SUPREME COURT NO. _____
COURT OF APPEALS NO. 85952-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

RIGOBERTO ALVARADO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Joe Campagna, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Rigoberto Alvarado asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the opinion in State v. Alvarado, COA No. 85952-8-I, filed on August 18, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1a. Whether the trial court violated Alvarado's right to a fair and impartial jury where the record demonstrates actual bias on the part of two jurors who were allowed to sit on Alvarado's jury – despite his motion to excuse them for cause and exhaustion of all allotted peremptory challenges?

1b. Whether this Court should accept review – as the issue represents a significant question of law under the state and federal constitutions and an issue of

substantial public interest – where the court of appeals held the challenge to the biased jurors was not preserved because petitioner could have used peremptory challenges on the biased jurors but chose to use them on other jurors he perceived as unfit? RAP 13.4(b)(3), (4).

2a. Whether the court erred in admitting evidence a state's witness identified Alvarado from an after-the-fact newspaper article that showed Alvarado's mugshot with a news story that he had been arrested in the matter, was a felon and had just been released from prison, where any relevance of the identification was far outweighed by the danger of unfair prejudice due to its suggestiveness?

2b. Whether this Court should accept review because the admissibility of suggestive identification evidence – where it is not the result of police involvement – is novel and requires clarity such that it involves an issue of substantial public interest that should be reviewed by this Court? RAP 13.4(b)(4).

3a. Whether the court erred in admitting evidence Alvarado gave a false name to police when arrested on an unrelated matter, when it was sheer speculation the false name was related to a consciousness of guilt related to the charged crimes, as opposed to avoidance of a potential probation violation?

3b. Whether this Court should accept review because the appellate court's resolution of this issue conflicts with this Court's decision in State v. Slater, 197 Wn.2d 660, 486 P.3d 873 (2021)? RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

1. Overview and Motions in Limine

Alvarado was convicted of first degree murder for the shooting death of Todd Deckman. CP 326. The state alleged that Alvarado shot him during an attempted robbery on March 31, 2020, at A&H Motorsports, an Autobody shop in Auburn. CP 4, 16. Alvarado was also convicted of first degree assault for allegedly hitting Bruce

Hood over the head with a gun during the same alleged robbery. CP 2, 16, 326. Both charges carried firearm enhancements. CP 1-2, 327. In a bifurcated proceeding, Alvarado was also convicted of unlawfully possessing a firearm. CP 326.

The defense at trial was identity. RP 200, 1193-95; 1RP 954. Alvarado has distinctive written tattoos on his forehead. RP 25, 1195. Hood never mentioned facial tattoos to the 911 operator, responding officers or his friend who took him to the hospital. RP 17, 305, 1193-94, 1305, 1370, 1412, 1518, 1670. Rather, Alvarado became a suspect based on traffic camera footage of a truck seen leaving A&H Motorsports. CP 7, 38, 206, 221.

Significantly, the court granted the defense motion to exclude any in-court identification by Hood of Alvarado under ER 403. CP 32; RP 1135-36. Hood did not have much of an opportunity to view the intruder prior to being hit over the head. Hood's potential in-court identification

would be three years after-the-fact, and police never showed Hood a montage or organized any kind of identification procedure whereby Hood previously identified Alvarado. The court reasoned any in-court identification would be unduly suggestive. The court noted several newer cases applying Neil v. Biggers to first-time in-court identifications. RP 1123-29; see e.g. City of Billings v. Nolan, 385 Mont. 190, 196, 383 P.3d 219, 225 (MT 2016); Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Examining those factors, the court held Hood's in-court identification would be of little probative value (due to suggestiveness) but highly prejudicial for obvious reasons. RP 1135-37.

Inconsistently, however, the court denied the defense's subsequent motion to exclude Hood's testimony that he identified Alvarado from an April 2020 Seattle Times newspaper article a friend or family member sent him. CP 233-52; RP1609-10. The court

recognized the article was suggestive. RP 1221-23, 1369.

It was a booking photo of Alvarado with a headline indicating Alvarado was the suspect in the shooting, had been arrested, was a felon and had just been released from prison. RP 1198-99, 1200-12. Like the in-court identification excluded by the court, the defense argued Hood's identification based on the article was impermissibly suggestive and of little probative value. RP 1212.

The court ruled the state could inquire of Hood about finding the article/photo and identifying Alvarado from it. While still suggestive, the court was unaware of any limitation on admitting a witness' independent research and how it may have informed the witness' memory. RP 1221-23. Only a cropped version of the photo (not the article) would be admitted. RP 1199, 1203, 1223.

The court did not deny the suggestive nature of the article but held Hood's anticipated identification was not more prejudicial than probative because the defense could cross-examine Hood about the circumstances of his identification. RP 1639. The court noted such was a matter of strategy. RP 1223.

The defense also moved to exclude evidence of Alvarado's arrest on an unrelated matter on April 11, 2020, including that he was trespassing in an abandoned duplex and gave police a false name. CP 228; RP 236, 1095-1117. The defense argued it was not relevant because it was unrelated to the charges and unfairly prejudicial. RP 236, 1100. The giving of a false name was more prejudicial than probative because Alvardo was on community custody at the time and likely gave the false name to avoid a community custody violation, rather than as consciousness of guilt for the current charges. RP 1104-1110. Defense counsel noted that to rebut the

state's claim of consciousness of guilt, the defense would have to introduce Alvarado's community custody status. RP 1111.

The court ruled the false name was relevant because it allowed the state to argue Alvarado was acting pursuant to a consciousness of guilt. RP 1114. The court did not see it as unfairly prejudicial but fair game for both sides to argue. RP 1115.

2. Jury Selection

Juror 57 expressed that if he (Juror 57) were innocent, he would say so. RP 609. Juror 57 expressed that an accused should not just sit there, say nothing and hope for the best. RP 610. Juror 57 indicated he would expect Alvarado to say something if he were indeed innocent. RP 610. At one point, Juror 57 claimed he would not hold it against Alvarado if he did not testify (RP 610); immediately afterward, however, Juror 57 said that if the state presented substantial evidence, he would want

to hear from both sides. RP 610. Juror 57 also stated in his questionnaire "A person accused of a crime must prove their innocence." RP 613.

The state sought to rehabilitate Juror 57 by asking whether he could follow an instruction indicating the defendant was not required to testify and that such a decision could not be held against the defendant. RP 611. Juror 57 responded, "I would have to bite my tongue and do it, but I could do it. Clearly it's not what I want." RP 611. When pressed for a firm answer and asked, "can you do it?" Juror 57 said, "yes." RP 612.

The court noted it was a close call but denied the defense's challenge for cause. RP 616-17, 954-76. The defense exercised all of its peremptory challenges on other jurors and Juror 57 was allowed to sit on the jury. RP 992-1035.

Juror 111 expressed that if the testimony of a police officer were on equal footing with the testimony of a

civilian or lay person, and that if siding with the police officer meant finding the defendant guilty, whereas siding with the lay person meant finding the defendant innocent, Juror 111 would find the defendant guilty. RP 720-23.

The court denied the defense motion to excuse Juror 111 for cause. RP 733, 958-80. As indicated, the defense exercised all of its peremptory challenges on other jurors and Juror 111 was allowed to sit on the jury. RP 992-1035.

In his reply brief to the appellate court, Alvarado argued he had legitimate concerns validating his exercise of peremptory challenges against those other jurors: 10, 18, 32, 110, 117, 137, 156, 76 and 128. Reply Brief of Appellant (RBOA) at 7-9. For jurors 10, 18, and 110, the court had denied for-cause challenges. RP 412 (No. 10), 497 (No. 18), 724-25 (No, 110); 942-43.

Number 32 had a gun pulled on him. RP 476. Although 32 did not say he could not be fair, the defense

likely thought he was impliedly biased due to the similarity of the charges and 32's experience.

Number 137 expressed the belief that state's expert witnesses are more truthful than defense experts because they have more experience and can better assess a situation. RP 783. Number 137 claimed she could set this aside. As a result, a defense challenge for cause would not have succeeded, although in a case such as this – with defense experts testifying – Alvardo would not want this juror to sit.

Juror 76 expressed the same sentiment that state's experts are more reliable. RP 584, 1032. Juror 76 also believes law enforcement witnesses are more likely to be truthful than other witnesses. RP 605-06, 1032.

Number 117 had a family member accused and/or convicted of assault. Number 117 "absolutely" believed his family member had been treated fairly. Number 117 also believed police officers are truthful. Ex 1001.

Number 128 “strongly agreed” a witness called by the prosecutor is more likely to tell the truth than a witness called by an accused person. RP 816. Although she backed off this statement, defense counsel likely doubted her sincerity.

Number 156 is a work safety investigator. RP 820. She disagreed it is better to let a guilty person go free than convict an innocent person. She also believed police officers are more likely to tell the truth and that an accused person has to prove his innocence. Ex 1001.

3. Trial Testimony

On the evening of March 31, 2020, Bruce Hood was working at his Auburn autobody shop (A&H Motorsports) with his friend Todd Deckman. RP 1240-47. A man with a gun came in and demanded wallets and money. When Deckman said they did not have any money, the man shot him, causing Deckman’s death within minutes. RP

1263. As Hood reached for his wallet, the man hit him over the head with the gun. RP 1263, 1266.

Hood was stumbling to his feet and running outside after the man when the assailant left in a truck. Hood told police it was a black Chevy pickup. RP 1269, 1275, 1292, 1387.

Hood called police and told the 911 operator the man was wearing long sleeves, long pants and had tattoos but did not say where. RP 1305-06. Hood did not describe the assailant as having a facial tattoo or one that had writing to anyone, including responding officers, his other friend who took him to the hospital or the detective who later followed up. RP 1412, 1518, 1370, 1664-65, 1670.

But at trial Hood insisted his assailant had a face tattoo that involved writing. RP 1305-06. The newspaper article and picture Hood saw (previously described) pictured Alvarado with a tattoo on his forehead consisting

of large writing. CP 248-51. The picture but not the article was admitted at trial. RP 1658; Ex 24.

Hood identified Exhibit 24 as the photo he saw from the article and testified it was the same person he saw in his shop on March 31, 2020. RP 1658; Ex 24.

Reviewing surveillance footage from nearby businesses, police were able to ascertain the truck described by Hood was a dark blue Toyota Tacoma truck and that the man seen running out of A&H and getting in the truck was wearing a "29" Seahawks jersey, with a long-sleeved shirt underneath, jeans and dark shoes. 1RP 62.

Reviewing traffic camera footage from before the truck's arrival, police were able to deduce the Tacoma truck had stopped earlier in the evening at 8:58 p.m. at a nearby Chevron gas station and obtained surveillance footage from the Chevron. 1RP 40-41, 51, 58, 609-610.

The video shows a man wearing a "29" Seahawks jersey exit the front passenger seat of the truck. 1RP 62, 612, 624. No facial tattoos are apparent in the video. 1RP 625, 1118.

The video also depicts a female getting out of the back passenger seat and walking toward the gas station market. 1RP 612, 625-26, 634, 732. The driver was wearing a baseball hat. 1RP 624.

The lead detective investigating the case, Douglas Faini, recognized the woman as Tristan Thomas. 1RP 698-99; 1RP 805-06. Faini leaned on Thomas by releasing her name and photo to the media. When Thomas subsequently came in to talk to police after seeing herself on the news, she claimed a man she knew only as "Nino" committed the shooting, although she did not actually see him do it or with a gun that night. 1RP 694, 704-721.

Thomas testified the night of the shooting Nino was wearing a numbered Seahawks jersey. 1RP 724. When questioned by Faini, she identified a photo from a montage as Nino. Faini testified it was Alvarado. 1RP 811, 917.

Meanwhile, on April 11, 2020, officer Todd Glenn was dispatched to a vacant duplex in Auburn and encountered a young, Hispanic male with facial tattoos. 1RP 398-99. When Glenn asked the man's name, he said Pablo Reyes. 1RP 400. However, Glenn and fellow officers could not find an identification for such a person. 1RP 400. They took pictures of the man. 1RP 400-401. In court, Glenn identified Alvarado as the man. Glenn testified Alvarado's facial tattoos were definitely noticeable at the time of the duplex encounter. 1RP 408.

After questioning Thomas, Faini learned of Alvarado's contact with police at the vacant duplex a couple days earlier. 1RP 834.

4. Court of Appeals Opinion

Alvarado argued the court's denial of his for-cause challenges to Jurors 57 and 111 violated his right to a fair and impartial jury. Brief of Appellant (BOA) at 39-52; RBOA at 1-13.

Alvarado argued the court erred in admitting Hood's identification of Alvarado from the suggestive newspaper article where: the article's suggestiveness undermined the reliability of Hood's identification making it of little probative value; its admission created a high danger of unfair prejudice because it was the only identification of Alvarado Hood made. BOA at 61-71. The court abused its discretion because it did not understand it had authority to exclude the identification under ER 403. BOA at 64-71; RBOA at 14-15.

Finally, Alvarado argued the court erred in admitting evidence Alvarado gave a false name when arrested on an unrelated matter because it was sheer speculation the

false name was related to a consciousness of guilt. BOA at 53-61; RBOA at 13.

The appellate court disagreed with each of Alvarado's arguments. Appendix at 1. Regarding Alvarado's challenge to Jurors 57 and 111, the appellate court held Alvarado did not preserve the error based on its opinion in State v. Kovalenko, 30 Wn. App. 2d 729, 546 P.3d 514 (2024), and this Court's opinion in State v. Talbott, 200 Wn.2d 731, 737-38, 521 P.3d 948 (2022). Appendix at 6-7.

Regarding Alvarado's challenge to the court's ruling admitting the false name evidence, the appellate court concluded the court's decision the evidence showed a consciousness of guilt was not manifestly unreasonable. Appendix at 8-12.

Regarding Alvarado's challenge to Hood's identification from the suggestive newspaper article, the appellate court recognized it presented a novel issue.

Appendix at 16. The court also acknowledged Hood's identification from the newspaper article carried similar reliability concerns as if the state had asked Hood to decide whether a single photograph of someone with a facial tattoo was the assailant. Appendix at 16.

At one point in its opinion, the appellate court tacitly agreed the trial court appeared focused in its ruling on the fact there was no state involvement as a barrier to exclusion. Appendix at 14. Yet, the appellate court concluded "Alvarado has not met his burden to establish that the trial court abused its discretion in allowing the parties to test the reliability of Hood's identification through direct and cross examination." Appendix at 19.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. ALVARADO'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED.

The inclusion of Jurors 57 and 111 on Alvarado's jury raises a significant question of law under the state

and federal constitutions. RAP 13.4(b)(3). It also raises a significant issue of substantial public interest because the appellate court's waiver analysis extends this Court's opinion in Talbott, 200 Wn.2d 731 (2022), beyond legitimate reason. RAP 13.4(b)(4).

Every person accused of a crime has the right to be tried by an impartial jury. U.S. CONST. amend. VI.; WASH CONST. art. 1, § 22; Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.1998). The bias or prejudice of even a single juror is enough to violate that guarantee. Id. Accordingly, "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." Dyer, 151 F.3d at 973, n. 2; see also United States v. Martinez–Salazar, 528 U.S. 304, 316, 120 S. Ct. 774, 782, 145 L.Ed.2d 792 (2000) ("Nor did the district court's ruling result in the seating of any juror who should have been dismissed for cause. As we have recognized, that circumstance would require reversal.").

To safeguard this right, judges must remove jurors for cause when the jurors cannot fairly decide a case, either on a party's motion to strike the juror or on the court's own motion in clear cases of bias. RCW 2.36.110; RCW 4.44.170; CrR 6.4(c)(1); State v. Davis, 175 Wash.2d 287, 290 P.3d 43 (2012), abrogated in part by State v. Gregory, 192 Wash.2d 1, 427 P.3d 621 (2018) (plurality opinion).

The trial court erred in denying for cause challenges to both Jurors 57 and 111. Juror 57 was biased against Alvarado for exercise of his Fifth Amendment Right. The Fifth Amendment to the United States Constitution affords a criminal defendant the right not to testify at his own trial; and the Sixth Amendment entitles him to an impartial jury that will not be adversely influenced by the fact that he exercised that constitutional right. Carter v. Kentucky, 450 U.S. 288, 305, 101 S. Ct. 1112, 1121-22, 67 L. Ed. 2d 241 (1981).

Juror 111 was biased against the presumption of innocence. Juror 111 expressed bias toward finding the defendant guilty. Juror 111 expressed that if the testimony of a police officer were on equal footing with the testimony of a civilian of lay person, and that if siding with the police officer meant finding the defendant guilty, whereas siding with the lay person meant finding the defendant innocent, Juror 111 would side with the officer and find the defendant guilty. RP 720-723. This is directly contrary to the presumption of innocence. State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), overruled in part by State v. Talbott, 200 Wn.2d 731 (2022).

The court of appeals sidestepped Alvarado's challenges to these unfit jurors, reasoning he waived his challenges by not exercising peremptory challenges on 57 and 111.

As with any constitutional right, a defendant's waiver must be knowingly, intelligently and voluntarily made. State v. Lee, 12 Wn. App. 2d 378, 460 P.3d 701 (2020). There was no knowing, intelligent and voluntary waiver of the right to an impartial jury here.

How to preserve the wrongful denial of a for-cause challenge has been anything but clear. A long line of precedent has held that a party who accepts the panel without exhausting their peremptory challenges cannot appeal "based on the jury's composition." State v. Clark, 143 Wn.2d 731, 762, 24 P.3d 1006 (2001). Thereafter, however, in State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001), this Court seemed to endorse a different rule:

> If a defendant believes that a juror should have been excused for cause and the trial court refused [their] for-cause challenge, [they] may elect not to use a peremptory challenge and allow the jury to be seated. After conviction, [they] can win reversal on appeal if [they] can show that the trial court

> abused its discretion in denying the for-cause challenge.

Fire, at 158.

It was not until Talbott that this Court harmonized the two lines of cases, noting that the appellant in Fire exhausted their peremptory challenges and the appellant in Clark did not. Accordingly, the cases were not inconsistent. Significantly, this Court stated:

> Thus, we take this opportunity to clarify that a party who does not exhaust their peremptory challenges and accepts the jury panel cannot appeal the seating of a particular juror. Our holding is limited to the facts of this case, and we express no opinion on the analysis that applies where a party exhausts their peremptory challenges and objects to the jury panel.

Talbott, at 733 (emphasis added).

In State v. Talbott, the trial court denied Talbott's motion to excuse a prospective juror (juror 40) for cause. Talbott could have removed juror 40 with a peremptory challenge, but did not. Nor did he exhaust his peremptory challenges on other prospective jurors. Instead, Talbott

affirmatively accepted the panel, including juror 40, *with at least two peremptory challenges still available to him*. Talbott, at 732. In that instance, this Court held Talbott did not have the right to appeal the seating of juror 40. Id.

Alvarado's jury trial took place in August and September 2023. He did not accept the jury panel with any peremptory challenges still available to him. Under Clark and Talbott, he has the right to appeal the seating of Jurors 57 and 111. He did not knowingly, intelligently and voluntarily waive that right.

Yet, the appellate court has extended Talbott to include the situation here where, although Alvarado exercised all of his peremptory challenges, he did not use them to remove Jurors 57 and 111. According to Division One, this also amounts to waiver. Kovalenko, 30 Wn. App. 2d at 739. But Talbott did not express an opinion on the facts presented here. Because Talbott expressly

declined to consider this situation, it cannot be said that Alvardo knowingly forfeited his right to an impartial jury.

And as the appellate court acknowledged but discounted in its Kovalenko decision, such a rule interferes with the purpose for having peremptory challenges. Kovalenko, 30 Wash. App. 2d at 738 ("such a rule would usurp counsel's autonomy to exercise peremptory challenges in a way that counsel believes would be most conducive to seating a fair and impartial jury."). The importance of peremptory challenges cannot be understated:

> Peremptory challenges, along with challenges for "cause," are the principal tools that enable litigants to remove unfavorable jurors during the jury selection process. The central function of the right of peremptory challenge is to enable a litigant to remove a certain number of potential jurors who are not challengeable for cause, but in whom the litigant perceives bias or hostility. "The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on

> the basis of the evidence placed before them, and not otherwise." . . . A related and equally important purpose of peremptory challenges is to reassure litigants—particularly criminal defendants—of the fairness of the jury that will decide their case. More than two centuries ago, Blackstone declared the peremptory challenge "necessary … that a prisoner … should have a good opinion of his jury, the want of which might totally disconcert him," and stated that "the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such dislike." Blackstone, 4 *Commentaries* 353 (1st ed. 1769).

United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996), abrogated by Rivera v. Illinois, 566 U.S. 148, 157, 160-62, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) (the United States Constitution does not guarantee peremptory challenges so the loss of one due to a court's good-faith error is not a matter of federal constitutional concern).

As indicated in the facts section above, Alvarado had legitimate concerns validating his exercise of peremptory challenges against the other jurors.

There was no gamesmanship of the sort predicted by the appellate court in Kovalenko. In keeping with this Court's opinion in Talbott and Clark, Alvarado preserved his challenges to Jurors 57 and 111. This Court should accept review of this constitutional question of significant public interest. RAP 13.4(b)(3), (4).

2. THE COURT ERRED IN ADMITTING HIGHLY SUGGESTIVE IDENTIFICATION EVIDENCE WITH LITTLE TO NO PROBATIVE VALUE BUT AN ELEVATED DANGER OF PREJUDICE.

The admissibility of suggestive identification evidence obtained in the absence of police involvement is a novel area of law and one of significant public interest because there is sparce legal guidance, yet it shares the same reliability concerns as suggestive police

identification procedures – the danger of misidentification. This Court should accept review. RAP 13.4(b)(4).

Generally, all relevant evidence is admissible. ER 402. "Relevant evidence" means 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.

But under ER 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Unfair prejudice" is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors. State v. Rice, 48 Wash. App. 7, 13, 737 P.2d 726, 730 (1987).

The court's evidentiary rulings are reviewed for an abuse of discretion. State v. Acosta, 123 Wash. App. 424, 431, 98 P.3d 503, 507 (2004). Abuse of discretion is "'discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" State v. Tharp, 27 Wn. App. 198, 206, 616 P.2d 693 (1980), aff'd, 96 Wash.2d 591, 637 P.2d 961 (1981) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The court erred in admitting Hood's identification of Alvarado as the shooter from the April 20, 2020 Seattle Times article. As defense counsel argued, the probative value of the identification based upon the news article was minimal at best – it showed the individual in the article was identified to Hood as the assailant by the Seattle Times author and was not indicative of Hood's memory. CP 244. CP 245. The suggestiveness

undermined the reliability of Hood's identification, making it of little probative value.

But the danger of unfair prejudice was high because this was the only identification of Alvarado Hood made, albeit from a highly suggestive source. And it left Alvarado with the hard choice not to inform jurors why the identification was unreliable because it would have exposed the jury to propensity evidence Alvarado was a felon who had just been released from prison two weeks prior to the shooting with extensive criminal history.

In Perry v. New Hampshire, the Supreme Court held that the admissibility of eyewitness identification evidence, where the police have not arranged the suggestive circumstances (such as here) should be governed by the rules of evidence, specifically ER 403. 565 U.S. 228, 247, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

In State v. Gould, the appellate court considered whether the trial court erred under ER 403 in admitting evidence identifying Gould's stepbrother as the individual seen with him shortly after the crime. Gould, 58 Wn. App. at 180. The evidence was brought forward mid-trial. Gould argued he was unfairly prejudiced by the surprise. Id.

Significantly, relevance was conceded in that case. This Court held surprise "standing alone" was not recognized as a basis for exclusion under ER 403. Id. at 181. Accordingly, the trial court did not err. Id.

But the trial court erred in its ER 403 analysis here. Despite finding the newspaper article suggestive, the court failed to exercise discretion to exclude the evidence. Instead, the court reasoned that *unlike the courtroom identification it excluded*, it knew of no limits for what a witness himself could look up and testify about.

> Separate analysis, I think, I don't know that I've seen any courts address or limit the introduction of what a witness non-State witness did on their own to look at photos, or look at people in the parking lot. Or do other things that would be unduly suggestive in terms of that seems a little different at least in terms of the power of what's happening. It's, there's something about it, as other people have said, a witness sitting in the box and pointing a finger. That has a certain weight. There's something about that that even though there's remedies about cross-examination and instructions and testimony that that carries that certain weight that some courts have said that is not allowable. As I said, it hasn't been held in Washington yet, but I made an independent call on 403 basis that that particular act couldn't happen here. In terms of, in terms of Mr. Hood's own memories that he's testifying to today; how he came to possess those memories that he's going to express on the stand, I continue to think it's fair game for both sides to explore.

RP 1220-21 (emphasis added).

This was an abuse of discretion. A trial court abuses its discretion when it fails to exercise its discretion, such as when it fails to make a necessary decision. State v. Flieger, 91 Wn. App. 236, 242, 955

P.2d 872 (1998). Here, the trial court recognized it had discretion under ER 403 to exclude Hood's in-court identification but did not recognize it had similar authority under ER 403 to exclude Hood's identification from the highly suggestive newspaper article for similar reasons – low probative value due to suggestibility but a high degree of danger of unfair prejudice to the danger of misidentification.

Contrary to the court of appeals, the court did not exercise its discretion. The error asserted by Alvarado is not that the court was required to apply the factors from

Neil v. Biggers[1] but that it created an arbitrary distinction in its ability to exclude identification evidence under ER 403. The court found exclusion permissible where it includes state action (i.e. in-court identification prompted by the prosecutor). But impermissible where there is no state action (identification prompted by suggestive newspaper article). That is the error. Both concern unreliable yet highly prejudicial evidence. Perry and ER 403 permit exclusion in both instances.

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[1]Under Neil v. Biggers, the court determines whether a suggestive montage creates a substantial likelihood of irreparable misidentification by looking at the following five factors:

> (1) the opportunity of the witness to view the criminal at the time; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. at 199–200.

This Court should accept review of this novel issue of substantial public interest. RAP 13.4(b)(4).

3. THE COURT ERRED IN ADMITTING FALSE NAME EVIDENCE THAT HAD NO RELEVANCE BUT AN ELEVATED DANGER OF UNFAIR PREJUDICE.

This Court should accept review because the appellate court's decision conflicts with this Court's decision in State v. Slater, 197 Wn.2d 660 (2021).

The court's decision to admit evidence Alvarado gave a false name to police when contacted on an unrelated matter was manifestly unreasonable. It did not constitute consciousness of guilt, because there could have been any number of reasons for it. As defense counsel explained, Alvarado was on community custody and could have been trying to avoid a probation violation. It was extremely prejudicial, however, because the prosecutor used it as evidence of guilt despite that being purely speculative.

The lack of relevance is demonstrated by analogy to cases examining the probativeness of so-called "flight" evidence. See e.g. State v. Slater, 197 Wn.2d 660. In Slater, this Court held failure to appear is not necessarily "flight" evidence indicative of a consciousness of guilt. Id. at 670-71. That is because there can be many reasons for failure to appear, such as unreliable transportation or lack of childcare. The reason for the failure therefore is sheer speculation. Id. at 675.

Similarly, the reason for Alvarado's false name is sheer speculation. That he gave the police a false name when caught in an abandoned building was not relevant. Only relevant evidence is admissible. The trial court erred in admitting the false name evidence.

F. CONCLUSION

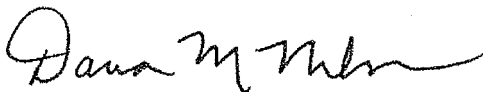
For the reasons stated above, this Court should accept review. RAP 13.4(b)(3), (4).

This document contains 5,548 words in 14-point font, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 17th day of September, 2025.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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8/18/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RIGOBERTO ALVARADO,

Appellant,

and DANNY OMAR MENDEZ, and each of them,

Defendants.

No. 85952-8-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Rigoberto Alvarado appeals his conviction following a jury trial for murder in the first degree, assault in the second degree, and unlawful possession of a firearm in the first degree. He challenges, under ER 403, the admission of the victim's testimony identifying Alvarado as the shooter based on a photograph of him that appeared in a newspaper article after his arrest reporting that prosecutors believed he was the assailant and identifying him as a felon with extensive criminal history. He also challenges the denial of Alvarado's two for-cause challenges, and the admission of testimony that Alvarado provided a fake name to police during an unrelated incident. Finding no error, we affirm.

FACTS

On March 31, 2020, Rigoberto Alvarado entered A&H Motors, an autobody repair shop where Bruce Hood and Gregory Deckman were present. Alvarado produced a firearm and demanded money. When Deckman refused, Alvarado shot him in the chest. Deckman later died from his injuries. After shooting Deckman, Alvarado then turned to Hood and demanded his wallet. As Hood turned in an attempt to take his wallet out of his pocket, Alvarado struck him in the head with the firearm. He then fled the scene with the wallet, pursued briefly by Hood, before escaping in a dark truck.

Hood called 911 and described the suspect as a Hispanic male who was shorter than him and with tattoos. Hood did not provide any details of the tattoos or where he saw them. First responders arrived and took Hood to the hospital where he had to undergo surgery for a fractured skull with bleeding on his brain. Police responded and collected evidence, including DNA from a fired shell casing and an intact cartridge found at the scene.

Surveillance cameras at the autobody shop were not operational. But video recordings from traffic cameras and security footage from nearby businesses identified the vehicle involved as a Toyota Tacoma truck. Prior to arriving at the auto shop, the truck stopped at a Chevron gas station. The gas station's security video shows the truck pull into a pump station. A male exits from the front right passenger seat and opens the door to the right rear passenger seat for a female to exit the vehicle. The video shows the male from a distance, capturing the fact he is wearing a Seahawk's jersey but does not show a clear image of his face. The video, however, clearly captures the female passenger's face as she enters the building at the gas station. Police later identified the

female as Tristin Thomas. And when later interviewed by police, Thomas identified the driver of the vehicle as Danny Mendez and the male passenger as someone she knew as "Nino." She later reluctantly identified Alvarado as "Nino." The video documented the truck's route from the gas station to the crime scene.

According to Thomas, Mendez, Alvarado, and Thomas stopped at a Chevron gas station in an attempt to obtain hot food. After leaving the gas station, the group proceeded to some nearby apartment complexes before continuing to the parking lot of A&H Motors. Once they pulled into the parking lot and parked, Alvarado exited the front passenger seat and grabbed something from near a fence. Alvarado then instructed Mendez, the driver, to wait, saying, "I'll be right back. Don't leave me." Nearby camera surveillance footage recorded an individual in a Seahawks jersey number 29 get out of the vehicle and then grab something. The footage then shows the same person enter A&H Motors through the front door. After Alvarado left them, a gunshot was heard. Alvarado then came running back to the truck, and as the group drove away Mendez asked Alvarado "if he shot him." Alvarado responded "yes." Mendez asked him why, and, according to Thomas, Alvarado responded that he "wasn't listening and wasn't moving fast enough." The truck then left at a high speed.

Law enforcement eventually located the truck, though the vehicle had been altered. The step-ups had been removed. The rims spray-painted and a decal appeared to have been removed from the rear windshield. Upon processing the vehicle, latent print examiners discovered Alvarado's fingerprints on the rear passenger-side door, consistent with surveillance video showing him opening the door for Thomas.

On April 11, other police officers investigating a non-related report of trespassing

made contact with Alvarado at a vacant property. During that investigation, Alvarado initially falsely identified himself as "Pablo Reyes." The State, later at trial, was permitted over defense objection, to introduce testimony that Alvarado gave a false name at the time of his arrest.

By April 16 the State had enough information to arrest and charge Alvarado with murder in the first degree, assault in the second degree, and unlawful possession of a firearm in the first degree. Hood was never asked to identify the shooter through a photo montage. On April 20, *The Seattle Times* published an article about the robbery, which included a photograph of Alvarado that showed large tattoos on his forehead. The April 20 article reported that prosecutors believed Alvarado committed the robbery two weeks after his release from prison. The article also detailed Alvarado's criminal history, which includes 13 felony convictions.

Hood read *The Seattle Times* article and viewed the photograph of Alvarado in the article more than once. It was not until a defense interview in January 2023, conducted with the prosecutor present, that Hood first shared that he read the article, viewed the photograph of Alvarado and recognized him as the individual who had murdered Deckman and assaulted Hood.

The case proceeded to trial in August 2023. Over the course of voir dire, Alvarado raised six challenges for-cause. The trial court granted one and denied the others. Alvarado exhausted his peremptory strikes on jurors other than two jurors he had previously challenged for cause: jurors 57 and 111. Alvarado accepted the jury with jurors 57 and 111 on the panel.

After the trial court ruled that Hood would not be allowed to make an in-court

identification, the prosecutor obtained the photograph from *The Seattle Times* article and confirmed with Hood that he identified Alvarado as the assailant through that photograph. Over defense objection, the State was permitted to admit the photograph of Alvarado from the article and elicit Hood's testimony that the person in the photograph was the assailant. Thomas also testified at trial. She identified Alvarado as the other passenger in the truck and spoke of their activities the day of the shooting. Additional facts are discussed further below where relevant.

The jury found Alvarado guilty as charged.

Alvarado appeals.

DISCUSSION

For-cause Challenge Waiver

Alvarado contends that jurors 57 and 111 were biased and that the trial court erred when it allowed them to sit on the jury panel.

The trial court allocated nine peremptory challenges to each party. Alvarado challenged six jurors for cause: 10, 18, 57, 110, 111, and 147. The court excused juror 147 but otherwise denied all the other for-cause challenges.

At the time the court entertained peremptory challenges, juror 57 was part of the potential petit jury. Alvarado used his first four peremptory challenges to strike jurors 10, 18, 32, and 110, which as a result moved juror 111 into the potential petit jury. At that time, Alvarado had five remaining peremptories. He chose to exercise them against jurors who he had not challenged for cause.[1] Alvarado accepted the jury with jurors 57 and 111 seated on the panel.

[1] The court granted his request to strike jurors 117, 137, 156, 76, 128.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution both guarantee criminal defendants the right to trial by an impartial jury. U.S. CONST. amend VI; WASH. CONST. art., I § 22. But "the burden of preventing trial errors rests squarely upon counsel for both sides." State v. Farley, 48 Wn.2d 11, 15, 290 P.2d 987 (1955). Even defense counsel in a criminal case must attempt to correct errors at trial, rather than saving them for appeal "in case the verdict goes against [them]." Id.

The State argues that this case is analogous to State v. Kovalenko, 30 Wn. App. 2d 729, 546 P.3d 514 (2024), and that Alvarado waived his right to assert a claim based on the trial court's denial of his for-cause challenge to jurors 57 and 111. We agree.

Our Washington Supreme Court recently reaffirmed its holding that a party who fails to use an available peremptory strike on a juror previously challenged for cause, who then affirmatively accepts the panel, waives any subsequent claim of error as to that juror's seating. State v. Talbott, 200 Wn.2d 731, 737-38, 521 P.3d 948 (2022). This Court extended that principle in Kovalenko.

In Kovalenko, after the defendant had two for-cause challenges denied he still had six available peremptory challenges. 30 Wn. App. 2d at 738-39. However, the defendant failed to use any of his available peremptory challenges on the juror that he had unsuccessfully moved to excuse for cause. Id. Instead, the defendant used his six peremptory strikes on other jurors, none of whom he had attempted to challenge for-cause. Id.

Under Kovalenko, the inquiry, for purposes of waiver, is not simply whether a party exhausted its peremptory challenges by the end of jury selection, but whether the

party had the opportunity to remove a challenged juror and affirmatively chose not to do so. The Kovalenko court reasoned that declining to apply waiver in such circumstances would encourage gamesmanship, effectively incentivizing a defendant to allow a potentially biased juror to remain on the panel, not to protect the right to a fair trial, but to preserve a fallback basis for reversal on appeal. Id. at 738–39.

In the instant case, after the trial court denied Alvarado's for-cause challenge to juror 57, Alvarado still possessed all nine of his peremptory challenges. He could have removed juror 57 from the panel at any point thereafter but did not. Alvarado still had four peremptory strikes available after the trial court denied his for-cause challenge to juror 111. Alvarado declined to exercise a peremptory strike on juror 111. Instead, he chose to remove other jurors who had not been challenged for cause and accept the panel knowing it included jurors 57 and 111.

Alvarado attempts to distinguish Kovalenko. He contends that unlike in Kovalenko, where the Court warned against manipulation of peremptory challenges, he used his challenges in good faith. Alvarado asserts that he excluded jurors with identifiable bias, not for gamesmanship. However, he provides no argument or explanation as to why a different result should be reached where a party elects to exhaust its peremptory challenges on jurors who were never challenged for cause. He offers no rationale that would justify a decision for us to depart from the legal principles as articulated in Talbott and applied in Kovalenko.

We follow Kovalenko and conclude that Alvarado waived his right to challenge the denial of his for-cause challenges against jurors 57 and 111.

False Name

The trial court denied Alvarado's motion to exclude, under ER 403,[2] testimony that Alvarado gave arresting officers a false name. Alvarado contends that because the arresting officers were investigating an unrelated matter the trial court abused its discretion. He further asserts that he was on community custody at the time of his arrest, and that the most probable reason he gave a false name was to avoid a custody violation, not because of any consciousness of guilt related to the murder or assault charges. He further argued that, to rebut the State's inference of guilt, he would be forced to reveal his custodial status to the jury, thereby introducing additional prejudicial information.

The court explained that the false name was relevant because it allowed the State to argue consciousness of guilt, a permissible inference from the facts. It further found the evidence was not unfairly prejudicial and deemed it fair for both parties to argue its significance to the jury.

Alvarado argues that his alternative explanation is sufficient enough to overcome the State's consciousness of guilt claim, thereby rendering the court's decision to admit the false name evidence as manifestly unreasonable. We disagree.

Generally, "[a]ll relevant evidence is admissible." ER 402. We review a trial court's decision to admit or exclude evidence for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

[2] Alvarado raised other arguments below that he no longer argues on appeal.

Relevant evidence is any evidence which has a tendency to make the existence of any fact that is of consequence to the determination of the issue more probable or less probable than it would be without the evidence. ER 401; State v. Lough, 125 Wn.2d 847, 861-62, 889 P.2d 487 (1995). Overall, "[t]he threshold to admit relevant evidence is very low" and "[e]ven minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Alvarado, citing State v. Chase, 59 Wn. App. 501, 799 P.2d 272 (1990), contends that there must be a connection between the act of showing a consciousness of guilt and the crime charged. Here, Alvarado argues, that there is nothing in the record to demonstrate that the reason he gave police a false name was to evade detection for the charged murder and assault. However, Alvarado misconstrues the holding in Chase.

In Chase, police responded to a burglary at a video store. As police arrived at the store, they saw two men running from the scene, whom the police chased on foot, before eventually finding three suspects involved in the crime. Id. at 502-03. Police captured the second suspect who gave the name Lee Parcurich, and the third suspect, who identified himself as Ken Coldeen. Id. Coldeen was later identified as Brian Chase. Id. at 504.

The Chase court held that the admission of the false names was proper because it tended to show consciousness of guilt, and thus to further inferences of identity and criminal intent. Id. at 507. Alvarado relies on the factual distinction in Chase to suggest a holding it did not make. The Chase court did not hold that giving a false name to avoid detection is only admissible as consciousness of guilt when the false name is given to officers investigating the crime at issue as Alvarado suggests.

The proper standard, as clarified in State v. Freeburg, is whether the defendant's conduct supports a reasonable inference of consciousness of guilt. 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001). Under Freeburg, evidence of "resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime." Id. The inference must be substantial and real, not speculative, but Alvarado cites to no authority that requires the conduct occur during an active investigation or immediately following the crime. When a party cites no authority in support of a proposition, this court may assume counsel has found none. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

It is reasonable for a jury to infer that at the time Alvarado gave the police a false name, he was aware that he had shot someone and assaulted another. It follows that another reasonable inference is that police would be trying to find the person who committed the crimes and widely shared information on what the assailant looked like with all law enforcement.

The fact that Alvarado may have another explanation as to why he gave a false name goes to weight, not admissibility. A jury could have accepted or rejected Alvarado's alternative explanation, should he have elected to introduce such testimony regarding his community custody, which he was free to do as well as request a limiting instruction as to such evidence. It is the jury's role to make credibility determinations. State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982). The fact that the jury may be asked to do so does not mean that the inference that Alvarado gave a false name to avoid detection of the charged crimes is speculative, conjectural, or fanciful. See

Freeburg, 105 Wn. App. at 498. Moreover, Alvarado certainly could have more than one reason to have given a false name. Even so, that does not mean the evidence is not relevant.

The next question is whether the "probative value is substantially outweighed by the danger of unfair prejudice" because even relevant evidence may be excluded. ER 403. Evidence causes unfair prejudice when the evidence is "'more likely to arouse an emotional response than a rational decision by the jury.'" State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). And "the burden of demonstrating unfair prejudice is on the party seeking to exclude the evidence," which in this case is, Alvarado. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999).

Applying a manifest abuse of discretion standard, we give a great deal of deference to the trial court's "evaluation of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to mislead under ER 403." State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." Darden, 145 Wn.2d at 619.

Alvarado relies on State v. Slater, 197 Wn.2d 660, 486 P.3d 873 (2021), in support of his ER 403 argument. In Slater, the defendant failed to appear (FTA) for trial after being charged with felony violation of a domestic violence no contact order. 197 Wn.2d at 665-66. Following the FTA, the trial court issued a bench warrant. Id. at 666. Approximately one month later, the defendant appeared to quash the warrant. Id. The Supreme Court found that evidence of a single FTA accompanied by a prompt motion to

quash the issued warrant is not sufficient evidence of flight and, therefore, cannot be used as evidence from which to infer consciousness of guilt on the underlying crime. Id. at 670-71.

Slater is wholly distinguishable. Slater was not attempting to avoid detection as to who he was. He simply failed to show up for court and then showed up, himself, to quash the warrant. That simply could not constitute evidence of "flight" to support a consciousness of guilt inference. Id. at 671. Thus, the prejudicial effect of introducing Slater's FTA outweighed any minimal relevance of his FTA. Id. at 668. In the instant case, as discussed above, it is reasonable that a jury could infer that Alvarado intentionally gave police a false name to avoid detection.

While it may be true that Alvarado's alternative explanation of giving a false name entails introducing evidence that is prejudicial to Alvarado, that is of no matter here. The question is not whether a defense theory is potentially prejudicial. The State has no control as to what Alvarado may testify to. While all evidence unfavorable to a defendant carries some risk of prejudice, ER 403 only bars admission when that prejudice substantially outweighs the evidence's value to the case. Moreover, Alvarado made no attempt to mitigate the risk of prejudice. After the trial court issued its ruling, defense counsel alerted the court of the possibility of Alvarado requesting a limiting instruction. The trial court expressly responded, stating that "it's something I would always consider." However, at the time the State introduced the testimony, Alvarado did not request a limiting instruction.

We conclude the trial court did not abuse its discretion in admitting evidence that Alvarado provided a false name to police.

Newspaper Photo Identification

The defense theory at trial was identity. Alvarado has prominent tattoos on his forehead. During the 911 call and follow-up with detectives, Hood never mentioned the tattoos with any detail. Police never attempted to present Hood with a photo montage of any suspect.

During motions *in limine*, Alvarado moved to bar Hood from making an in-court identification of Alvarado. During argument, defense alerted the court that Hood had seen photographs of Alvarado in the media and that the only time Hood had indicated that he believed Alvarado was the assailant was three years after the shooting. The court applied the Biggers[3] factors and concluded that Hood's potential in-court identification carried significant risk of prejudice and should be excluded under ER 403. The court explained that when it considered the Biggers factors of opportunity of the witness to observe, the degree of attention, the accuracy of the description prior, the certainty at the confrontation and the length of time that elapsed,

> I just have so many concerns about Mr. Hood now adding in the facts that it appears that he's done his own research to see photos in the media or photos elsewhere of Mr. Alvarado. He had a minimal opportunity to observe. That observation was under the extreme stress of seeing, at least allegedly, his friend shot to death in front of him. And having a gun in his face, perhaps. And at least spending part of that time facing the other way as he reached for his wallet. And then immediately after suffering a serious head injury that required surgery. He gave a description at that time that did not include, as far as I can tell, the pretty prominent facial tattoos which are in photos a couple weeks later, which I think arguably were there at the time.

Following the court's ruling and after defense gave its opening statement, the State pursued an alternative method of identification based on *The Seattle Times* article

[3] Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

Hood had referenced during a defense interview in January 2023. Prior to Hood testifying and outside of court, the prosecutor searched online and located the April 2020 article that included a photograph of Alvarado and showed the article containing Alarado's photo to Hood. Hood confirmed that this was the photo he had seen earlier and identified the individual pictured as the assailant. The State notified the court of its intent to admit the photograph and have Hood identify the individual in the photograph as the person who assaulted him and shot Deckman.

Alvarado objected arguing that the danger of unfair prejudice from the photo identification is the same reason the trial court correctly barred Hood from making an in-court identification:

> The Court has said in its analysis that [asking Hood to identify the defendant in court] would be zeroing in on one person. But I would point out to the Court that this article also zeros in on one person. It doesn't provide numerous different options. It in fact only shows one person. And not only does it show only one person, it shows only one person that is arrested and then is called a felon, and indicates that this occurred two weeks from release from prison.
>
> So it's substantially similar with respect to the actual practical outcome. And then it puts defense in a position where we really cannot cross-examine on this material without bringing in things about prior criminal history that really the jury should not hear.

The trial court acknowledged that the circumstances surrounding Hood's viewing of the photograph were highly suggestive but appeared to focus on the fact that someone, other than the State, was responsible for sending *The Seattle Times* article to Hood, and that defense could cross-examine regarding the circumstances of the identification. The court explained

> In terms of, in terms of Mr. Hood's own memories that he's testifying to today; how he came to possess those memories that he's going to express on the stand, I continue to think it's fair game for both sides to explore. Both whether it's just from the 10 seconds or so that he appears

> to have seen someone in the store; or whether it's through doing his own research or doing other things, I would have given both parties pretty, especially the defense, pretty free reign to explore with them those questions.
>
> ....
>
> If this were a matter of, and maybe this is slicing it too fine, but I don't know how else to do it. If this were a matter of the State for the first time doing a one packet montage or a one photo montage and showing Mr. Hood for the first time that photo, obviously that would be out. Because that would be impermissibly suggestive.

The court ruled that it would not permit the State to introduce the article, but concluded,

> I don't find that showing the photo in the course of asking Mr. Hood what he did to remember, or perhaps to jog his memory or other things like that would, that the probative value would be substantially outweighed by the danger of unfair prejudice in the same way that the in-court ID does.

When the trial court earlier had barred in-court identification, it remarked that other safeguards of mitigating the suggestibility of an in-court identification were not practical, such as having Alvarado sit elsewhere in the courtroom. The trial court noted that it would not be possible to have others in the courtroom who had the same facial tattoos as Alvarado.

Alvarado argues that "[h]ad the court applied the same factors to the [sic] Hood's newspaper identification, as it did to his proposed in court identification, it is clear the court would have excluded it." Alvarado argues that the trial court erred in its ER 403 analysis because it "failed to exercise discretion to exclude the evidence."

Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). A trial court's decision on whether to admit an out-of-court identification is reviewed for abuse of discretion. State v. Sanchez, 171 Wn. App.

518, 579, 288 P.3d 351 (2012). A trial court abuses its discretion if any of the following is true:

> (1) The decision is "manifestly unreasonable," that is, it falls "outside the range of acceptable choices, given the facts and the applicable legal standard";
>
> (2) The decision is "based on untenable grounds," that is, "the factual findings are unsupported by the record"; or
>
> (3) The decision is "based on untenable reasons," that is, it is "based on an incorrect standard or the facts do not meet the requirements of the correct standard."

State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). Alternatively, a trial court abuses its discretion when no reasonable judge would have ruled as the trial court did. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

We acknowledge that the facts presented in the instant case are novel. Most criminal witness identification cases arise following State action that involve a police-initiated lineup or photomontage. As the trial court acknowledged, had the State asked Hood to decide whether the single photograph of someone with a facial tattoo was the assailant, it would be undisputed that the identification would be obtained through unacceptable suggestive procedures. Here, not only did Hood only view a single photograph of Alvarado with a facial tattoo, he did so while reading that prosecutors believed him to be the assailant and that Alvarado was a felon. The absence of state-actor involvement in the identification process does not eliminate concerns about the reliability of the identification.

The trial court observed that the question as to whether Hood's identification of Alvarado was based on his own memory that was triggered by the photograph or a

memory that was suggested by the photograph would be left for the parties to test through direct and cross examination. Alvarado does not raise a due process challenge and no longer disputes on appeal that the "suggestibility" of the means by which Hood identified Alvarado did not involve state action.

As this court observed in State v. Sanchez, "the United States Supreme Court held that the Constitution 'protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.'" 171 Wn. App. 518, 572, 288 P.3d 351 (2012) (quoting Perry v. New Hampshire, 565 U.S. 228, 237, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012)). As the Perry court reasoned

> Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, compulsory process, and confrontation plus cross-examination of witnesses. Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice" have we imposed a constraint tied to the Due Process Clause.

565 U.S. at 237 (internal citations omitted) (quoting Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)).

Alvarado argues that the trial court had the discretion to consider eyewitness identification reliability factors under ER 403 as other states such as Oregon have done, citing as an example, State v. Lawson, 352 Or. 724, 743-44, 291 P.3d 673 (2012). In Lawson, the Oregon Supreme Court revised its test governing the admissibility of

identification evidence, the Classen test,[4] that was created more than three decades prior when there was no statutory evidence code. Lawson, 352 Or. at 746, 749. The court recognized the voluminous body of scientific knowledge developed on the subject of eyewitness identification and concluded that in light of scientific findings discussed, Oregon's Classen test was no longer adequate and needed revision. Id. at 750. The new test required the proponent of the identification evidence to demonstrate by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that the identification was, in fact, based on those perceptions. Id. at 754. Oregon courts also "must examine the relative reliability of evidence produced by the parties to determine the probative value of the identification." Id. at 757. Notably, the two cases that were before the Oregon Supreme Court in Lawson both involved state action related to circumstances that were "highly suggestive" or "unduly suggestive." Id. at 764, 766. Whether our state wishes to follow Oregon's example is a question better suited for our Supreme Court.

What is before us is whether the trial court abused its discretion in ruling that Hood's identification of Alvarado through the photograph was admissible. Alvarado cites to no authority that required the trial court to apply the reliability factors from Biggers in its ER 403 analysis. And contrary to Alvarado's assertion that the trial court failed to exercise its discretion, the record shows that the trial court did indeed exercise its discretion. In fact, the trial court expressly considered the Biggers factors as "relevant in a 403 sense" when it considered whether to allow Hood to make an in-court identification. The trial court distinguished its ruling as to the in-court identification

[4] State v. Classen, 285 Or. 221, 232, 590 P.2d 1198 (1979), abrogated on other grounds by State v. Haugen, 361 Or. 284, 392 P.3d 306 (2017).

explaining that "my exclusion for what [Hood] could do in court was zeroing in on the one person who is sitting at that table, and saying 'Oh, that's the guy'. "Because that, I think, has so many problems based on how we got here, that that act I found was danger of unfair prejudice substantially outweighed the probative value."

Alvarado has not met his burden to establish that the trial court abused its discretion in allowing the parties to test the reliability of Hood's identification through direct and cross examination. The record supports that Alvarado was able to do just that. Even if it could be argued that the trial court erred in allowing Hood's identification testimony, any such error was harmless.

The record contains substantial additional and independent evidence linking Alvarado to the crimes. A live round of ammunition and a fired bullet shell casing were found at the crime scene that bore DNA matching Alvarado. The shell casing identified Alvarado as a possible contributor among a mixed profile of three possible contributors. The live round DNA testing determined Alvarado as the sole contributor. Surveillance video footage placed a man wearing a Seahawks jersey, who was later identified to be Alvarado by Thomas, at a Chevron gas station near the scene shortly before the offense. The video footage showed Alvarado exit the vehicle wearing the same Seahawks jersey captured by surveillance video when he was fleeing the crime scene. Additionally, Thomas testified to hearing a gunshot from the vehicle, to Alvarado running back to the truck, and to the inculpatory statements Alvarado made to Mendez in the truck immediately after the shooting. After law enforcement located the getaway vehicle, a latent print examination determined that Alvarado's fingerprints were found on the

truck's rear passenger side door, which Alvarado can be seen touching from the Chevron surveillance footage.

Alvarado raises understandable concerns as to the reliability of Hood's identification through the photograph that appeared in *The Seattle Times*. But we give great deference to the trial court in its evaluation of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to mislead under ER 403. Thus, Alvarado has not established that the trial court manifestly abused its discretion. And even if admitting the identification testimony was error given the facts and circumstances of how Hood came to view Alvarado's photograph, the error was harmless given the overwhelming evidence linking Hood to the crime.

We affirm.

Coburn, J.

WE CONCUR:

Feldman, J.

Díaz, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

September 17, 2025 - 3:27 PM

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