In re Det. of Coe*, 175 Wn.2d 482, 515, 286 P.3d 29 (2012)).

Under *In re Cross*, the "petitioner bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial." *Id.* (citing *United States v. Solorio*, 669 F.3d 943, 956 (9th Cir.2012)).

"There is no prejudicial error under the cumulative error rule if the evidence is overwhelming against a defendant." *Id.* at 691 (citing *State v. Cofield*, 288 Kan. 367, 203 P.3d 1261 (2009)).

Here, in addition to the murder convictions, Bauer was also convicted of six counts of Possessing a Stolen Firearm and seven counts of Unlawful Possession of a Firearm, all of which occurred about a month after the murders. Supp. CP 527–30.

Bauer did not advance any argument that cumulative error had any impact at all upon the firearm charges. Additionally, the *Bauer* Court's opinion is silent on whether the evidence it deemed inadmissible had any effect upon the firearm

convictions.

Furthermore, there was overwhelming evidence as to the firearm charges. The firearms were found a month after the murders during a search of Bauer's cabin and shop he had control over on 2591 Lower Elwha Rd. (RP 2478, (.25 Brescia), RP 2479 (9 mm SCCY), RP 2480–81 (.44 pistol)), RP 3212, 3225, 3269–78 (30-30 Winchester ex. 788, Spandau ex. 789, .22 Rossi pump action ex. 790, Stevens ex. 125; *see also* CP 94–106 (jury instructions for counts 4–16 designating each firearm).

Moreover, Bauer testified that the firearms were in fact taken from the victims' home (RP 4342–43; 4351–52) and he helped carry them (RP 4407), but that he felt he didn't have a choice in keeping them on his property although he could have left his own compound. RP 4412–13. Bauer admitted that the firearms were in his shop and in his cabin. RP 4410. Bauer, in a jail phone call on Mar. 18, 2019, suggested that his son should be able to get the guns. RP 3150–52, Ex. 138 (reference CP 483).

Thus, there was overwhelming evidence of guilt based

upon law enforcement finding the firearms in Bauer's cabin and shop and Bauer's admissions.

The Bauer Court's decision conflicts with this Court's decision in *In re Cross* because Bauer did not establish prejudice from cumulative error towards his firearm convictions which were supported by overwhelming evidence. Therefore, this Court should review this issue. RAP 13.4(b)(1).

Further, the *Bauer* Court held that the trial court abused its discretion allowing overly extensive evidence to rebut Bauer's claims he would not ever shoot anyone and that the admission of Bauer's statements violated his right to remail silent and was not harmless. These decisions as argued *supra* were based upon a misunderstanding or incomplete view of the facts in the record.

Additionally, the *Bauer* Court's decision on cumulative error also did not appear to give any consideration to the State's argument on constitutional harmless error. *See* Br. of Respondent, no. 86608-7-I, filed Dec. 4, 2023, at 51–56. Although this argument was not in a section addressing

cumulative error, the argument focused on untainted evidence only, without mention of evidence the Court found to be erroneously admitted. *See In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002)) ("On appeal, 'we may affirm the [lower] court on any grounds established by the pleadings and supported by the record.'").

Because the *Bauer* Court's decision on cumulative error was dependent upon a misunderstanding of facts in the record and did not take the State's argument on constitutional harmless error into account, there remains a significant question of constitutional law as to whether Bauer is entitled to a new trial. RAP 13.4(b)(3).

Finally, there is no Washington case law on the question of whether a new trial may be granted for only those counts a defendant establishes prejudice from cumulative error especially when other counts are supported by overwhelming evidence.

Therefore, the State seeks review of these issues.

4. Court of Appeals decision that it could not review the State's cross appeal because the State was not an aggrieved party conflicts and the criteria under RAP 2.2(b) does not include evidentiary rulings with *State v. Bergstrom, State v. Brown,* and RAP 2.4(a).

The *Bauer* Court declined to review the State's cross-appeal because the State, the prevailing party at trial, was not an aggrieved party under RAP 3.1, and because evidentiary rulings do not fall under the criteria setting forth what the State may appeal under RAP 2.2(b). Slip op. at 29.

A party is aggrieved under RAP 3.1 if a court ruling imposes a burden. *See State v. Bergstrom*, 199 Wn.2d 23, 34 n.10, 502 P.3d 837 (2022) (finding the State to be an aggrieved party despite the State seeking review of "a ruling ostensibly in its favor" . . . "Because the Court of Appeals has imposed on the State an improper burden to prove an element that did not exist in the 2001 bail jumping statute, as discussed infra, the State is "aggrieved" within the meaning of RAP 3.1.") (citing *Randy Reynolds & Assocs.*, 193 Wn.2d at 150, 437 P.3d 677

("'[f]or a party to be aggrieved, the decision must ... impose on a party a burden or obligation'") (further citations omitted).

Here, Ryan Ward, one of only two living witnesses besides Bauer, refused to testify and when asked if he remembered anything about the murders, he stated, "I don't know what you're talking about." RP 1293.

The State moved to have Ward's statements admitted in evidence under the doctrines of past recorded recollection and forfeiture by wrongdoing. The trial court ruled against the State resulting in the suppression of statements by one of the two living witnesses. This required the State to meet its burden of proof without critical evidence. Therefore, the State is an aggrieved party.

Furthermore, similar to evidentiary rulings, the issue raised by the State in *Bergstrom* does not fall expressly within RAP 2.2(b). The Court also reviews other issues raised by the State that do not fall within the express language of RAP 2.2(b) such rulings on pretrial discovery motions. *See State v. Brown*,

132 Wn.2d 529, 539–41, 940 P.2d 546 (1997) (reviewing a denial of a CrR 4.7 motion to compel discovery raised by the State).

Finally, the *Bauer* Court's decision conflicts with RAP 2.4(a) which states: "The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent."

Here, the State would suffer prejudicial error if the trial court's ruling suppressing the recorded statements of one of the only two living witnesses is erroneous and repeated on remand.

Additionally, the issue would never be reviewed if Bauer is acquitted upon retrial. Even if the State had prevailed on appeal, a retrial could still potentially arise in the event of a successful personal restraint petition years in the future. *See In re Stenson*, 174 Wn.2d 474, 476, 276 P.3d 286 (2012) (reversing 1994 conviction on the sixth personal restraint petition).

Therefore, the Bauer Court's decision declining review of the State's cross appeal because the State is not an aggrieved party under RAP 3.1 renders the scope of review under RAP 2.4(a) superfluous.

Because the *Bauer* Court's decision conflicts with this Court's decisions in *State v. Bergstrom*, *State v. Brown*, and with RAP 2.4(a), the State respectfully asks this Court to review the *Bauer* Court's decision declining review of the State's cross appeal. RAP 13.4(b)(1).

VI. CONCLUSION

The Court of Appeals decision on the admission of Alexandrea Earley's rebuttal evidence conflicts with this Court's decision in *State v. Warren*, 165 Wn.2d 17, by limiting the State's ability to rebut a false impression to less than proof beyond a reasonable doubt and is based on a mistaken understanding of the facts because references to enforcer and hired muscle and organizing the meeting with Drum was elicited by the defense and referred to Ryan Ward, not Bauer.

The decision on the admission of Bauer's interview conflicts with *Davis v. U.S.*, 512 U.S. 452, this Court's decision in *State v. Radcliffe*, 164 Wn.2d 900, and the Court of Appeals, Div. 2, decision in *State v. Gasteazoro-Paniagua*, 173 Wn. App. 751, because Bauer's statement, interpreted by Agent Halla as a question of what to do, was an equivocal request for a lawyer. The decision also raises significant questions of constitutional law as to whether Bauer's request for a lawyer was equivocal and whether admission of his interview at trial was harmless beyond a reasonable doubt because the Court of Appeals decision was based upon an incomplete view of the record.

The Court of Appeals decision on cumulative error conflicts with *In re Cross*, 180 Wn.2d 664, because Bauer never established how cumulative error affected the verdicts on the firearm charges for which there was overwhelming evidence. The decision on cumulative error also raises a significant question of constitutional law as to whether Bauer is entitled to

a new trial because the decision relied upon a factual misunderstanding and did not consider the full record.

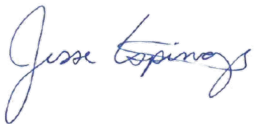
The Court of Appeals decision declining to review the State's cross appeal conflicts with this Court's decisions in *State v. Bergstrom*, 199 Wn.2d 23, and *State v. Brown*, 132 Wn.2d 529, on what constitutes an aggrieved party under RAP 3.1, and the issues the respondent may raise on appeal under RAP 2.2(b), all of which and renders RAP 2.4(a) superfluous.

For the all the foregoing reasons, the State respectfully requests that this Court grant review of the issues raised in the State's Petition for Review.

This document contains 4,669 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED March 10, 2025.

Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney



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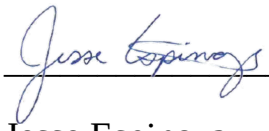
CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Devon Knowles on March 10, 2025.

MARK B. NICHOLS,
Prosecutor



Jesse Espinoza

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent/Cross-Appellant, v. DENNIS M. BAUER, Appellant/Cross-Respondent.	No. 86608-7-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Dennis Bauer and two acquaintances were arrested in connection with three murders. Bauer was charged with three counts of aggravated murder in the first degree, four counts of theft of a firearm, six counts of unlawful possession of a firearm in the first degree, and six counts of possession of a stolen firearm.

A jury convicted Bauer of three counts of aggravated murder in the first degree and multiple firearm charges. Bauer was sentenced to life in prison without the possibility of parole. Bauer appeals, arguing the trial court erred in admitting particular evidence, in limiting his ability to cross-examine certain witnesses, and in instructing the jury that they could find aggravated murder based on felony murder. Bauer also asserts that law enforcement violated his constitutional rights by continuing interrogation after he unequivocally invoked his right to counsel. The State cross-appeals, asserting that the court erred in denying the admission of evidence under forfeiture by wrongdoing and recorded recollection.

Because the trial court erred in admitting extensive inadmissible evidence, in admitting inculpatory hearsay statements, in including Bauer's custodial statements in violation of his *Miranda*[1] rights, and in prohibiting Bauer from cross-examining key witnesses about their credibility, and these errors combined denied Bauer a fair trial, we reverse and remand for a new trial.

FACTS

Background

Darrell Iverson (Darrell), his son Jordan Iverson (Jordan), and Jordan's girlfriend Tiffany May all lived on Darrell's property in Port Angeles. The Iversons were known in the area for selling drugs and people came and went from the property at all hours of the day and night.

Dennis Bauer lived in a nearby cabin, known as "the Ranch," and allowed people to use his property when they needed a place to stay. Those who stayed at the property, including Bauer, often used drugs. Kallie LeTellier and Ryan Ward both lived at the Ranch through 2018. Bauer, LeTellier, and Ward all frequently visited the Iverson property to use methamphetamine.

In December 2018, law enforcement found the Iversons and May deceased on their property. Both Darrell and May had been shot seven times; Jordan had been shot five times. About a month later, law enforcement arrested LeTellier, Ward, and Bauer when DNA evidence and text messages placed all three at the Iverson house on the night of the shooting. Ward was carrying a gun

[1] *Miranda v. Arizona*, 384 U.S. 426, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

registered to Darrell when he was arrested. When law enforcement executed a search warrant at the Ranch, they found firearms and additional items belonging to the decedents.

Following her arrest, LeTellier immediately gave a statement conceding that she, Ward, and Bauer were at the Iverson property the night of the shootings. She initially stated that she saw Bauer shoot May, heard additional shots, and realized Ward shot Darrell and Jordan. She denied any involvement in the killings and maintained that same story the next day. She changed her account, however, when law enforcement told her they had video proof of her involvement though they in fact did not. LeTellier then stated that she shot and killed May. She maintained sole responsibility for shooting May in two subsequent interviews.

LeTellier also told law enforcement that two weeks prior to the shootings she was in the Iversons' kitchen when she heard footsteps behind her and was hit over the head. She blacked out and awoke naked and tied to a bed. The Iversons then raped her for over seven hours. May walked in and out of the room during the rape.

LeTellier recounted returning to the Ranch and telling Ward and Bauer what happened. She noted that both were angry and upset and that Ward threatened to kill the Iversons in retaliation. Bauer later testified that he had no knowledge of the rape prior to the killings.

Following Bauer's arrest, he was also questioned by law enforcement. After the officers read him his *Miranda* rights and offered a waiver of those rights

to sign, Bauer stated, “I’ve found that usually people that start talking end up in kind of trouble, they don’t even know what they’re getting into so I’d much rather speak to a lawyer I think.” The officers reiterated that the wavier was necessary to continue the conversation. Bauer then signed the wavier and responded to questioning without an attorney.

Pleas

The State charged LeTellier, Ward, and Bauer with three counts of aggravated first-degree murder each. The State reduced LeTellier’s charges, however, in exchange for her cooperation. LeTellier pleaded guilty to second-degree murder in February 2020 and received a 33-year sentence. When she entered her first plea, she took full responsibility for her participation and did not place blame on Bauer.

Ward pleaded guilty as charged to three counts of aggravated murder. In his guilty plea statement, Ward wrote that LeTellier’s statement was “mostly accurate, in that the victims of this crime were murdered for her sexual enslavement at their hands." The court sentenced Ward to life without the possibility of parole.

Bauer entered a plea of not guilty and his case proceeded to trial in October 2021. As Bauer proceeded to trial, LeTellier reached out to the prosecutor, seeking to withdraw her guilty plea. LeTellier claimed, in contrast to all of her earlier statements, that Bauer held a gun to her head and forced her to shoot May. She conceded that this contradicted her earlier accounts and acknowledged that she had many opportunities to share this version of the story

before entering her initial plea taking full responsibility for killing May. She nonetheless maintained this new version.

The court denied the admission of LeTellier's letter to the prosecutor as evidence in Bauer's trial. The court also prohibited Bauer from cross-examining LeTellier on her effort to withdraw her plea.

Trial

At trial, the State argued around the motive Ward articulated of avenging LeTellier, introducing a separate motive arising from a drug debt the State claimed Bauer owed Darrell. In attempting to prove this alternative motive, the State introduced extensive evidence about Bauer's participation in the drug trade. Bauer repeatedly objected.

Both Bauer and LeTellier testified at trial. Ward refused to testify, which the State attributed to a threat from Bauer after a book with Bauer's name had been found in Ward's cell, with letters underlined to spell out "Ryan, don't say anything." The court denied the State's request to admit Ward's recorded statement to law enforcement to serve as testimony. But the court did allow Ward's girlfriend, Jessica Topham, to testify to as to what Ward told her about the night of the shootings as an excited utterance.

Topham testified that, the day after the shootings, Ward called and arranged to stay with her. She stated that Ward appeared "scared, worried, crying, [and] emotional." Ward recounted that LeTellier had shot May and that while Bauer had shot Darrell and Jordan, Bauer told him to "go finish Jordan off [be]cause he wasn't dead yet." Topham maintained that Ward was visibly

worried the whole time he was at her home.

LeTellier testified in great detail, providing further specifics of the night of the shootings. She reiterated that Bauer pointed his gun at her until she shot May. She stated that Bauer then shot May four more times.

Bauer, in contrast, testified that while he was present when LeTellier and Ward shot the Iversons and May, he did not plan or participate in the shooting. When the State asked Bauer why, if he was not involved, he did not shoot Ward or LeTellier after seeing them shoot the Iversons, Bauer responded, "the thought never crossed my mind." On redirect, Bauer continued on, noting that "I do not shoot people . . . I don't care if you hand me a gun or not, I'm going to put it down." When asked again why he did not pick up a gun and shoot Ward or LeTellier, Bauer stated, "I'm not going to shoot anybody."

In response, the State introduced rebuttal evidence that Bauer had committed an unrelated shooting the month prior. Bauer's ex-girlfriend, Alexandria Earley, testified that Ward contacted her requesting that she connect with a mutual friend to set up a meeting. She stated that she, Ward, and Bauer drove to meet this friend at a prearranged location, where Bauer lay in wait and then "shot at him." The court prohibited Bauer from cross-examining Earley about her relationship with Bauer and her own legal implications from this prior shooting. The State then recalled LeTellier to support Earley's testimony.

The State also introduced one of Bauer's Facebook messages to rebut "[Bauer's] multiple assertions that he would never shoot anybody." The message to an unrelated friend read: "I can shoot everybody and just say fuck it or not."

The State charged Bauer with three counts each of premeditated or felony murder committed in the course of a robbery. This included special allegations of aggravated murder under RCW 10.95.020. The State also charged firearm enhancements for each count and six counts of unlawful firearm possession and theft of stolen firearms. The court instructed the jury that it could find aggravated murder based on premeditated murder in the first degree or felony murder.

The jury convicted Bauer on all counts. Bauer appeals. The State cross-appeals.

ANALYSIS

Standard of Review

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022). A court abuses its discretion if " 'no reasonable person would take the view adopted by the trial court.' " *Jennings*, 199 Wn.2d at 59 (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). A misunderstanding of underlying law is necessarily an abuse of discretion. *State v. Meza*, 26 Wn. App. 2d 604, 609-10, 529 P.3d 398 (2023).

Rebuttal Evidence

Bauer asserts that the trial court improperly admitted extensive evidence of an unrelated shooting as rebuttal evidence. We agree.

We review a trial court's determination that a party has opened the door to otherwise inadmissible evidence for an abuse of discretion. *State v. Warren*, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006).

The open door doctrine " 'permits a court 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.' " *Fite v. Mudd*, 19 Wn. App. 2d 917, 935, 498 P.3d 538 (2021) (quoting *State v. Rushworth*, 12 Wn. App. 2d, 473, 458 P.3d 1192 (2020)). So, when a defendant opens the door to an otherwise prohibited topic, the State may introduce relevant evidence in response. *State v. Lang*, 12 Wn. App. 2d 481, 487, 458 P.3d 791 (2020). Evidence is relevant if it has "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. But relevant evidence may be inadmissible if its probative value is substantially outweighed by the risk of unfair prejudice. ER 403.

Bauer repeatedly testified that he would not shoot someone, regardless of the circumstances. In doing so, he opened the door to allow the State to introduce relevant evidence to the contrary. Because the trial centered on whether Bauer shot three people, the trial court did not abuse its discretion in determining that evidence of Bauer's prior shooting was relevant evidence. It was not unreasonable to allow the State to cure the false impression that Bauer created with the jury. The issue arises, however, in weighing the probative value of the extent of the evidence against its prejudicial effect.

Earley's testimony extended far beyond the fact that Bauer had shot at someone before. In fact, Earley's testimony detailed Bauer's role as the "muscle" for a drug dealer and described how he organized a meeting with another drug

user who was behind on a debt, lay in wait, and shot at him. Instead of simply evidencing Bauer's willingness to shoot, the testimony created an image of Bauer as a hardened criminal, fully entrenched in the drug trade. In a trial centered on witness credibility, the prejudicial effect of the admission of the expansive surrounding statements outweighed any probative value they might have provided. Therefore, the trial court abused its discretion in admitting far more of Earley's testimony than was appropriate as rebuttal evidence.

Drug-Trade Evidence

Bauer next asserts that the trial court erred in admitting evidence as to Bauer's involvement in the drug trade as propensity evidence. The State contends that the evidence was properly admitted as proof of motive, opportunity and knowledge under ER 404(b) and to complete the story under the doctrine of res gestae. Although the drug trade evidence is not propensity evidence, given that it does not establish Bauer's likelihood to commit the charged crime based on past acts, because the evidence is more prejudicial than probative and neither completes the story nor establishes motive, the trial court abused its discretion in admitting the testimony.

Again, evidence is relevant if it has any tendency to make a consequential fact more or less probable but inadmissible if its prejudicial effect outweighs any probative value. ER 401. Similarly, evidence of the accused's prior bad acts are inadmissible to prove criminal propensity. ER. 404(b). Such evidence suggests propensity if offered to show action in conformity with past crimes, wrongs, or acts. ER 404(b).

But otherwise inadmissible evidence may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). It may also be admitted as res gestae evidence, to " '[complete] the story of the crime charged or [provide] immediate context for events close in both time and place to that crime.' " *State v. Ta'afulisia*, 21 Wn. App. 2d 914, 938, 508 P.3d 1059 (2022) (quoting *State v. Sullivan*, 18 Wn. App. 2d 225, 237, 491 P.3d 176 (2021)). Res gestae evidence must be " 'a link in the chain' of an unbroken sequence of events surrounding the charged offense." *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (quoting *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). Res gestae evidence is not subject to the requirements of ER 404(b). *Ta'afulisia*, 21 Wn. App. 2d at 938.

Bauer asserts that the State introduced evidence of Bauer's role in the local "drug hierarchy" as propensity evidence to establish action in conformity therewith. The State contends that Bauer's role in that hierarchy was necessary both to "complet[e] the story" of the shootings and to establish Bauer's motive. Over Bauer's repeated objections, the court allowed the State to introduce extensive evidence about Bauer's general involvement in the drug trade, as well as specific details centering on a failed effort to send money to another drug dealer three weeks before the shootings. We conclude that while the evidence was not propensity evidence, the extent of the evidence is again more prejudicial than probative and it neither establishes motive, nor completes the story.

To begin, Bauer is incorrect in maintaining that the State introduced the evidence as propensity evidence. The State introduced evidence of Bauer's prior

bad acts as they related to the drug trade. As the introduced evidence did not include prior murders, the evidence does not present bad acts to prove conformity therewith. That said, the evidence is more prejudicial than it is probative because it continues the image of Bauer as a hardened criminal deeply involved in the drug trade while adding little relevant information. And because the evidence neither establishes motive nor completes the story, the trial court erred in admitting it.

The State attempts to establish that LeTellier's documentation of Bauer's drug use and Kyle Weed's testimony surrounding Bauer's attempt, and failure, to pay another drug dealer establish Bauer's motive for killing Darrell, Jordan, and May. But the State does little to actually connect this failed MoneyGram with Bauer's relationship to Darrell. In fact, LeTellier testified that she, Ward, and Bauer continued to use drugs with the Iversons up until the night of the shooting. And although law enforcement found firearms and other property belonging to the decedents in Bauer's home following the shooting, no evidence in the record establishes a drug-related conflict between the men. The State's knowledge of other evidence, including Ward's specific statement naming LeTellier's rape as motive, undercuts the story of a drug debt. The State's tentative theory, without any further connection beyond the fact that both Bauer and Darrell were involved in buying and selling drugs, is not enough to admit otherwise inadmissible evidence. The trial court abused its discretion in admitting the drug-trade testimony under ER 404(b).

As to the idea of "complet[ing] the story," similarly little evidence connects

Bauer's unsuccessful money transfer to an entirely separate drug dealer to the deaths of Darrell, Jordan, and May. Taking place three weeks prior to the shootings, which is notably a longer time frame than the time between LeTellier's rape and the shootings, Bauer's attempt to send money does not constitute a link in a chain of an unbroken sequence of events. Rather, the testimony creates a negative image of Bauer, potentially unrelated to the charged offense. Any probative value it might hold in relation to the shootings pales in comparison to its prejudicial effect. The trial court erred in admitting the drug-trade testimony under the res gestae doctrine.

Hearsay

Bauer asserts that the trial court's admission of inadmissible hearsay statements deprived him of a fair trial. We conclude that the trial court did not abuse its discretion in admitting Ward's first statement as an excited utterance but did err in admitting his second statement without hearsay exceptions for each level of hearsay in his statement.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay evidence is inadmissible except as provided by the rules of evidence, other court rules, or by statute. ER 802. And a number of exceptions exist. ER 803, ER 804. When a statement includes multiple levels of hearsay, each piece must fall under an exception to be admissible. ER 805.

1. Excited Utterance

Bauer asserts that the trial court erred in admitting Ward's statements to

Topham as an excited utterance because Ward was no longer under the influence of a startling event when he spoke to Topham. We conclude that, given the evidence provided, it was not unreasonable for the court to determine that Ward was still under the stress of the shooting when he spoke to Topham and therefore admit his statements as an excited utterance.

An excited utterance, or "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" does not qualify as inadmissible hearsay. ER 803(2). Courts reason that statements made under the stress of the event cannot be the result of "fabrication, intervening actions, or the exercise of choice or judgment." *State v. Carte*, 27 Wn. App. 2d 861, 883, 534 P.3d 378 (2023), *review denied*, 2 Wn.3d 1017, 542 P.3d 569 (2024). A party intending to admit a statement as an excited utterance must show that "(1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." *Carte*, 27 Wn. App. 2d at 883. A statement is more likely to qualify as an excited utterance if the declarant is agitated or emotional, but such agitation or anxiety is not sufficient on its own. *Carte*, 27 Wn. App. 2d at 884.

Here, the trial court admitted Ward's statements to his girlfriend, detailing the events of the shooting, hours after it occurred. We conclude that the State clearly established the first and third factors required to introduce an excited utterance. The shooting itself certainly constitutes a startling event or condition. And Ward's statements that Bauer shot Darrell and Jordan and then requested

that Ward "finish Jordan off," relate clearly to that startling event. The remaining question is whether, five hours after the shootings, Ward was still under the stress or excitement of the startling event or condition when he spoke with Topham.

Topham testified that when Ward stepped into her car the morning after the shooting he was crying and visibly worried. She believed his emotions to be genuine and when she asked what was wrong, he recounted the events of the night before. Bauer objected to Topham's testimony, relying primarily on the time that had elapsed between the shooting and when Ward reconnected with Topham. Bauer suggested that there must have been intervening events in the four to six-hour period between the actual deaths and leaving with Topham. But Bauer did not provide any evidence of such intervening factors. Given the enormity of the startling event, the evidence of Ward's agitated or emotional state, the likelihood that leaving with Topham was the first time Ward had been away from LeTellier and Bauer since the shooting, and the lack of evidence of intervening events, it was not unreasonable for the court to allow the testimony. The trial court did not abuse its discretion in admitting Ward's statement to Topham as an excited utterance.

2. Multi-Level Hearsay

Bauer next asserts that the trial court erred in admitting Ward's statement to Topham under the coconspirator exception to hearsay because, while Bauer's statements to Ward were arguably made between coconspirators, when Ward told Topham, the statement was no longer in furtherance of a conspiracy. We

conclude that the trial court did abuse its discretion in admitting the testimony because Topham's account contained multiple levels of hearsay and the State failed to establish an exception for each level.

A statement is not hearsay if the statement is made by a coconspirator of the party during the course of and in furtherance of the conspiracy. ER 801(d)(2)(v). To be a coconspirator statement, the statement must "be made by a coconspirator, not to a coconspirator." *State v. Sanchez-Guillen*, 135 Wn. App. 636, 643, 145 P.3d 406 (2006) (emphasis omitted).

A statement is similarly not hearsay if the statement addresses "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive . . .), but not including a statement of memory or belief to prove the fact remember or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." ER 803(a)(3). The use of "then" in the term "then-existing" refers to the time the statement was made, not the earlier time the statement describes. *Sanchez-Guillen*, 135 Wn. App. at 646. "Statements discussing the conduct of another person that may have created the declarant's state of mind are inadmissible under ER 803(a)(3)." *State v. Sublett*, 156 Wn. App. 160, 199, 231 P.3d 231 (2010).

In addition to testifying as to Ward's account of the night of the shootings, Topham testified that Ward told her Bauer asked him to return to the Iverson property to collect shells they had left behind. Bauer objected to the testimony, asserting hearsay. The court overruled the objection, determining that Bauer's statement to Ward fell within the bounds of coconspirator statements. But there

are two levels of hearsay involved in Topham's testimony: Bauer's statements to Ward and Ward's statements to Topham.

Although Bauer's statements to Ward do constitute coconspirator statements,[2] with both men involved in the shooting and the subsequent attempt at a cover-up, no evidence exists to suggest that Ward recounting Bauer's statements to Topham furthered the conspiracy between Bauer and Ward. Nothing in the record suggests that Ward relayed the information to Topham with the intent of eliciting her help retrieving the shells or involving her in the overall crime. Rather, as with Ward's initial statements placing blame on Bauer, it seems that Ward was continuing to tell a story that reduced his own culpability. Ward's statements to Topham do not fall under the coconspirator hearsay exception.

The State then contends that the statements are not hearsay because they expressed Ward's then-existing statement of mind. Ward's statements to Topham, the State maintains, were simply expressing his plan to go get the shells left behind. But Topham did not testify solely to Ward's intent to do so. Instead, she testified that Ward told her that Bauer told him he had to return to the property to retrieve the shells. Ward did not express any ownership of this "plan," but rather indicated that he had to follow Bauer's instructions. Bauer's conduct therefore created Ward's statement of mind. Accordingly, Topham's testimony was not excluded as hearsay under ER 803(a)(3).

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[2] Bauer's statements to Ward are also admissible as statements by a party opponent. ER 801(d)(2).

Because no exception covers both levels of hearsay testimony, we conclude that the trial court abused its discretion in admitting Ward's statements to Topham as coconspirator statements.

Sixth Amendment Right to Challenge Accusers

Bauer contends that the court deprived him of his constitutional right to challenge his accusers in limiting his ability to cross-examine LeTellier and Earley about their potential biases. We conclude that the trial court did violate Bauer's Sixth Amendment right because the excluded evidence was at least minimally relevant, was not so prejudicial as to disrupt the fairness of the proceedings, and the State's reasons for exclusion did not outweigh Bauer's interests in cross-examination.

The Sixth Amendment to the United States Constitution and Washington Constitution article I, section 22 grant criminal defendants the right to present testimony in their own defense. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22. The right to present a complete defense includes the right to confront and cross-examine adverse witnesses to expose bias. *State v. Orn*, 197 Wn.2d 343, 352, 482 P.3d 913 (2021). We review an alleged violation of this Sixth Amendment right de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

"The trial court must provide the accused with 'a fair opportunity' to defend against the government's accusations." *Carte*, 27 Wn. App. 2d at 877 (internal quotation marks omitted) (quoting *Jones*, 168 Wn.2d at 720). The court may satisfy this right by allowing meaningful cross-examination. *Carte*, 27 Wn. App.

2d at 877. This right is not absolute, however, and the accused does not have a right to present evidence that is " 'incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' " *Carte*, 27 Wn. App. 2d at 877 (internal quotation marks omitted) (quoting *State v. Lizarraga*, 191 Wn. App. 530, 533, 364 P.3d 810 (2015)). Also, the accused has no right to introduce irrelevant evidence. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Evidence is relevant if it has any tendency to make the existence of any fact or consequence to the determination of the action more or less probable than it would have been without the evidence. ER 401. "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *U.S. v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L.ed.2d 450 (1984). The accused must be able to explore witness bias that "stems from a witness's motive to cooperate with the State based on the possibility of leniency or the desire to avoid prosecution." *Orn*, 197 Wn.2d at 352.

We apply a three-part test to determine whether the trial court violated the accused's right to confront a witness by limiting the scope of cross-examination, asking "(1) whether the excluded evidence was at least minimally relevant, (2) whether the evidence was 'so prejudicial as to disrupt the fairness of the factfinding process' at trial, and if so, (3) whether the State's interest in excluding the prejudicial evidence outweighs the defendant's need to present it." *Orn*, 197 Wn.2d at 353 (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

Here, the court prohibited Bauer from cross-examining LeTellier about her efforts to withdraw her guilty plea, as well as from cross-examining Earley about her own legal implications in relation to the testimony she provided about Bauer's prior shooting.

1. LeTellier

The State introduced LeTellier as a witness to provide a description of the night of the shooting and Bauer's role in its planning and execution. She did so in great detail, from noting that Bauer and Ward left their cell phones at home before driving to the Iverson property to describing watching Bauer shoot May. But LeTellier's account of the night changed a number of times over the course of the months leading up to trial. LeTellier's initial statement denied any involvement in the shooting, placing all of the blame on Bauer and Ward. Her initial plea statement, however, took full responsibility for killing May. And it was not until Bauer proceeded to trial that LeTellier sought to withdraw that plea agreement, asserting, for the first time, that she only shot May because Bauer held a gun to her head. Despite acknowledging the changes to LeTellier's account, the court prohibited Bauer from cross-examining her about her attempts to withdraw her plea. The trial court erred in doing so.

LeTellier's credibility, as the only other witness at the scene who testified, is certainly at least minimally relevant to the overall question of Bauer's guilt. LeTellier's conflicting accounts of the night of the shooting mean that at least some of the versions were untrue. And the fact that LeTellier hoped to withdraw her plea and seek a rape trauma defense helps explain why the most recent

version of the story would minimize her own involvement and directly implicate Bauer.

Next, no evidence in the record suggests that questions about LeTellier's attempt to withdraw her plea would be so prejudicial as to disrupt the fairness of the factfinding process. The State contends that allowing Bauer to ask about LeTellier's attempt to revoke her plea paints the State in a bad light, suggesting some sort of "wink" deal with LeTellier based on her performance at trial. This would invite speculation, the State asserts, asking the jury to weigh LeTellier's credibility based on facts not in evidence. But the risk of painting the State in a bad light is not enough to establish that relevant testimony would be so prejudicial as to completely undermine fairness. And Bauer's need to present evidence of LeTellier's potential motivation to fabricate a new story outweighs the State's interest in protecting its reputation.

We conclude that the trial court erred in prohibiting Bauer from cross-examining LeTellier about her attempt to withdraw her plea deal.

2. Earley

The State introduced Earley as a witness to rebut Bauer's character evidence. She did so by detailing Bauer's prior misconduct unrelated to the charges at hand, depicting Bauer as a criminal. The court, however, prohibited Bauer from questioning Earley about the legal implications of her own involvement in that prior misconduct. This was error.

Evidence about Earley's motivation for testifying is relevant because it tends to show her interest in incriminating Bauer and minimizing her own

culpability. If Earley were to face charges for the same conduct she attributed to Bauer, it is logical that she would emphasize his role in an attempt to lessen her own.

And questions around Earley's own criminal behavior are not so prejudicial as to disrupt the fairness of trial. As with LeTellier, the State suggests that the evidence is too prejudicial because it indicates that the State was hiding an immunity deal. The State also pointed out that Bauer called his own witness to rebut Earley's testimony and therefore did not need to undermine her through cross-examination. But, again, the risk of potentially suggesting that the State is slightly underhanded is not enough to establish that relevant credibility testimony is too prejudicial to allow for a fair trial. Earley suggested to the jury that Bauer was the type of seasoned criminal who organized shootings based on drug debts. It would not have been unreasonably prejudicial to grant Bauer the ability to challenge that image by questioning the person suggesting it. Again, the State's interest in protecting its reputation is not enough to outweigh Bauer's need to undermine the credibility of key witnesses.

The trial court violated Bauer's Sixth Amendment right to challenge his accusers in limiting his ability to cross-examine LeTellier and Earley.

Fifth Amendment Right to Silence

Bauer asserts that law enforcement violated his Fifth Amendment[3] right to silence when officers continued to interrogate him after he unequivocally invoked his right to an attorney. Bauer also asserts that such error is not harmless.

[3] U.S. CONST. amend. V.

Because Bauer unequivocally invoked his right to counsel, law enforcement violated his right to silence. And because the State did not prove beyond a reasonable doubt that no probability exists that the outcome of the trial would have been different had the questioning ended at Bauer's request, we conclude the error is not harmless.

We review questions of constitutional law de novo. *State v. TVI, Inc.*, 1 Wn.3d 118, 128, 524 P.3d 622 (2023).

1. Unequivocal Request

Before any custodial interrogation, law enforcement must inform a suspect that " 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning.' " *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014) (quoting *Miranda*, 384 U.S. at 479). Wavier of these rights must be knowing, voluntary, and intelligent. *Piatnitsky*, 180 Wn.2d at 412. "Even once waived, a suspect can invoke these rights at any point during the interview and the interrogation must cease." *Piatnitsky*, 180 Wn.2d at 412. But that request must be unequivocal. *Davis v. United States*, 512 U.S. 452, 462, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). If the request is not unequivocal, officers may continue questioning the suspect. Davis, 512 U.S. at 462.

A suspect's request for counsel is unequivocal if they articulate their desire with sufficient clarity such that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.

State v. Gasteazoro-Paniagua, 173 Wn. App. 751, 756, 294 P.3d 857 (2013). The Washington Supreme Court has held that " '[m]aybe [I] should contact an attorney' " or "I guess I'll just have to talk to a lawyer about it" are equivocal statements rather than an unequivocal request, but that " 'I gotta talk to my lawyer' " and " 'I'm gonna need a lawyer because it wasn't me' " are unequivocal requests for an attorney. *Gasteazoro-Paniagua*, 173 Wn. App. at 756 (alterations in original) (internal quotation marks omitted) (quoting *State v. Radcliffe*, 164 Wn.2d 900, 907-08, 194 P.3d 250 (2008); *State v. Nyasta*, 168 Wn. App. 30, 42, 275 P.3d 1162 (2012); *State v. Pierce*, 169 Wn. App. 533, 544-45, 280 P.3d 1158 (2012)).

Here, when placed in custody and asked to waive his *Miranda* rights, Bauer stated, "I'd rather not sign [the waiver]" and emphasized that he did not know what was happening. In response, Officer Jeff Waterhouse, who read Bauer his rights, reassured him that "constitutional rights . . . will never go away." Even if Bauer were to sign the waiver, Officer Waterhouse specified, he could assert any of his rights at any point during the interview. Bauer then stated, "I've found that usually people that start talking end up in kind of trouble, they don't even know what they're getting into so I'd much rather speak to a lawyer I think." Officer Waterhouse acknowledged Bauer's statement, saying "[o]kay, so you don't." But when Bauer reiterated that he did not know what the arrest was about, Officer Waterhouse continued to press on the waiver. Bauer eventually signed and responded to questioning without his attorney.

Bauer expressed twice, within minutes of being read his *Miranda* rights,

that he did not understand his arrest and that he did not want to waive his rights. This came in the form of three statements. Bauer first stated that he did not want to sign the wavier. His second statement, noting that he found that people who start talking usually end up in trouble, explained his desire not to sign the wavier. He then added that he would rather speak to a lawyer. That third statement, specifically stating that he would rather speak to a lawyer, followed directly on the heels of Officer Waterhouse affirming that he could assert his rights at any time. Including "I think" at the end of that sentence was, in this circumstance, simply a description of his current train of thought; unlike "I guess," which carries an association of uncertainty. Any reasonable officer would have understood that statement to be a request for an attorney.

In fact, Officer Waterhouse acknowledged Bauer's desire not to talk. Beyond the any reasonable officer standard, the record supports that Officer Waterhouse actually understood Bauer's request. Bauer unequivocally invoked his right to counsel. And because Officer Waterhouse continued the investigation after Bauer unequivocally invoked his right to counsel, law enforcement violated Bauer's constitutional right to silence.

2. Harmless Error

"A constitutional error is harmless if 'it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *State v. A.M.*, 194 Wn.2d 33, 41, 448 P.3d 35 (2019) (internal quotation marks omitted) (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). " 'An error is not harmless beyond a reasonable doubt when there is a reasonable probability

that the outcome of the trial would have been different had the error not occurred.' " *A.M.*, 194 Wn.2d at 41 (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)). " 'A reasonable probability exists when confidence in the outcome of the trial is undermined.' " *A.M.*, 194 Wn.2d at 41 (quoting State v. Benn, 120 Wn.2d 631, 649, 845 P.2d 289 (1993)).

Bauer asserts that the State cannot prove the error was harmless beyond a reasonable doubt because, without the admitted statements to law enforcement, Bauer would not have felt the need to testify and the jury's assessment of credibility would have been far more limited. Bauer continues on to suggest that the statements he made in violation of his *Miranda* rights were critical to the State's case. Because beyond reasonable doubt is a high bar, the State does not establish that the outcome of the trial would not have been materially different absent an error.

Bauer told law enforcement that he traded tools and a couple of guns with Darrell in exchange for drugs, that he knew the people who lived at the Iverson property, details of his relationship with Darrell, and that he was working the night of the shooting. Bauer also provided details about LeTellier and Ward, noted specifically that he did not think Ward would be connected to the murders, and consistently denied that he himself was present the night of the shootings. This latter testimony, in particular, contradicted Bauer's later defense of mere presence. At no point elsewhere in the trial did Bauer assert that he was not at the Iverson property the night of the shooting. And the State highlighted this inconsistency in closing statements, referencing his interview with law

enforcement directly. Given that both parties relied primarily on the jury believing their witnesses over the other side's, any challenges to credibility were critical to the outcome of the case. Bauer's inconsistencies before the jury stemmed from inadmissible testimony. Because the State does not prove, beyond a reasonable doubt, that the outcome of the trial would not have been different absent the inadmissible statements, we conclude the error is not harmless.

Aggravated Murder

Bauer asserts that because the court informed the jury that they could find aggravated murder based on premeditated murder *or* the felony murder charge, his aggravated murder convictions are not authorized by law under RCW 10.95.020. Because the jury found Bauer guilty of premeditated murder and established the aggravating circumstances, we disagree.

We review challenged jury instructions de novo, evaluating the particular phrase in the context of the instructions as a whole. *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011).

A person is guilty of aggravated first degree murder if they commit first degree murder as defined by RCW 9A.32.030(1)(a), and one or more aggravating circumstances exist. RCW 10.95.020. RCW 9A.32.030(1)(a) provides that a person is guilty of murder in the first degree when "with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." A person is guilty of felony murder, in contrast, when "he or she commits or attempts to commit any felony . . . and, in the course of and in furtherance of such crime . . . he or she, or another

participant, causes the death of a person other than one of the participants." RCW 9A.32.050(1)(c). To find a person guilty of aggravated first degree murder, the crime must be "premeditated murder in the first degree (*not* murder by extreme indifference or felony murder) accompanied by the presence of one or more of the statutory aggravating circumstances." *State v. Irizarry*, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988).

Bauer asserts that because the court did not differentiate between premediated murder and felony murder in giving the aggravated murder jury instruction, there is no way to know that the jury relied on the correct charges in finding Bauer guilty. He relies on *Irizarry*, noting that aggravated murder under RCW 10.95.020 cannot be found based on felony murder and, if done, the conviction should be vacated. 111 Wn.2d at 595. But *Irizarry* is factually distinguishable because the defendant in that case was found guilty only of felony murder.

Here, although the court did provide an inaccurate jury instruction, the jury unanimously found Bauer guilty of both premeditated murder and felony murder, plus the aggravating circumstances. Accordingly, the jury met each requirement outlined by both *Irizarry* and RCW 10.95.020: the jury found the crime to be premeditated murder in the first degree, accompanied by the presence of one or more of the statutory aggravating circumstances. We conclude that Bauer's aggravated murder convictions were authorized by appropriate law and standards.

Cumulative Error

Bauer lastly asserts that, even if a single error alone is not enough to warrant reversal, the combined effects of all of the errors denied him a fair trial under the cumulative error doctrine. The State does not address Bauer's cumulative error claim. We agree with Bauer.

The cumulative error doctrine applies when " 'a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless.' " *State v. Azevedo*, 31 Wn. App. 2d 70, 85, 547 P.3d 287 (2024) (quoting *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014) (abrogated on other grounds by *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018)). "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial." *Cross*, 180 Wn.2d at 690.

Here, the trial court erred in admitting extensive inadmissible evidence, in admitting inculpatory hearsay statements, in including Bauer's custodial statements in violation of his *Miranda* rights, and in prohibiting Bauer from cross-examining key witnesses about their credibility. Given that the State's case rested on the jury believing LeTellier, Earley, and other state witnesses over Bauer, the cumulative errors substantially prejudiced Bauer and denied him a fair trial.

The State's inadmissible drug-trade evidence depicted Bauer as a hardened criminal, entrenched in the drug trade and capable of killing without

much thought. This image was then bolstered by Ward's inadmissible hearsay indicating that Bauer was in charge. Bauer's statements to law enforcement, which differed from his trial testimony, then created an image that he was a liar. Combined, this testimony prejudiced the jury against Bauer and undercut his defense of mere presence at the Iverson property. In prohibiting Bauer from cross-examining the two key witnesses establishing this image, the court then significantly limited Bauer's ability to challenge that portrayal. When combined, the trial court's errors denied Bauer a fair trial.

Cross-Appeal

On cross-appeal, the State contends that the trial court erred in ruling that Ward's statements to law enforcement were inadmissible under ER 804(b)(6) and ER 803(a)(5). Because the State is not an aggrieved party under RAP 3.1 and its appeal of evidentiary rulings does not fit in the RAP 2.2(b) criteria, we decline to reach the cross-appeal.

"The standing of the State to appeal in a criminal case is limited by RAP 2.2(b)." *State v. Hawthorne*, 48 Wn. App. 23, 28, 737 P.2d 717 (1987). RAP 2.2(b) permits the State to appeal only in the following circumstances: (1) final decision, except not guilty; (2) pretrial order suppressing evidence; (3) arrest or vacation of judgment; (4) new trial; (5) disposition in juvenile offense proceedings; and (6) particular sentences in criminal cases. Any appeal outside of the RAP 2.2(b) criteria is not permitted. RAP 2.2(b).

Further, only an aggrieved party may seek review. RAP 3.1. Generally, a party is not aggrieved by a favorable decision. *Randy Reynolds & Associates,*

Inc., v. Harmon, 193 Wn.2d 143, 151, 437 P.3d 677 (2019).

Here, the State received a unanimous guilty verdict on all charged offenses. Accordingly, the State was not an aggrieved party below and therefore could not seek review. In addition, the State's appeal surrounding the admission of evidence does not fit any of the RAP 2.2(b) criteria. The first two criteria are the most applicable, but the State does not wish to appeal the final judgment, nor did the trial court suppress the evidence in a pretrial order. In addition, because we remand for a new trial, the admission of evidence will be a question for the trial court. The evidence at the new trial may not be the exact evidence argued initially.

We decline to reach the cross appeal and remand for a new trial.

Smith, C.J.

WE CONCUR:

Bowman, J.

Dwyer, J.

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

STATE OF WASHINGTON, Respondent/Cross-Appellant, v. DENNIS M. BAUER, Appellant/Cross-Respondent.	No. 86608-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent/Cross-Appellant State of Washington has moved for reconsideration of the opinion filed on December 16, 2024. Appellant/Cross-Respondent Dennis M. Bauer has filed an answer. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

March 10, 2025 - 4:57 PM

Filing Petition for Review

Transmittal Information

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