No. 86105-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHAYNE C. BAKER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

United States Supreme Court Cases

Constitutional Provisions

Treatises

Rules

Other Jurisdictions

A. INTRODUCTION

The State acknowledged that identity was central to its case against Shayne Baker. Indeed, the prosecutor told the jury,

> [H]ow do we know it's the defendant who did this? Because the issue here isn't going to be it didn't occur in the state of Washington, or somebody didn't get shot, or great bodily injury wasn't done…**the question before you is going to be: How do I know it's Shayne Baker?**[1]

The court allowed the jury to answer this question largely by relying on unduly suggestive and unreliable identifications. The court allowed the State to elicit first-time, in-court identifications of Mr. Baker. However, in a courtroom, it is obvious who the State believes is guilty of the charged crimes: the person seated next to defense counsel at the defense table. After all, why would the State waste its resources calling a jury and prosecuting someone if the State did not believe he was guilty of the crime? It was only under these highly suggestive circumstances that two key witnesses identified Mr. Baker. For

[1] 5/12/23RP 3651-52.

this reason and the other reasons stated in this brief, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. In violation of the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution, the trial court erred when it allowed the State to elicit two highly suggestive and unreliable first-time in-court identifications of Mr. Baker.

2. In violation of the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution, the trial court erred when it allowed the State to admit evidence of a highly suggestive and unreliable out-of-court identification of Mr. Baker.

a. The trial court erred in entering the conclusions of law entered in the order denying Mr. Baker's motion to suppress the out-of-court identification.[2]

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[2] CP __, sub. no. 170, pgs. 3-4. To the extent that this Court can construe any of the conclusions of law as factual

3. In violation of *Frye*,[3] ER 702, and ER 403, the trial court erred when it allowed the State's firearm identification witness to offer her unqualified opinion that the gun recovered in Mr. Baker's stolen truck was the gun that fired the shots at both crime scenes.

4. In violation of the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 of the Washington Constitution, the prosecutor deprived Mr. Baker of his right to a fair trial when she misrepresented the evidence produced at trial.

5. In violation of the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution, the prosecutor and the court's errors cumulatively deprived Mr. Baker of his right to a fair trial.

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findings, counsel is unable to assign error to any one of them because the court did not number these findings. *See* RAP 10.3(g).

[3] 293 F. 1013 (D.C. Cir. 1923).

C. ISSUES

1. The due process clause of the federal constitution bars courts from admitting identification evidence that (a) the State obtained through a highly suggestive procedure; and (b) is otherwise unreliable.

(a) A first time in-court identification is highly suggestive because a defendant's position in a courtroom makes it blatantly obvious that the State believes the defendant committed the crimes at issue. Here, the court allowed one victim and another key witness to make a first-time in-court identification of Mr. Baker. Because this identification procedure was highly suggestive and because numerous considerations reveal this identification was also unreliable, this Court should reverse.

(b) Our Supreme Court has held that article I, section 3 of our constitution provides greater protections against the admission of unreliable evidence than the Fourteenth Amendment. Consequently, article I, section 3 of our

constitution provides an independent basis for this Court to hold that the State's use of a first-time in-court identification procedure is improper.

(c) A single-blind identification occurs when an officer shows a witness a photographic montage with potential suspects, but the officer knows who the true suspect is in the montage. Such identification procedures are unduly suggestive, and the police compound the suggestiveness of this procedure when they remain in the room during the identification. The court allowed the State to introduce evidence from an out-of-court identification where police employed a single-blind identification inside a cramped police truck. Because this was unduly suggestive, and because a consideration of relevant factors demonstrates the identification was unreliable, this Court should reverse.

2. Courts cannot admit purported expert testimony if the testimony rests on unreliable methodology or if the scientific community does not generally accept the methodology the

expert used to render her opinion. The court allowed the State's firearm identification witness to assert that the ammunition and casings from the crime scenes came from the gun recovered from Mr. Baker's stolen truck. However, the methods this witness used to render this opinion are controversial, and the scientific community warns against such definitive testimony. The court erred when it admitted this evidence.

3. A prosecutor engages in misconduct when she misrepresents the evidence to the jury. The prosecutor acknowledged that the main issue in this case was whether she could prove Mr. Baker was the shooter. During summation, she told the jury that Mr. Baker explicitly named one of the surviving victims during his interrogation and acknowledged that he gave the victim a ride. The problem, however, is that Mr. Baker never said this. The prosecutor engaged in prejudicial misconduct.

4. An accumulation of independently non-reversible errors can nevertheless deprive a defendant of his right to a fair

trial. If any of the previously stated errors do not independently require reversal, this Court should still reverse due to the cumulative effect of these errors.

D. STATEMENT OF THE CASE

1. Shayne Baker's June 21, 2022 arrest.

Shayne Baker has struggled with drug abuse and addiction since he was 12 years old. CP 43. By age 25, Mr. Baker abused drugs daily. CP 43, 54. Mr. Baker's drug addiction has resulted in him experiencing periods of homelessness. CP 43.

On June 21, 2022, Mr. Baker was 25 years old. CP 38. He is White. CP 38. Mr. Baker is 6'2, weighs 160 pounds, and has brown hair and hazel eyes. CP 38.

On June 21, 2022, Mr. Baker was parked outside of a restaurant when police officers drew their weapons, commanded Mr. Baker to put his hands up, and arrested him.

Ex. 768 (:17-:30).[4] Mr. Baker asked, "what's going on?" Ex. 768 (1:25). The police told Mr. Baker that the car he was in—an older model, dark blue, Chevy Silverado truck with a license in the left rear window—was stolen. Ex. 768 (3:18-3:23); 4/24/23RP 739. Mr. Baker responded, "wow, no way, I just bought it." Ex. 768 (3:18-3:23).

Mr. Baker explained he bought the car roughly a day prior. Ex. 768 (4:49-4:55). The police found a gun under the driver's seat of the truck. 4/24/23RP 742. The gun was a Glock .45. 5/9/23RP 3091. Glocks are common guns. 5/9/23RP 3014. The police also found drug paraphernalia. Ex. 768 (2:42).

The police transported Mr. Baker to the police station and detectives interrogated him. He informed the detectives that he had not slept for over a day and was on uppers. Ex. 1009 (5:00-7:20, 10:32-10:45). Mr. Baker explained he bought the blue truck from a random man he met near a Home Depot and

[4] Unless specified otherwise, all of the exhibits cited to in this brief are the State's exhibits.

bus bay. Ex. 1009 (2:53-3:34). He estimated that he bought the blue truck maybe "three days, maybe a day or two ago...48 hours ago." Ex. 1009 (4:27-5:16).

The detectives pressed Mr. Baker about his whereabouts within the couple of days that preceded his arrest. In response, Mr. Baker (a) admitted to at some point giving two men a ride from Chevron to a home; (b) denied letting someone borrow the truck, but qualified this by saying "he didn't think" he let anyone borrow it; (c) agreed he "probably" gave someone a ride to pick up a lawnmower; and (d) told the detectives that a pair of keys from the truck were missing. Ex. 1009 (14:48-17:08; 18:26-19:12).

After this interrogation, the State charged Mr. Baker with multiple crimes stemming from two shootings. One of the shootings happened on June 19, 2022 and the other happened on June 20, 2022. CP 917-18. The June 20, 2022 shooting resulted in the death of two men. CP 917-18.

3. The June 19, 2022 shooting.

Zachary Monary stayed over at his mother's apartment for Father's Day weekend. 4/26/23RP 1162-63. On the morning of June 19, Mr. Monary awoke to his mother telling him that someone was next to his car, which was parked in a busy parking lot close to the apartment. 4/26/23RP 1091, 1143.

Mr. Monary admittedly "overreacted," and went downstairs to confront the person. 4/26/23RP 1163. Mr. Monary believed the person was trying to pry the window down, so he yelled and was "loud and vulgar." 4/26/23RP 1169. By this time, the person went back inside of his truck. 4/26/23RP 1165. As Mr. Monary yelled at the man, he saw a handgun inside of the man's truck. 4/26/23RP 1166-67. When Mr. Monary stepped back from the car, the man shot Mr. Monary six times. 4/26/23RP 1168, 1172. Mr. Monary survived, but the shooting left him paralyzed from the shoulders down. 5/4/23RP 2408.

Mr. Monary's mother described the culprit's car as a "multicolored, greenish, blackish mess." 4/26/23RP 1099. She also described the culprit as appearing possibly mixed race. 4/26/23RP 1096. Another witness described the truck as "dark, dirty green," and the witness described the culprit as a slender White male who was under 6' tall. 4/25/23RP 923, 926. The same witness believed the culprit was in his 40s or 50s. 4/25/23RP 950. Mr. Monary described the culprit as a White male, but he could not remember what he looked like. 4/26/23RP 1175-76. Mr. Monary could only remember that the culprit drove a truck. 4/26/23RP 1176.

Darcy Stanyo drove her car near the time and the area of the shooting. 4/25/23RP 1013-14. She saw a dark blue truck run through a red light and drive erratically. 4/25/23RP 1014-16. She described the driver of the truck as slender, with dark hair, and appearing "clean cut." 4/25/23RP 1035. Ms. Stanyo called the police and reported the license plate number. CP 910; 4/25/23RP 1014, 1019.

4. The June 20, 2022 shooting.

The shooting on June 20, 2022 happened at a "trap house," which is a place where people use and sell drugs and traffic in stolen property. CP 312; 4/28/23RP 1612-13. The owner of the trap house, which was located on Lexington Avenue in Everett, was Anthony Burnett. 5/1/23RP 1950, 1955. Consistent with the nature of trap houses, Mr. Burnett's home had a constant cycle of people coming in and out of the house, with neighbors describing it as a "circus." 4/27/23RP 1391-92.

People often spent the night at the Lexington home, but many did not officially live there. 4/24/23RP 744-45. There were no doorknobs or locks for the front door. 4/28/23RP 1656. The people who frequented the home often used fake names. 4/27/23RP 1468; 4/28/23RP 1585; 5/1/23RP 1956; 5/12/23RP 3666.

Trenton Wood was at the trap house on the day of the shooting. He was friends with some of the people who lived there. 5/1/23RP 1871. Mr. Wood came by to help with some

gardening, as the home was having issues with the city. 5/1/23RP 1872. While at the house, Mr. Wood realized he needed to pick up a lawnmower from his cousin. 5/1/23RP 1873-74. So, Mr. Wood asked a man at the trap house with a blue truck who said his name was "Shane" to give him a ride in exchange for five dollars. 5/1/23RP 1874-75, 1877. The man agreed and returned Mr. Wood to the home. 5/1/23RP 1877.

When both men returned to the home, Anthony Jolly—another person who lived in the home—told Mr. Wood he believed the truck was stolen. 5/1/23RP 1878. Mr. Wood took a picture of the truck's license plate. 5/1/23RP 1880.

Several men confronted the man about the truck and asked for the keys. 5/1/23RP 1884-85. Once inside the house, Mr. Wood told the man, "I'm going to need the keys for that truck." 5/1/23RP 1885. Mr. Jolly and Mr. Burnett were also inside the home.

When the man said the keys were inside the truck, Mr. Jolly said the men were "going to get the keys." 5/1/23RP 1885.

The man then put his hands in his jacket, pulled out a gun, and shot Mr. Burnett, Mr. Jolly, and Mr. Wood in the head. 5/1/23RP 1886-89; CP 911. Mr. Burnett and Mr. Jolly died, but Mr. Wood survived. CP 911. As the man fled the home, he shot at an unknown male that called himself "Jarvis." CP 911; 5/12/23RP 3621. The police never found out "Jarvis's" true name and never identified him. 5/11/23RP 3257.

Despite being shot in the head, Mr. Wood could speak immediately after the shooting, as the bullet ricocheted to his shoulder. 5/1/23RP 188. He told the police the man who shot him identified himself as "Shane," but he was unsure if the man lied about his name. Ex. 1096, pg. 18.

5. The investigation.

Shortly after the trap house shooting, Hannah Parish showed up at the home and spoke to the police. CP 912. She was not at the home at the time of the shooting. CP 313. After hearing that Mr. Wood claimed a person named "Shane" shot him, she told the police that around 3 a.m. or 4 a.m. on the

morning of the shooting, a man who explicitly identified himself as Shayne Baker came to the trap house and claimed to be 25 years old. 4/28/23RP 1651; 5/1/23RP 1854.

After Ms. Parish gave this name, Christopher Walt, a person who stayed at the home "off and on," told the police that on the morning of June 19, 2022, a person in a blue pickup truck gave him a ride from Chevron to the Lexington home. 4/28/23RP 1593-94; CP 315, 912. The license plate from the trap house shooting matched the license plate Ms. Stanyo identified that correlated with Mr. Monary's shooting. CP 910-12.

After pinning down Mr. Baker as their suspect, the police administered multiple six-pack montages that featured Mr. Baker. Neither Mr. Monary nor Mr. Wood identified Mr. Baker from the montage. CP 336. Other people who were at the trap house on or near the time of the shootings, like Mr. Walt, also did not pick out Mr. Baker from a photographic montage. *See* 4/28/23RP 1610-11; 5/2/23RP 2089-90.

The only person who testified at trial that positively identified Mr. Baker from a photographic montage was Tahee Sheppard, who was high on fentanyl and in and out of consciousness at the time he claimed to have seen Mr. Baker. 4/27/23RP 1507-08. Mr. Sheppard was not inside of the house at the time of the shooting. CP 718. The police administered this identification procedure in a cramped police truck, and the detective who administered the montage knew Mr. Baker was their suspect. 3/23/23RP 40-42.

6. The trial: relevant rulings and testimony.

Before trial, Mr. Baker asked the court to suppress Mr. Sheppard's out-of-court identification, but the court refused. CP 621; 3/23/23RP 98. Additionally, Mr. Baker asked the court to forbid the State from eliciting any first-time in-court identifications because such identifications would be unduly suggestive; the court again refused. CP 332-37; 4/24/23RP 704-18.

Consequently, despite explicitly not identifying Mr. Baker shortly after the shooting, Mr. Wood identified Mr. Baker as his shooter for the first time at trial. 5/1/23RP 1898-99. Similarly, the court permitted Steven Ahrnkiel, a resident of the Lexington home who did not originally identify Mr. Baker after viewing a montage, to identify Mr. Baker for the first time at trial. 5/2/23RP 2047-48, 2089-90.

The State also sought to admit Dijana Coric's firearm identification testimony, where she concluded that the gun found in the blue truck fired the bullets and casings recovered from both crime scenes. CP 371-72. Mr. Baker asked the court to exclude this testimony as not generally accepted in the scientific community under *Frye* and inadmissible under ER 702 and ER 403, but the court allowed Ms. Coric to give this opinion. CP 370-383; 4/12/23RP 18-19. Thus, Ms. Coric told the jury that the cartridge cases and bullets she examined were fired from the gun recovered in the truck. 5/10/23RP 3277, 3314-15.

During summation, the prosecutor told the jury that during Mr. Baker's interrogation, he admitted that he gave his "homey" Trenton Wood a ride to get his lawnmower. 5/12/23RP 3654. However, Mr. Baker never once uttered Mr. Wood's name during the interrogation, and he only meekly acknowledged he might have given someone a ride to pick up a lawnmower.

E. ARGUMENT

1. This Court should reverse Mr. Baker's convictions because the trial court deprived him of his right to due process when it allowed the prosecutor to conduct multiple unduly suggestive and highly unreliable showups of Mr. Baker at his trial.

a. Due process requires the exclusion of unreliable evidence.

Both the federal constitution and the Washington constitution protect a defendant's right to due process. U.S. Const. amend. XIV; Const. art. I, § 3. The right to due process secures a defendant's right to a fair trial. *Manson v. Brathwaite,* 432 U.S. 98, 113, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *State*

v. Jaime, 168 Wn.2d 857, 861-62, 233 P.3d 554 (2010). The right to due process prohibits a court from admitting categories of evidence that are incredibly unreliable because such evidence undercuts a person's right to a fair trial. *See State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984).

This is particularly true in the context of eyewitness identifications. For example, due process prohibits a court from admitting evidence of an out-of-court eyewitness identification if (1) the police employed an identification procedure that was "unnecessarily suggestive and conducive to irreparable mistaken identification;" and (2) the totality of the circumstances demonstrates the identification was unreliable. *Neil v. Biggers*, 409 U.S. 188, 196, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) (quoting *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)).

Courts have identified several identification procedures that are unnecessarily suggestive and are extremely likely to lead to a mistaken identification. Relevant here is the use of

showups, which consists of a procedure where a State actor—generally a police officer—shows a witness only one suspect and asks if that person was the perpetrator. *See Biggers*, 409 U.S. at 194-95. Showups are highly suggestive because "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by police[.]" *U.S. v. Wade*, 388 U.S. 218, 234, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

The setting in which a State actor conducts a showup may add to its suggestiveness. "The suggestiveness of a showup is aggravated when it is conducted in a police stationhouse," as "[t]he circumstances of the station house showup unnecessarily sugges[t] to the victim that she should positively identify the defendant." *People v. Sammons*, 949 N.W.2d 36, 44 (Mich. 2020) (quoting *State v. Gordon*, 441 A.2d 119 (Conn. 1981)).

Because showups are unduly suggestive and pose an unacceptably high risk of resulting in a mistaken identification, courts have "widely condemned" the practice. *Stovall*, 388 U.S.

at 302; *accord State v. Derri*, 199 Wn.2d 658, 684, 511 P.3d 1267 (2022).

b. A first time in-court identification is highly suggestive. Consequently, both the federal and state due process clauses prohibits such identifications at trial.

Neither the United States Supreme Court nor our Supreme Court have addressed whether a prosecutor's elicitation of a first-time in-court identification amounts to a showup. Instead, the United States Supreme Court and our Supreme Court have only expressly addressed police-led, pretrial showups. *See generally, e.g., Biggers*, 409 U.S. 188; *Derri*, 199 Wn.2d 658. However, this Court has held that an in-court identification procedure can contravene a person's right to due process, and this Court has reversed a conviction based on the State's use of an in-court showup. *See State v. McDonald*, 40 Wn. App. 743, 747-48, 700 P.2d 327 (1985).

Many states and federal courts have also rightfully held that a prosecutor's inducement of a witness's first time in-court

identification amounts to an impermissibly suggestive showup. For example, in *State v. Dickson*, 141 A.3d 810, 818 (Conn. 2016), the State charged the defendant with numerous offenses stemming from a robbery and shooting. A year afterwards, the police showed one of the victims a photographic montage that included the defendant, but the victim did not identify the defendant as his assailant. *Id.* Despite the victim's inability to identify the defendant via the montage, the prosecutor asked the victim to identify the person who shot him at the defendant's trial; the victim identified the defendant, who sat next to counsel at the defense table. *Id.*

As he did in the trial court, on appeal, the defendant argued this in-court identification amounted to an impermissibly suggestive showup that was highly suggestive and conducive to an irreparable misidentification. The Connecticut Supreme Court agreed, holding that "first time in-court identifications are inherently suggestive and implicate a

defendant's due process rights no less than unnecessarily suggestive out of court identifications." *See id.* at 822.

The court arrived at this conclusion for five key reasons. First, the court felt "hard-pressed to imagine how there could be a more suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." *Id.* at 822. Indeed, the court went on to opine, "[i]f this procedure is not suggestive, then no procedure is suggestive." *Id.* at 822-23.

Second, "because the extreme suggestiveness and unfairness of a one-on-one in-court confrontation is so obvious," the court found it "likely that a jury would naturally assume that the prosecutor would not be allowed to ask the witness to identify the defendant for the first time in court unless the prosecutor and the trial court had a good reason to believe that the witness would be able to identify the defendant

in a nonsuggestive setting." *Id.* at 823. Accordingly, a first time in-court identification amounted to "improper vouching." *Id.*

Third, just as our Supreme Court has explicitly acknowledged, the Connecticut Supreme Court also recognized "mistaken eyewitness identifications are a significant cause of erroneous convictions." *Id.*; *accord Derri*, 199 Wn.2d at 662. Because a first time in-court identification is highly suggestive, refusing to recognize the procedure as incompatible with the right to due process only heightened the possibility of future erroneous convictions. *See Dickson*, 141 A.3d at 823-24.

Fourth, the court could not "perceive why, if an in-court identification following an unduly suggestive pretrial procedure implicates the defendant's due process rights because it is the result of state action, the same would not be true when a prosecutor elicits a first time in-court identification." *Id.* at 824. And fifth, "the rationale for the rule excluding identifications that are the result of unnecessarily suggestive procedures—

deterrence of improper conduct by a state actor—applies equally to prosecutors." *Id.*

For the same reasons, many other state and federal courts have also held a prosecutor's exercise of a first time identification of the defendant in the courtroom implicates due process. *See, e.g., Com. v. Crayton*, 21 N.E.3d 157 (Mass. 2014); *People v. Posey,* 1 N.W.3d 101 (Mich. 2023); *City of Billings v. Nolan*, 383 P.3d 219 (Mont. 2016); *State v. Watson*, 298 A.3d 1049 (N.J. 2023); *U.S. v. Greene*, 704 F.3d 298 (4th Cir. 2013); *U.S. v. Rogers*, 126 F.3d 655 (5th Cir. 1997); *U.S. v. Hill*, 967 F.2d 226 (6th Cir. 1992); *U.S. v. Rundell*, 858 F.2d 425 (8th Cir. 1988).

These courts have also relied on common sense and social science to conclude that a first-time in-court identification is unduly suggestive and implicates the right to due process. For example, a New Jersey court reasoned it was "common sense" to conclude such procedures were highly suggestive showups, as "most anyone who has watched a trial

on television knows where the defendant sits in a courtroom." *Watson*, 298 A.3d at 1062. But a courtroom showup is even more suggestive than a pretrial showup because by presenting the defendant in an actual courtroom, "the witness is given an even stronger impression that the authorities are already satisfied that they have the right man." *Id.*; *accord Crayton*, 21 N.E.3d 157 at 166-67.

Scholarly sources agree first-time in-court identifications are highly suggestive and unreliable. *Watson*, 298 A.3d at 1062 (referencing sources). These sources opine that in-court identifications do not accurately account for a person's memory because "in the courtroom, the eyewitness can easily see where the defendant is sitting." *Id.* (quoting Nat'l Rsch. Council of the Nat'l Acad. Of Scis., *Identifying the Culprit: Assessing Eyewitness Identification* 36 n.28 (2014)). Yet "in court eyewitness identifications can influence juries in ways that cross-examination, expert testimony, or jury instructions are unable to counter effectively." *Id.*

Our Supreme Court has directed courts to "consider the current scientific understanding of the fallibility of eyewitness identifications when deciding **suggestiveness** and reliability[.]" *Derri*, 199 Wn.2d at 673 (emphasis added). Because scientific research has concluded that first-time, in-court identifications are unduly suggestive, this should also compel this Court to conclude that first time, in-court identifications are subject to due process challenges. *See Identifying the Culprit*, *supra* pgs. 36, 65; *see also* Aliza B. Kaplan & Janice C. Puracal, *Who Could it Be Now? Challenging the Reliability of First Time In-Court Identification*, 105 J. of Crim. Law & Criminology 947, 961 (2015) (*referencing* Memory & Law 5 (Lynn Nadel & Walter P. Sinnott-Armstrong eds.,2012)).

c. Because our State's due process clause provides broader protections against the admission of unreliable evidence, our State's due process clause provides an independent basis for the exclusion of first-time in-court identifications.

Like other courts that have grappled with the issue of unduly suggestive first-time in-court identifications, this Court

can reach the merits of this issue under the federal due process clause. However, this Court can also reach the merits of this issue under article I, section 3 of our constitution. Indeed, the United States Supreme Court has noted that "state courts remain free, in interpreting state constitutions, to guard against the evil" of impermissibly suggestive eyewitness identifications. *Brathwaite*, 432 U.S. 128-29 (Marshall, J., dissenting).

While the United States Supreme Court has yet to weigh in on the issue of an unduly suggestive in-court eyewitness identification, our Supreme Court has noted that the United States Supreme Court's interpretation of the Fourteenth Amendment does not control Washington's interpretation of its own state constitution's due process clause. *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). And Washington courts "should look to empirical data to support and expand [its] jurisprudence where appropriate." *Derri*, 199 Wn.2d at 675. As discussed, the empirical data supports a

finding that a prosecutor's elicitation of a first-time in-court identification is unduly suggestive and presents an unacceptably high risk of a wrongful conviction. *See Identifying the Culprit*, *supra* pg. 36.

Our Supreme Court has already held that article I, section 3 of the Washington Constitution provides greater protection against the admission of unreliable evidence than the Fourteenth Amendment. *Bartholomew*, 101 Wn.2d at 639-40; *see also State v. Blake*, 197 Wn.2d 170, 181, 481 P.3d 521 (2021) ("Our state constitution's due process clause provides even greater protection of individual rights in certain circumstances.") While neither *Bartholomew* nor *Blake* used a *Gunwall* analysis to conclude that our State constitution provides broader due process protections than the federal constitution, a *Gunwall* analysis confirms the correctness of these decisions.[5]

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[5] When evaluating whether a state constitutional provision supplies different or broader protections than its

As to the first two *Gunwall* factors, the language of the federal and state due process clauses are similar but differ slightly. The Sixth and Fourteenth Amendments outline that the people cannot be "deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment specifies the State may not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amends. V; XIV. On the other hand, article I, section 3 states "no person shall be deprived of life, liberty, or property without due process of law," so the plain text does not specify that only government action is within its purview. Const. art. I, § 3. This slight difference weighs in favor of a broader interpretation.

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federal counterpart, this Court analyzes six nonexclusive criteria: (1) the text of the state constitutional provision, (2) the differences in the texts of the parallel state and federal provisions, (3) state constitutional history, (4) pre-existing state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest and local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P3d 808 (1986).

Even where the language of the state and federal clauses are similar, federal cases may not "properly claim persuasive weight as guideposts when interpreting counterpart state guarantees" unless they are "logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific [constitutional] guarantees." *State v. Davis*, 38 Wn. App. 600, 605 n.4, 686 P.2d 1143 (1984) (quoting Justice William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977)).

The third *Gunwall* factor suggests an independent state constitutional analysis that points to broader protections. Article 1, section 3 requires independent interpretation unless historical evidence shows otherwise. Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 514-16 (1984). The framers of the Washington Constitution modeled article I, section 3 on the

Oregon and Indiana constitutions rather than the federal constitution. Justice Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 3 (2002). Like their Indiana and Oregon counterparts, the framers of the Washington Constitution "originally intended [the provisions of the Declaration of Rights] as the primary devices to protect individual rights." *Id.*

Thus, the federal Bill of Rights, including the Fourteenth Amendment, "was intended as a secondary layer of protection" that applies only against the federal government. Utter, *supra*, at 497.

Regarding the fourth factor, pre-existing state law supports an independent interpretation of article I, section 3 because our Supreme Court has already held the state constitution's due process clause provides broader protection against unreliable evidence than the federal due process clause. *Bartholomew*, 101 Wn.2d at 639. In *Bartholomew*, the Court invalidated a statute permitting consideration of any relevant

evidence regardless of reliability, and it did so on independent state constitutional grounds. *Id.* at 644. The Court held the statute violated article I, section 3, declaring, "We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *Id.* at 640. Our Supreme Court recently reaffirmed article I, section 3's primacy in *Blake*. 197 Wn.2d at 181 n.9.

Our Supreme Court's very recent expansion of the factors a court can consider to determine the admissibility of eyewitness testimony also weighs in favor of a broader reading of our State's due process clause. In *Derri*, our Supreme Court first noted that "mistaken eyewitness identification is a leading cause of wrongful conviction" and highlighted that as of 2022, eight Washingtonians had "been exonerated after being convicted, in part, based on mistaken eyewitness identification." 199 Wn.2d at 662. However, the court recognized the number of people wrongly convicted based on mistaken eyewitness testimony was "likely much higher." *Id.*

Accordingly, in the context of potentially suggestive pre-trial police identification procedures, *Derri* held courts "must consider new, relevant, widely accepted scientific research when determining the suggestibility and reliability of eyewitness identifications." *Id.* And while the United States Supreme Court outlined only five factors for courts to consider to determine whether the totality of the circumstances nevertheless suggests the eyewitness's identification is reliable, *Derri* added to these factors. *Derri* stated other variables that can affect reliability "should [also] be considered as part of the totality of the circumstances." *Id.* at 689.

Specifically, *Derri* instructs courts to examine "estimator variables" to determine the reliability of an eyewitness identification. *Id.* at 676. "Estimator variables' are environmental or individual variables not under the control of the police but equally capable of affecting an eyewitness' ability to perceive and remember an event." *Id.* (internal quotations and citations omitted).

The fifth *Gunwall* factor, differences in structure between the state and federal constitutions, always supports an independent constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Finally, preventing wrongful convictions is a matter of State and local concern, as is the fundamental fairness of trials held in this state. *See Derri*, 199 Wn.2d at 662; *Bartholomew*, 101 Wn.2d at 643-44.

In sum, article I, section 3 guarantees fair proceedings, and this Court deems "particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability." *Bartholomew*, 101 Wn.2d at 640. Consequently, this Court should hold article I, section 3 independently prohibits prosecutors from eliciting a first time, in-court, eyewitness identification.

d. The prosecutor's solicitation of a first-time in court identification from a victim and a key eyewitness deprived Mr. Baker of his right to due process.

The prosecutor solicited a first-time, in-court identification from one of the surviving victims and another key witness. These eyewitnesses largely described the culprit as a young, White male. Mr. Baker was the only young White male sitting at the defense table. At the other table sat the prosecutor, along with the State's managing detective. 5/1/23RP 1935; 5/2/23RP 2104. The judge and the jury also sat in the courtroom. This setting made it abundantly clear that the State believed Mr. Baker was the shooter and was guilty of all of the charged offenses. The prosecutor's solicitation of these in-court, first-time identifications was an impermissibly suggestive showup that deprived Mr. Baker of his right to due process.

For many of the reasons cited in this brief, Mr. Baker asked the court to prohibit the State from "asking witnesses to make in court identifications of Mr. Baker." CP 332-37;

4/24/23RP 694-99. The State objected to the motion, arguing the defense could simply cross-examine the witnesses to bring out the suggestive nature of the in-court identification procedure. 4/24/23RP 699-700. The State argued the suggestive nature of a first-time in-court identification went to its "weight and not admissibility." 4/24/23RP 700.

The court denied the motion and allowed the State to elicit the following unduly suggestive, first time, in-court identifications. RP 704-18.

i. Trenton Wood's first-time in-court identification.

Trenton Wood was the only surviving victim of the June 20th shooting. 4/24/23RP 741. Mr. Wood is Native American. 4/27/23RP 1476; Ex. 1097, pg. 81.

The police interviewed Mr. Wood shortly after the shooting. Ex. 1095, pg. 1. In the two days that followed the shooting, Mr. Wood described the shooter as (1) in his early 20s or 30s; (2) White; (3) clean shaven; (4) with shaggy hair; (4) skinny; and (5) around 6'1. Ex. 1095, pgs. 15-16; Ex. 1096, pg.

6. Mr. Wood claimed the shooter identified himself as Shane, but Mr. Wood "wasn't paying attention to [the shooter] at all." Ex. 1095, pgs. 2, 24. Mr. Wood was unsure if the shooter lied about his name. Ex. 1096, pg. 18.

The day after the shooting, the police presented Mr. Wood with a photographic montage of six males; the montage included a picture of Mr. Baker. 5/1/23RP 1908-09, 1913; CP 336. Before the police administered the montage, the police instructed Mr. Wood that if the person who committed the shooting was not in the montage, Mr. Wood could write "not present," or "none of these." 5/1/23RP 1916-17. On the other hand, if Mr. Wood was unsure if the shooter was in the montage, the police instructed him to write, "I don't know." 5/1/23RP 1916-17.

While looking at the montage, Mr. Wood commented, "No. I don't see him[,]" and asked, "[y]ou're telling me his name is Shane[?]" Def. Ex. 1099; pgs. 7-8. While peering at the pictures one by one, Mr. Wood repeatedly commented,

"definitely not." Def. Ex. 1099, pgs. 7-8. After viewing the montage that included a picture of Mr. Baker and five other young White males, Mr. Wood wrote, "not here." 5/1/23RP 1918.

Nearly one year after the shooting, Mr. Wood testified at Mr. Baker's trial. Mr. Wood recounted the following: on the day of the shooting, he arrived at Mr. Burnett's trap house sometime between the late-morning to the mid-afternoon to help with yardwork. 5/1/23RP 1871-72. In the middle of doing yardwork, Mr. Wood realized he needed to get his lawnmower and weed eater back from his cousin, who lived down the street. 5/1/23RP 1873-74.

Mr. Wood saw an unknown male with a truck at Mr. Burnett's home. 5/1/23RP 1874-75. Mr. Wood described the truck as a "big old truck" that he thought was "blue" and "pretty cool looking." 5/1/23RP 1875. He could not provide any other details about the truck. 5/1/23RP 1875.

Mr. Wood offered the unknown man five dollars to drive him down the street to pick up the gardening equipment. 5/1/23RP 1874. Mr. Wood claimed they introduced themselves to each other, and according to Mr. Wood, the man with the truck claimed his name was "Shane." 5/1/23RP 1877. Mr. Wood also testified the man with the truck asked him where he could get a nine millimeter gun. 5/1/23RP 1877. Mr. Wood told him he did not know, but Mr. Wood volunteered to "ask around." 5/1/23RP 1877.

Shortly after the man dropped off Mr. Wood, Mr. Jolly told Mr. Wood he thought the blue truck was stolen. 5/1/23RP 1878. Mr. Wood removed his tools from the truck and took a picture of the truck's license plate. 5/1/23RP 1880. Mr. Wood volunteered to grab the keys to the truck to get someone else to park the truck elsewhere. 5/1/23RP 1884.

Mr. Wood walked inside the house and into the living room. 5/1/23RP 1885, 1903. Mr. Burnett was also in the living room. 5/1/23RP 1885. Mr. Wood told the driver of the truck,

"I'm going to need the keys for that truck," and Mr. Wood told the driver of the truck he thought the keys were in his backpack. 5/1/23RP 1885. When the driver said he had numerous keys in the backpack, Mr. Jolly told him, "we're going to get the keys." 5/1/23RP 1885.

Mr. Wood claimed the driver of the truck looked at all of them, took his backpack, and put his hand in his jacket. 5/1/23RP 1885. When Mr. Jolly said, "you don't have a gun," the man shot Mr. Wood, Mr. Jolly, and Mr. Burnett in the head 5/1/23RP 1885-88. By the time Mr. Wood got up, the shooter was gone. 5/1/23RP 1889.

The prosecutor then asked Mr. Wood if he saw the driver of the blue truck in the courtroom. 5/1/23RP 1897-98. The following exchange took place:

> A I don't really want to look at anybody.
>
> Q Would it be okay if you did? I know you don't want to look at anybody, and it's okay if you don't want to.
>
> A Can we stand face to face?

Q No, but you can stand up if you'd like to look around the courtroom and make that determination.

A Hmm.

Q Do you see the person who shot [Mr. Jolly] and [Mr. Burnett] in the room today?

A Did you give him a haircut?

Q You just made a comment. Do you see the person in the courtroom who shot [Mr. Jolly] and [Mr. Burnett] who got a haircut from the time that you saw him last?

A Is it this gentleman right here (indicating)?

Q I can't answer that for you, Mr. Wood. Is that the gentleman right there?

A It sure looks like him to me.

Q Okay.

MS. SARACINO: Record identifying Mr. Baker.

5/1/23RP 1898-99.

The prosecutor went on to ask:

Q And you said it sure looks like him in reference to the gentleman that you indicated in the courtroom. Are you certain that that's him?

A You know, I said, you know, yes, I know who he is.

Q Okay. That's who it is. One moment.

5/1/23RP 1899.

Mr. Wood claimed he did not identify Mr. Baker from the montage the day after the shooting because he did not trust the police. 5/1/23RP 1913, 1935. Mr. Wood also claimed his memory of the shooter by the time of the trial was just as good as his memory of the shooter the day after the shooting. 5/1/23RP 1947.

This identification procedure was unduly suggestive. It was blatantly obvious that the person the State believed shot Mr. Wood was sitting at the defense table. The presence of a judge and jury before Mr. Baker added to the suggestibility of this identification procedure. Mr. Wood's in-court identification was the result of an impermissibly suggestive showup.

When a defendant establishes that the State engaged in an unduly suggestive identification procedure, this Court must next examine whether "there were [nevertheless] sufficient

indicia of reliability to outweigh the suggestiveness of the procedure." *Derri*, 199 Wn.2d at 686.

There are generally five factors courts examine, including the eyewitness's (1) opportunity to view the culprit; (2) degree of attention; (3) prior description of the culprit; (4) level of certainty at the time of the suggestive procedure; and (5) the time between the crime and the identification. *Id.* at 686-89. However, our Supreme Court has also directed courts to examine other factors, and it has also directed courts to consider "updated scientific evidence relating to the reliability of the eyewitness identification (including estimator variables)" when evaluating this step of the test. *Id.* at 686.

While one of the factors weighs in favor of reliability, the rest of the factors weigh against reliability. Mr. Wood had ample opportunity to view the shooter, and the shooter's face was clearly visible. Mr. Wood had two short conversations with the shooter. Accordingly, Mr. Wood's opportunity to view the shooter weighs in favor of reliability.

However, the rest of the factors weigh against reliability. First, the degree of attention to the shooter weighs against the reliability of the identification because Mr. Wood viewed the shooter under extremely stressful circumstances. "Studies have shown consistently that high degrees of stress actually impair the ability to remember." *Id.* at 687. While Mr. Wood had a neutral conversation with the shooter in the truck, a stressful conversation with the shooter followed shortly afterwards. During that conversation, Mr. Wood demanded the shooter's keys. The stress undoubtedly compounded after the shooter shot Mr. Wood, and he sadly had to watch his friends die right next to him, which further added to Mr. Wood's trauma and resulting stress. And Mr. Wood admitted he did not pay much attention to the shooter.

Additionally, the presence of a weapon—here, a gun—also diminishes from a person's ability to accurately recall a culprit. *Derri*, 199 Wn.2d at 687. And an eyewitness's inability to recall specific facial features weighs against reliability. *See*

id. Shortly after the shooting, Mr. Wood gave no description of the shooter's facial features other than that the shooter did not have facial hair. Given all of these circumstances, Mr. Wood's degree of attention weighs against reliability.

The accuracy of Mr. Wood's prior description of the culprit does not weigh in favor in reliability. It may appear so at first blush, as Mr. Wood described the shooter as a thin young White man who was approximately 6'1, and Mr. Baker is a thin young White man who is 6'2. CP 38. However, this factor should "receive limited weight" because "people tend to select the person who looks most like their memory of the culprit and will readily select an innocent person if that person fits they eyewitness's pre-lineup description[.]" *Derri*, 190 Wn.2d at 687-88. It therefore makes sense that Mr. Wood would identify Mr. Baker as the shooter, as he generally resembles Mr. Wood's memory of the shooter. Furthermore, Mr. Baker was the only person seated at defense table who even remotely resembled Mr. Wood's memory of the shooter.

As noted, Mr. Wood's original description of the shooter was generic and did not include any details about any significant features. This is unlike other cases where eyewitnesses gave detailed descriptions of the culprit's face. *See id.* at 687. Overall, this factor does not weigh in favor of reliability.

Our Supreme Court has also held that an eyewitness's level of certainty at the time of the procedure "should be given less weight" where "it has already been determined that the procedure employed was suggestive." *Id.* at 688. Nevertheless, "a low level of certainty always weighs against reliability." *Id.* Here, Mr. Baker has established the procedure was suggestive. Additionally, Mr. Wood was not originally confident about his identification, as he wanted to see Mr. Baker face-to-face to make his identification and originally said Mr. Baker "sure looks like" the shooter rather than simply saying he was the shooter. However, after the prosecutor's further prodding, Mr.

Wood claimed Mr. Baker was the shooter. On balance, this factor does not weigh in favor of reliability.

The time between the crime and the identification also weighs against reliability. "As time passes, this factor becomes less useful in determining reliability." *Derri*, 199 Wn.2d at 689. This is because "[m]emory deteriorates after viewing an event and never improves." *Id.* Mr. Wood had the opportunity to identify Mr. Baker just a day after the shooting, and he did not. Instead, he identified Mr. Baker nearly a year after the shooting after the State subjected him to a showup identification procedure. This weighs against reliability. *See id.*

Other factors also weigh against reliability. Notably, this was a cross-racial identification, as Mr. Wood is Native American and Mr. Baker is White. "[C]ross-racial identifications can be particularly unreliable—studies show that rates of error in making identifications are much higher when a person is asked to identify someone of another race." *Id.* at 675; *accord State v. Butler*, 200 Wn.2d 695, 711, 521 P.3d 931

(2022). The presence of a cross-racial identification weighs against the reliability of Mr. Wood's identification.

Finally, co-witness suggestion also weighs against the reliability of the identification. Co-witness suggestion happens when multiple eyewitnesses share details about the culprit before an identification procedure. *See Derri*, 199 Wn.2d at 689 n.26. Co-witness suggestion weighs against reliability because "it is a form of multiple exposures to the suspect that may cause a person to form a false memory of details that he or she never actually observed." *Id.* (internal citations and quotations omitted).

Before the in-court identification, Mr. Wood spoke to at least two other people who were at the home at the time of the shooting about the incident. 5/2/23RP 2028-29, 2091. One of the people Mr. Wood spoke to looked up news reports and other online materials about the shooting, and these materials included a picture of Mr. Baker. 5/2/23RP 2028-29. This factor also weighs against the reliability of the identification.

In sum, the in-court identification was unduly suggestive, and insufficient indicia of reliability exists to outweigh its suggestiveness. The court erred when it allowed Mr. Wood to make this identification before the jury.

ii. Steven Ahrnkiel's first time in-court identification.

Steven Ahrnkiel lived with Mr. Burnett on the date of the shooting. 5/2/23RP 2034. Mr. Ahrnkiel and his wife, Carrie Jenks, lived in a bedroom in the first floor of the home. 5/2/23RP 2034-35.

The police interviewed Mr. Ahrnkiel on the evening of the shooting. PT Ex. 12, pg. 3. Mr. Ahrnkiel explained that he was doing yard work during the shooting. PT Ex. 12, pg. 6. Shortly after the shooting, he saw a blue truck pull out and speed off. PT Ex. 12, pg. 7. Mr. Ahrnkiel claimed he saw the owner of the blue truck earlier that day, and the owner of the truck wore a jacket, baseball cap, and blue jeans. PT Ex. 12, pg. 11. Mr. Ahrnkiel told police that he previously saw the same truck a couple of times prior within the past couple of weeks

before the shooting. PT Ex. 12, pg. 9. He did not know the truck owner's name, but Mr. Ahrnkiel described the man as White, tall, slender, and roughly 30 years old. PT Ex. 12, pgs. 9-10. He told the police he believed he could recognize the man if he saw him again. PT Ex. 12, pg. 12.

Shortly afterwards, the police gave Mr. Ahrnkiel a photographic montage that included six pictures of young White men, including Mr. Baker. 5/2/23RP 2081-83, 2089-90; PT Ex. 12, pg. 33. Mr. Ahrnkiel was "not sure" whether any of the men was the owner of the blue truck, and he did not identify Mr. Baker. 5/2/23RP 2089-90.

Nearly one year after the shooting, Mr. Ahrnkiel testified at Mr. Baker's trial. Mr. Ahrnkiel testified that on the day of the shooting, he saw Mr. Wood unloading his gardening equipment from a blue truck with a "young man." 5/2/23RP 2047. Mr. Ahrnkiel's testimony then proceeded as follows:

> Q Okay. And can you describe the young man that was with [Mr. Wood] when [Mr. Wood] was unloading his Weed Eater?

A This guy over here (indicating).

Q Okay. So I asked you if you could describe the gentleman who was unloading the Weed Eater, and you indicated "this guy over here." Who are you talking about?

A The defendant.

Q Okay. And I want to ask you very specifically, can you describe what the person you're indicating is wearing and where they're located in the courtroom? And then I have follow-up questions for you.

A Okay. The off-white shirt, sitting with the defense attorneys by the sheriff over there.

Q Okay.

MS. SARACINO: Record identifying Mr. Baker.

5/2/23RP 2047-48.

The prosecutor went on to ask:

Q (By Ms. Saracino): What I want to make sure is, is your identification of the gentleman assisting [Mr. Wood] based on your recollection of that day or something else?

A It's on my recollection of that day but of a different moment.

5/2/23RP 2048.

Mr. Ahrnkiel then claimed he remembered it was specifically Mr. Baker who owned the blue truck based on a "small joke" he made on the day of the shooting. 5/2/23RP 2049. He claimed Mr. Burnett bragged about his military training on the day of the shooting, and Mr. Ahrnkiel quipped, "the closest thing we get to military training here is Black Ops II," which is a video game. 5/2/23RP 2049-50. He claimed Mr. Baker responded, "sometimes that's a good thing." 5/2/23RP 2050.

Later, Mr. Ahrnkiel admitted that he discussed the shooting with other people who were at the home at the time of the shooting, including Mr. Wood. 5/2/23RP 2091. He also admitted that he discussed with his wife what she read on the news about the shooting. 5/2/23RP 2028-29, 2091. She also viewed a picture of Mr. Baker on the news. 5/2/23RP 2029.

This first-time in-court identification was unduly suggestive. Mr. Baker was the only young White male seated at the defense table. At the opposite table sat the prosecutor and a

managing detective. Before Mr. Baker sat the jury and the judge. This setting made it blatantly obvious that the State believed Mr. Baker was the shooter.

Now that Mr. Baker has established that this identification procedure was unduly suggestive, this Court must examine whether other indicia of reliability nevertheless render the identification reliable. *Derri*, 199 Wn.2d at 686.[6]

Most of the factors weigh against reliability. First, Mr. Ahrnkiel's opportunity to view the driver of the blue truck is unclear, as Mr. Ahrnkiel discussed only a brief interaction with the driver. It is also unclear where the owner of the blue truck was positioned at the time of this interaction and what the lighting was like. In the absence of such information, this factor does not weigh in favor of reliability. *Compare id.* at 686-87.

[6] These factors include: (1) opportunity to view the culprit; (2) degree of attention; (3) prior description of the culprit; (4) level of certainty at the time of the suggestive procedure; and (5) the time between the crime and the identification.

Mr. Ahrnkiel's degree of attention slightly weighs in favor of reliability, as he viewed the driver of the truck before the shooting. Consequently, he viewed the driver in a non-stressful environment and without the presence of a weapon, which can reduce the likelihood of a misidentification. *See id.* at 687. However, while Mr. Ahrnkiel gave a general description about the driver's appearance and his clothes, he did not provide any details like the driver's facial features or what his voice sounded like. This diminishes from the weight of this factor. *Compare id.* at 687 (finding this factor weighed in favor of reliability where witnesses described the culprit's facial features and voice).

The remainder of the factors either barely weigh in favor of reliability or weigh heavily against reliability. The factor that asks this Court to consider the accuracy of the prior description of the culprit receives little weight. *See id.* at 688. This is because witnesses "tend to select the person who looks most like their memory of the culprit and will readily select an

innocent person if that person fits the eyewitness' [] description." *Id.* Here, Mr. Ahrnkiel gave a very generic description of the driver of the blue truck that generally matches Mr. Baker's appearance, although Mr. Baker is in his 20s rather than his 30s. But it makes perfect sense that Mr. Ahrnkiel identified Mr. Baker in the courtroom, as he was the only person at the defense table who matched Mr. Ahrnkiel's original description of the driver.

Similarly, Mr. Ahrnkiel's level of certainty also receives very little weight because the suggestibility of the identification procedure used here "can artificially inflate a witness' certainty in their identification." *Id.*

The time between the crime and the identification also weighs against its reliability, as "memory deteriorates after viewing an event and never improves." *Id.* at 689. Mr. Ahrnkiel had an opportunity to identify Mr. Baker when he viewed the photographic montage shortly after the shooting, but he did not. Mr. Ahrnkiel only identified Mr. Baker after viewing him in

court. This factor heavily weighs against the reliability of the identification.

The corrupting effect of co-witness suggestion also weighs against the reliability of the identification. Mr. Ahrnkiel admitted that he discussed the shooting with his wife and Mr. Wood. Mr. Ahrnkiel's wife admitted that she looked up photos and articles about the shooting. And Mr. Sheppard also discussed the shooting with Mr. Ahrnkiel. 4/23/23RP 1437. Mr. Ahrnkiel's discussion of the shooting with co-witnesses ran the risk of contaminating his memory with false information, increasing the chances of misidentification. *Id.* at 689 n.26.

In sum, the prosecutor's identification procedure was unduly suggestive, and insufficient indicia of reliability exist to outweigh the suggestiveness of the procedure. The court erred when it permitted the State to conduct this identification procedure at Mr. Baker's trial.

e. The admission of this highly unreliable yet incredibly prejudicial evidence requires reversal.

Both this Court and the United States Supreme Court have reversed where the defendant merely established (1) the State employed an unduly suggestive identification procedure; and (2) insufficient indicia of reliability exist to otherwise render the identification reliable. *Foster v. California*, 394 U.S. 440, 443-44, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969); *accord McDonald*, 40 Wn. App. at 747-48. Because Mr. Baker has established this, this Court should reverse.

However, if this Court believes this error is subject to review under the constitutional harmless error standard, this error nevertheless compels reversal. Once a defendant establishes that an error violated his constitutional rights, the State bears the heavy burden of proving the error was harmless beyond a reasonable doubt. *State v. A.M.*, 194 Wn.2d 33, 41, 448 P.3d 35 (2019). A constitutional error is harmless beyond a reasonable doubt only if the State establishes there is no

reasonable probability the outcome of the trial would have differed absent the error. *Id.*

The State cannot meet this heavy burden. The identity of the shooter was hotly contested at trial. The prosecutor acknowledged this was the key issue in the case, saying to the jury, "**The question before you is going to be: How do I know it's Shayne Baker?"** 5/12/23RP 3651-52 (emphasis added).

To answer this question, the State pointed to equivocal pieces of evidence. For example, the State relied on the footage of the stolen blue truck from various locations, including near the location of the June 19th shooting and the June 20th shootings. *See, e.g,* 5/12/23RP 3643-45, 3647-50. But Mr. Baker established that multiple people had access to the blue truck, and multiple people could have driven the truck when the shootings happened. 5/12/23RP 3660-64, 3686-87. During Mr. Baker's interrogation, he told the detectives that one of the keys to the blue truck was missing. Ex. 1009 (12:34-:38, 16:34-

16:51). This fortified Mr. Baker's position that someone else used the blue truck during the time of the shootings.

Moreover, the eyewitnesses to the June 19th shooting identified the shooter as appearing mixed race and in his 40s or 50s. 5/12/23RP 3665. Mr. Baker is neither mixed race nor near his 40s or 50s.

The State also pointed to testimony from Mr. Wood that the shooter identified himself as Shane. *See* 5/12/23RP 3642. But Mr. Wood specifically said he was unsure if the shooter gave him a fake name, and he did not identify Mr. Baker in a photo montage just a day after the shooting. Importantly, the evidence demonstrated many people who frequented the home where the June 20th shooting took place used street names or fake names. 5/12/23RP 3666.

The State also pointed to Hannah Parish's claim to police that she hung out with a man who specifically identified himself as a 25-year-old Shayne Baker in the early morning on June 20th. *See* 5/12/23RP 3647. Like Mr. Wood, Ms. Parish

was unsure if this man told the truth about his name. 5/12/23RP 3666. But even if this person was Mr. Baker, that does not establish that he was the shooter. It only establishes that he was at the home multiple hours before the shooting, which is unremarkable given that multiple people frequented the home at all hours of the day and evening to do drugs. *See* 5/12/23RP 3666.

Critically, the State highlighted Mr. Wood's and Mr. Ahrnkiel's unreliable identifications. *See*, *e.g.*, 5/12/23RP 3704, 3708-09. It makes sense that the State would rely on these identifications, as "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" *Watson*, 298 A.3d at 1067-68 (quoting *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (Brennan, J., dissenting)).

The power of this eyewitness testimony is precisely why the State cannot prove this error was harmless beyond a reasonable doubt. Accordingly, this Court should reverse.

2. This Court should reverse Mr. Baker's convictions because the trial court deprived him of his right to due process when it allowed the State to introduce evidence of an unduly suggestive and unreliable out- of-court identification.

a. Identification evidence produced through an unduly suggestive and unreliable procedure deprives a defendant of his right to due process.

As discussed in the previous section, the federal constitution and the Washington constitution prohibit a court from admitting evidence produced through an unduly suggestive and unreliable identification procedure. U.S. Const. amend. XIV; Const. art. I, § 3; *Derri*, 199 Wn.2d at 662-63; *see supra* pages 18 to 35.

When the police conduct a single-blind identification procedure rather than a double-blind identification procedure, this is unduly suggestive. *See Derri,* 199 Wn.2d at 679-80. "In a 'single-blind procedure' the administrator, but not the witness, knows which photo is the suspect." *Id.* On the other hand, in a double-blind procedure, "the administrator [also] does not know who the suspect is." *Id.*

"Only double-blind procedures prevent the tester from unintentionally influencing the outcome of the results." *Id.* at 680. This is because the expectations of the police "can cue the behavior of the [witness.]" *Id.* at 680. "Decades of research have found that cues from the [police] can be subtle, transferred unconsciously, and result simply from the expectations of the [police]." *Id.* (citations and internal quotations omitted).

Consequently, "numerous studies show that single-blind administration of lineups increases the likelihood that witnesses will identify the suspect irrespective of whether the suspect is the culprit or an innocent suspect." *Id.* (citations omitted). The police compound the unduly suggestive nature of these single-blind procedures when they remain in the room during the identification procedure. *Id.* at 681.

b. The detectives employed an out-of-court identification procedure that was unduly suggestive when they administered a single-blind identification procedure surrounded by detectives in a cramped space.

The police employed an unduly suggestive out-of-court identification procedure when they administered a single-blind photographic lineup in a car surrounded by police who knew Mr. Baker was their suspect. Under the totality of the circumstances, the procedure was so unnecessarily suggestive as to create a very substantial likelihood of irreparable misidentification. The court erred when it admitted this evidence.

Tahee Sheppard is Native American. 3/23/23RP 81. Mr. Sheppard sometimes stayed in the trailers on Mr. Burnett's property. CP 718.

The police interviewed Mr. Sheppard the day of the shooting. CP 718. Mr. Sheppard told the police he was "on the nod" that day, meaning going in and out of a state of unconsciousness due to fentanyl use. 4/27/23RP 1507-08; CP

718. Mr. Sheppard told the police some random White guy around his age (mid-20s) showed up at the house that day. CP 718, 722. Mr. Sheppard claimed this person "was just kinda helping out, linge[r]ing around." CP 722. Mr. Sheppard said he "didn't even look at [this person] because [he] was on the nod." CP 722.

Although Mr. Sheppard did not look at this person, the police pressed Mr. Sheppard about his appearance. CP 725. Mr. Sheppard described him as looking "kinda like Ashton Kutcher," but "not as handsome." CP 725. Mr. Sheppard did not otherwise provide any details about the man's facial features. He said the man drove a black or navy blue truck and smoked "clear," meaning methamphetamine. CP 726. Mr. Sheppard also claimed this man wore "work boot cowboy boots." CP 729. Mr. Sheppard was not inside Mr. Burnett's house at the time of the shooting. CP 627.

Three days after the shooting, law enforcement found Mr. Sheppard at a store. CP 628; 4/27/23RP 1425. By this time,

the police had arrested Mr. Baker, and the news publicized his arrest. 4/27/23RP 1426. Mr. Sheppard agreed to look at a montage, though he wanted to get it over with quickly and asked to view the pictures inside the police truck. 3/23/23RP 36-38. The detectives agreed, and two detectives sat in the police truck with Mr. Sheppard. 3/23/23RP 53. One detective sat in the front seat, the other detective sat in the backseat, and Mr. Sheppard sat in the front passenger seat. 3/23/23RP 29.

While inside the truck, the police handed Mr. Sheppard the photographic montage. 3/23/23RP 40-42. Although the packet with the montage contained instructions that told the viewer that the suspect may not be there and the viewer did not have to choose a suspect, it is unclear whether Mr. Sheppard read this instruction. 3/23/23RP 16, 18.

The police used a single-blind procedure when they administered the montage. 3/23/23RP 41; CP 635. After viewing the montage in the police car with the police present, Mr. Sheppard identified Mr. Baker. CP 628; PT Ex. 1, pg. 2.

After mulling the issue over, the court found "there was at least one factor of a suggestive procedure in Mr. Sheppard's case, in that there was [not] a double blind procedure." 3/23/23RP 95. However, the court's findings conclude Mr. Baker did not meet his burden to show the identification procedure was unnecessarily suggestive. CP __, sub. no. 170, pg. 3.

The court was wrong, as Mr. Baker met his burden. The police employed a single-blind procedure, which science has shown significantly increases the suggestibility of the procedure. The suggestibility is heightened further when the police employ the identification procedure while sitting in the same room as the eyewitness. Two detectives sat in a police truck with Mr. Sheppard as he looked at the montage. Thus, Mr. Sheppard made his identification while sitting in a relatively cramped space with two detectives who knew that Mr. Baker was their suspect and were likely to unconsciously influence Mr. Sheppard's choice. This was unduly suggestive. *See Derri*,

199 Wn.2d at 681. The court's conclusion to the contrary was untenable.

c. Insufficient indicia of reliability existed to outweigh the suggestiveness of the procedure.

Despite its erroneous conclusion, the court proceeded to step two of the analysis, which requires a court to examine whether "there were [nevertheless] sufficient indicia of reliability to outweigh the suggestiveness of the procedure." *Derri*, 199 Wn.2d at 686. The court, however, erred when it made this analysis.

Courts must examine several factors, including the eyewitness's (1) opportunity to view the culprit; (2) degree of attention; (3) prior description of the culprit; (4) level of certainty at the time of the suggestive procedure; and (5) the time between the crime and the identification. *Id.* at 686-89. However, this list is not exhaustive. *Id.* at 686. Courts must also examine "suggestions from co-witnesses and others not connected to the State," the effect of "cross-racial

identification," and the eyewitness's level of intoxication. *Id.* at 686 n.23.

The court said it would not weigh the "opportunity to view the culprit" factor "one way or the other" because Mr. Sheppard's retelling on the day of the shooting was "scattered." 3/23/23RP 96; CP __, sub. no. 170, pg. 4. However, the court should have weighed the lack of detail in Mr. Baker's favor rather than neutrally weighing it in its analysis. *Compare Derri*, 199 Wn.2d at 686-87 (finding opportunity to view weighed in favor of reliability because the record affirmatively revealed lighting, the culprit's visibility, and length of time witnesses spent with the culprit); *State v. Cook*, 31 Wn. App. 165, 172-73, 639 P.2d 863 (1982) (finding this factor weighed in favor of reliability because record affirmatively showed the witnesses had ample opportunity to view the culprit).

The court found that Mr. Sheppard's degree of attention weighed in the State's favor because he "provided a very detailed description regarding the appearance and clothing and

vehicle of the [suspect.]" CP __, sub no. 170, pg. 4. However, the record belies this conclusion. Mr. Sheppard did not provide a "detailed" description. The word "detailed" means "including many small descriptive features." *Detailed*, Merriam-Webster.[7]

Mr. Sheppard did not provide any small descriptive features and instead provided only a general description. In terms of clothing, Mr. Sheppard only described the person's boots. Mr. Sheppard generally described the car as a blue or black truck. And Mr. Sheppard provided no details about the person's facial features. Mr. Sheppard just described the person as a White man in his mid-20s who looked like a "less handsome" Ashton Kutcher.

This ties in to the next factor, which is the accuracy of the witness's prior description of the person to the person the witness later identified. Mr. Sheppard described the culprit as a "less handsome" Ashton Kutcher. The court believed this factor

[7] https://www.merriam-webster.com/thesaurus/detailed (last visited Nov. 10, 2024).

weighed in favor of reliability, opining, "in reviewing the lineup photo and comparing to [Mr. Sheppard's] description, there is a reasonable correlation." CP __, sub no. 170, pg. 4.

The court was wrong. Here is a picture of Mr. Baker:

Aside from Mr. Baker and Ashton Kutcher being White males with a full head of brown hair, Mr. Baker and Ashton Kutcher do not look alike. Accordingly, this factor does not weigh in favor of reliability.

The court overweighed Mr. Sheppard's degree of certainty in the State's favor. *See id.* at. 4. First, Mr. Sheppard did not quantify his degree of certainty. And while Mr. Sheppard said "you got him, that's the one" to the police after he made his identification, our Supreme Court has stated a witness's degree of certainty carries little weight, as "suggestive procedures severely compromise the correlation between witness certainty and identification." *Derri*, 199 Wn.2d at 688; 3/23/23RP 98. However, the fact that only three days elapsed between the shooting and the identification does not weigh against reliability.

Critically, the court failed to consider other variables our Supreme Court has directed courts to consider before it admitted Mr. Sheppard's identification. *See Derri*, 199 Wn.2d at 689; CP 645-48. First, the court did not consider the corrupting effect of co-witness suggestion. CP 645-47; 4/27/23RP 1447-49. Mr. Sheppard admitted that, before he viewed the montage, he discussed the shooting with Mr.

Ahrnkiel and two other witnesses. 4/27/23RP 1437. This weighs against the reliability of the identification. *Derri*, 199 Wn.2d at 689 n.6.

Similarly, the court did not take into account that this was a cross-racial identification, which also weighs against reliability. *Id*. at 675; *accord Butler*, 200 Wn.2d at 711.

Finally, the court did not assess Mr. Sheppard's level of intoxication. Mr. Sheppard admitted to consuming so much fentanyl at the time he viewed the man in question that he was "on the nod" and thereby in and out of consciousness. This factor also weighs against reliability. *See State v. Henderson*, 27 A.2d 872, 906 (N.J. 2011); *see also Facts About Fentanyl*, DEA[8] (effects of fentanyl use include confusion, sedation, and pupillary constriction).

The court erred when it admitted this evidence.

[8] https://www.dea.gov/resources/facts-about-fentanyl (last visited Dec. 1, 2024).

d. The admission of this highly unreliable yet prejudicial evidence requires reversal.

For the reasons discussed in pages 58 to 61 of this brief, this Court should reverse. In addition to the reasons discussed in that portion in the brief, it is important to note that Mr. Sheppard's out-of-court identification bolstered Mr. Wood's and Mr. Ahrnkiel's unreliable in-court identifications. Mr. Sheppard's identification thereby compounded the harm that flowed from these identifications.

This Court should reverse.

3. This Court should reverse Mr. Baker's convictions because the trial court allowed the State to present unreliable testimony and conclusions concerning firearm identification evidence.

a. Expert testimony must comport with *Frye* and ER 702.

"The trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies both *Frye*[9] and ER 702." *Lakey v. Puget Sound Energy, Inc*., 176 Wn.2d 909,

[9] 293 F. 1013 (D.C. Cir. 1923).

918, 296 P.3d 860 (2013). "*Frye* and ER 702 work together to regulate expert testimony: *Frye* excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable; ER 702 excludes testimony where the expert fails to adhere to that reliable methodology." *Id.* Additionally, courts should exclude evidence if the evidence presents a danger of confusing or misleading the jury. *See* ER 403.

Under *Frye*, the primary goal is to determine whether the expert will base her testimony on established and reliable scientific methodology. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603, 260 P.3d 857 (2011). To determine whether expert testimony satisfies *Frye*, courts examine "(1) whether the underlying theory is generally accepted in the scientific community and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the

scientific community." *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

The scientific community under *Frye* is comprised of individuals working with the specific theory along with "scientists familiar with the challenged theory." *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). In the context of firearm identification evidence, the relevant community includes (a) the Association of Firearm and Tool Mark Examiners (ATFE); and (b) scientists that have authored reports either embracing or challenging the theory of firearm identification. *See United States v. Shipp*, 422 F. Supp. 3d 762, 782–83 (E.D.N.Y. 2019). Furthermore, general acceptance in the scientific community may change over time, so a court's determination of whether evidence meets *Frye* must account for recent changes within the scientific community. *State v. Kunze*, 97 Wn. App. 832, 853, 988 P.2d 977 (1999).

Courts determine whether evidence meets the *Frye* standard from a number of sources, including the record at trial,

available literature, and cases from other jurisdictions. *State v. Baity*, 140 Wn.2d 1, 10, 991 P.2d 1151 (2000). This Court reviews a trial court's *Frye* decision de novo. *State v. Brewczynski*, 173 Wn. App. 541, 555, 294 P.3d 825 (2013).

b. Firearm identification evidence does not comport with *Frye* because the scientific community does not generally accept the methodology it uses to conclude that a bullet originated from a particular gun.

Firearm identification evidence is inadmissible under *Frye*. This is because the scientific community does not generally accept its methodology. Many of the studies that have examined whether firearm identification evidence is accurate relied on flawed methodology. And the few studies that have used rigorous and scientifically sound methodology have revealed this evidence presents an unacceptably high risk of false positives and false negatives.

To the extent there is any consensus in the scientific community regarding firearm identification evidence, this consensus is limited to a consensus that such evidence can be

useful to identify whether a bullet or casing came from a gun of a particular make or model. The scientific community, however, warns against a witness using firearm identification evidence to definitively say a bullet or casing was fired from a particular gun. The court erred when it declined to conduct a *Frye* hearing, which resulted in the State introducing a damning, unqualified opinion concerning the casings recovered from the crime scenes.

"The underlying principle of firearm identification is that each firearm will transfer a unique set of marks, known as 'toolmarks,' to ammunition fired from that gun." *United States v. Monteiro*, 407 F. Supp. 2d 351, 359 (D. Mass. 2006). "A toolmark is 'generated when a hard object (tool) comes into contact with a relatively softer object,' such as the marks that result 'when the internal parts of a firearm make contact with the brass and lead that comprise ammunition.'" *United States v. Willock*, 696 F. Supp. 2d 536, 555 (D. Md. 2010) (quoting Nat'l Rsch. Council, Nat'l Acad. of Scis., *Strengthening Forensic*

Science in the United States: A Path Forward 150 (2009) ("NRC 2009 Report")).

Firearm identification is premised on the theory that imperfections on firearms leave behind unique traces, and "no two firearms will make identical marks on a bullet or cartridge case." *Abruquah v. State*, 296 A.3d 961, 973 (Md. 2023). "That, the theory goes, is because the method of manufacturing firearms results in the interior of each firearm being unique and, therefore, making unique imprints on ammunition components fired from it." *Id.* at 973.

However, this theory is neither objective nor quantified. *United States v. Adams*, 444 F. Supp. 3d 1248, 1263 (D. Or. 2020). Instead, it is subjective. *Abruquah*, 296 A.3d at 976. An examiner simply visually inspects bullets or casings under a microscope to examine its pattern and subjectively determines whether it originates from a particular gun. *Id.* at 975-76.

Largely due to the complete lack of an objective methodology and uncertain predictive value, groups within the

scientific community have criticized the "science" behind firearm identification. In 2008, the National Research Council of the National Academies of Science (the "NRC"), declined to establish a national database of ballistic images to aid in criminal investigations. Nat'l Rsch. Council, Nat'l Acad. of Scis., *Ballistic Imaging: Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database* 1–5 (2008) (NRC 2008 Report). This was because the NRC "determined that there was no data-based foundation to declare, with any certainty, individualization based on toolmark pattern matching." *Williams v. United States*, 130 A.3d 343, 352 (D.C. 2016) (Easterly, J., concurring); *see* NRC 2008 Report at 3.

In 2009, the NRC published another report, which echoed its previous concerns about the uncertainty and lack of rigor for most pattern-matching techniques. *See generally* NRC 2009 Report; *Abruquah*, 296 A.3d at 977. This report also pointed out that "there is an inability of examiners to specify

how many points of similarity are necessary for a given level of confidence in the [examiner's] result." *Abruquah*, 296 A.3d at 977 (internal quotations and citations omitted).

In 2016, the President's Council on Science and Technology, another leading scientific body, found several flaws in firearm identification. President's Council of Advisors on Sci. & Tech., Exec. Office of the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 111–14 (2016) ("PCAST Report").

In sum, the report found: (1) the theory behind firearm identification was circular and thus logically unsound; (2) most of the studies that purported to highlight the accuracy of firearm identification were improperly designed and underestimated the false positive and false negative errors rates; and (3) the one appropriately designed study showed a false positive rate "as high as 1 in 46." *See generally id.* at 104-14; *Abruquah*, 296 A.3d at 978. Furthermore, the one appropriately designed study

"was not published in a scientific journal, had not been subjected to peer review, and stood alone." *Abruquah*, 296 A.3d at 978.

In 2020, the Federal Bureau of Investigation (FBI) and an independent laboratory conducted one other appropriately designed study to determine the validity of firearm identification. "Treating inconclusive results as appropriate answers, the authors identified a false negative rate for bullets and cartridge cases of 2.92% and 1.76%, respectively, and a false positive rate for each of 0.7% and 0.92%, respectively." *Abruquah*, 296 A.3d at 980-81. The results varied significantly based on the specific manufacturer of the tested firearm. *Id.*

When an examiner analyzed the same bullets or cartridge cases a second time, "she reached a different conclusion 21-38 percent of the time." Brandon L. Garrett et. al., *Judging Firearms Evidence and the Rule 702 Amendments*, 107 Judicature 40, 45 (2023). "Even worse, when two different

examiners analyzed the same bullets or cartridge cases, they reached different conclusions 32-69 percent of the time." *Id.*

The State sough to present firearm identification evidence at Mr. Baker's trial. The police recovered several cartridge casings and ammunition at the scene of both shootings. CP 371. The casings and ammunition came from a .45 caliber firearm. CP 371. The police found a .45 caliber firearm inside the blue truck after they arrested Mr. Baker. CP 371.

Dijana Coric, a firearm identification analyst with the Washington State Patrol crime lab, tested some of the cartridge cases from the scene of both crimes. CP 371. After visually inspecting these materials under a microscope, she concluded the bullets came from the gun recovered in the blue truck. CP 371-72.

Mr. Baker asked the court to conduct a *Frye* hearing and exclude Ms. Coric's testimony in its entirety based on the lack of consensus in the scientific community regarding her

methodology and "in light of new developments in the field." CP 370-382. Mr. Baker largely relied on the science and arguments discussed above. CP 370-82. Alternatively, Mr. Baker asked the court to prevent or limit Ms. Coric's testimony (a) under ER 702 because she lacked the educational or occupational background to give an opinion on toolmark evidence because she lacked expertise in metallurgy; and (b) under ER 403 to only say that she could not exclude the firearm the police found in the blue truck "as the firearm that ejected the shell casings and fired the bullet." CP 383.

Mr. Baker also presented the declaration of William Tobin, a former FBI special agent and metallurgy expert. CP 393-97. The declaration opines Ms. Coric's conclusions were "entirely subjective" and "constitute[d] nothing more than speculation." CP 372. It also emphasized that the process Ms. Coric employed to arrive at her conclusion "has been rejected by the most respected voices of the mainstream scientific community as without established foundational validity or

reliability." CP 388. If the court allowed her to testify, Mr. Tobin asked the court to limit her testimony to be "that, in the opinion of the examiner, a specific firearm could not be eliminated as the firing platform for evidentiary bullets or cartridge cases." CP 453.

The trial court denied the motion for a *Frye* hearing based on this Court's opinion in *State v. DeJesus*, 7 Wn. App. 2d 849, 436 P.3d 834 (2018), where a panel of this Court held a trial court properly denied a *Frye* hearing on firearm identification evidence because such evidence is generally accepted in the scientific community. 4/12/23RP 18-19.

The court's ruling under *Frye* was wrong because *DeJesus* neither bound the trial court nor does it bind this Court for several reasons. First, the court in *DeJesus* focused its analysis on whether the general scientific community accepted firearm identification evidence. 7 Wn. App. 2d at 860-65. In doing so, this Court examined cases from other jurisdictions.

Yet since this Court issued its opinion in *DeJesus* in 2018, several courts have clarified what the general scientific community actually agrees on and therefore what satisfies *Frye*. The general scientific community generally agrees "examiners [may] express an opinion on toolmarks that are class characteristics." *Ross,* 129 N.Y.S.3d at 641. "Class characteristics are common to all bullets and cartridge cases fired from weapons of the make and model that fired the ammunition." *Abruquah*, 296 A.3d at 974.

However, "[m]ainstream scientists really focus their critique elsewhere—on whether examiners should be expressing opinions on perceived individual characteristics." *Ross,* 129 N.Y.S.3d at 641. "Individual characteristics are those unique to the individual firearm that therefore distinguish the firearm from all others." *Abruquah*, 296 A.3d at 974 (internal citations and quotations omitted). "Because "forensic toolmark practice lacks adequate scientific underpinning and the confidence of the scientific community" for opinions beyond

simply comparing class characteristics, "any claims that firearm examiners can match marks to a particular gun with certainty 'are patently absurd.'" *United States v. Briscoe*, __ F. Supp. 3d __, 2023 WL 8096886, at *11 (D.N.M. 2023) (quoting *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 29:16).

DeJesus did not say the scientific community agreed that firearm identification supports an unqualified match of a specific firearm to specific cartridges. To the extent *DeJesus* implied otherwise, this Court should reevaluate this position. *See State v. Miller*, 30 Wn. App. 2d 461, 468, 545 P.3d 388 (2024) ("[I]f we conclude one of our prior opinions was incorrect, we are free to depart from it.").

When the court initially ruled on *Frye*, Mr. Baker explicitly brought to the court's attention that since this Court issued its opinion in *DeJesus*, courts from other jurisdictions have limited the scope of a firearm identification expert's conclusions. 4/12/23RP 23. Rather than reassess its decision to

deny Mr. Baker's request for a *Frye* hearing, the court simply restated, "*DeJesus* spoke, I think at great length, that courts from around the country have universally held that toolmark analysis is [] generally accepted." 4/12/23RP 34.

But again, *DeJesus* did not discuss the scope of the scientific community's general agreement. It also did not state it was appropriate for a firearm identification witness to claim, without qualification, that the bullets or casings she tested came from a particular gun. The court was wrong to rely on *DeJesus* to deny the *Frye* hearing.

The court also said it reviewed the cases that limited a firearm identification examiner's testimony, yet it did not explain why this caselaw nevertheless supported its decision to deny the *Frye* hearing. 4/24/23RP 685.

The court erred when it denied Mr. Baker's request for a *Frye* hearing.

c. ER 702 and ER 403 bar a forensic examiner from testifying that a particular gun fired a particular bullet or particular casing because firearm identification evidence is entirely subjective and not scientifically sound.

The court also erred when it allowed Ms. Coric to definitively say that the casings she tested came from the gun recovered in the blue truck. This is because, under ER 702, Ms. Coric lacked the expertise to render such a decisive opinion, and therefore her conclusion would not assist the trier of fact. The court should have instead limited her testimony under ER 702 and ER 403 to simply opine that she could not exclude the gun found in the blue truck as the gun that fired the shots in both shootings.

"To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and that the testimony will assist the trier of fact." *In re Det. of McGary,* 175 Wn. App. 328, 338–39, 306 P.3d 1005 (2013). "Before allowing an expert to render an opinion, the trial court must find that there is an adequate foundation so that an opinion is

not mere speculation, conjecture, or misleading." *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014).

This is because "unreliable testimony does not assist the trier of fact." *Lakey*, 176 Wn.2d at 918. "ER 702 thereby permits the trial judge, in determining if the opinion is admissible as an expert opinion, to assess the reliability of the theory, methodology, procedure or principle propounded by the expert and the probative value of [her] testimony." *State v. Maule*, 35 Wn. App. 287, 295, 667 P.2d 96 (1983). This grants the court the discretion to restrict a purported expert's testimony in line with the court's assessment of the theory and procedures the witness relied on to render her opinion. *See Johnston-Forbes*, 181 Wn.2d at 354-55.

Pursuant to ER 702 and ER 403, Mr. Baker asked the court to forbid Ms. Coric from definitively saying that the cartridge cases she tested were ejected from the gun found in the blue truck. CP 320-26. Instead, Mr. Baker asked the court to

limit Ms. Coric's testimony to stating she could not "eliminate the seized firearm [from the blue truck] as the possible firearm used at the various scenes [in] this case." CP 326. To support this request, Mr. Baker pointed to the scientific reports cited in his motion for a *Frye* hearing, cases from other jurisdictions that have limited firearm identification evidence, and Mr. Tobin's declaration. CP 320-26.

In response, the State cited this Court's opinion in *State v. Lizarraga*, 191 Wn. App. 530, 364 P.3d 810 (2015). 4/24/23RP 702. The State claimed that because this Court "specifically found" that the court did not err in limiting firearm identification evidence, the trial court should do the same. *See* 4/24/23RP 702. The court said it would not limit Ms. Coric's testimony as it could "only rely" on the "motions before it." 4/24/23RP 704.

While Mr. Baker cited the PCAST report in his original motion, Mr. Baker once against cited the PCAST report and renewed his objection to Ms. Coric testifying that the items she

tested were fired from the gun recovered in the blue truck. *See* CP 320, 5/9/23RP 2934-35. The PCAST report explicitly recommends that courts limit an examiner's testimony so that she does not make any "statements of certainty." 5/9/23RP 2935. The court once again denied the request, opining the court did "not find that the caselaw in Washington requires a limitation on the expert's testimony." 5/9/23RP 3037. Furthermore, the court believed Ms. Coric "herself seem[s] to limit her testimony with regard to what her conclusions were." 5/9/23RP 3037.

However, Ms. Coric did not limit her conclusions. Instead, she told the jury that the cartridge cases and bullets she examined were fired from the gun recovered in the blue truck. 5/10/23RP 3277, 3314-15. Ms. Coric admitted that her conclusions were based on viewing the materials under a microscope and forming her own subjective opinion. 5/10/23RP 3317-19.

For several reasons, the court erred when it allowed Ms. Coric to provide her unqualified opinion that the items she tested were fired by the gun in the blue truck. First, as discussed in the previous section, the scientific community warns against providing such definitive opinions based on a subjective "science." Such testimony is therefore unreliable and improper under ER 702. *See Abruquah*, 296 A.3d at 996-97.

Indeed, many courts have recently permitted examiners to testify only that certain "recovered cartridge cases could not be excluded as having been fired from the recovered firearm[.]" *E.g., U.S. v. Cloud*, 576 F. Supp. 3d 827, 845 (E.D. Wash. 2021). These courts prohibit examiners from testifying "that any cartridge case or bullet fragment is a 'match' to other casings or bullet fragments." *Briscoe*, 2023 WL 8096886, at *12; *accord, e.g.*, *Cloud*, 576 F. Supp. 3d at 845; *U.S. v. Davis*, 2019 WL 4306971, at *7 (W.D. Va. 2019) (unpublished); *Shipp*, 422 F. Supp. 3d at 783; *Adams*, 444 F. Supp. 3d at 1267.

Even the Department of Justice ("DOJ") now requires experts to cabin their testimony. U.S. Dep't of Justice, *Uniform Language for Testimony and Reports for the Forensic Firearms/Toolmarks Discipline Pattern Examination* (May 2023).[10] The DOJ expressly prohibits its experts from testifying that two toolmarks definitely originated from the same firearm. *Id.* at 3.

In addition, other courts have found error—even plain error—when an examiner offers an unqualified opinion that two cartridges match based on toolmark comparison. *E.g.*, *Williams v. United States*, 210 A.3d 734, 744 (D.C. 2019) ("[I]t is plainly error to allow a firearms and toolmark examiner to unqualifiedly opine, based on pattern matching, that a specific bullet was fired by a specific gun."); *Abruquah*, 296 A.3d at 998 (finding unqualified toolmark identification testimony was not harmless and reversing).

[10] https://perma.cc/99EU-FEFE.

Mr. Baker cited to cases from other jurisdictions that support this, but the court appears to have overlooked them. CP 325-26. To the extent the court relied on *Lizarraga*, that opinion did not bind the trial court. The opinion is from 2015. In light of developing science and caselaw in the field of firearm identification, the court was free to depart from *Lizarraga*. *Cf. Kunze*, 97 Wn. App. at 853.

Furthermore, because of the questionable validity of Ms. Coric's subjective opinion that the items she tested were fired from the gun found in the blue truck, this testimony also presented a high likelihood of misleading the jury under ER 403. CP 323. This evidentiary rule formed a separate basis for excluding the evidence. Yet the court did not examine this separate reason for excluding the evidence.

The court erred when it allowed Ms. Coric to give a definitive opinion as to the source of the bullets and casings absent Ms. Coric using methodology that adheres to general scientific standards.

d. The identity of the shooter was hotly contested. Because this evidence bolstered the State's theory that Mr. Baker was the shooter, a reasonable probability exists this improper evidence affected the outcome of the trial. This requires reversal.

Evidentiary errors require reversal if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). This requires this Court to assess whether a reasonable probability exists that the trier of fact would have reached a different outcome. *State v. Gunderson*, 181 Wn.2d 916, 926. 337 P.3d 1090 (2014). The analysis does not turn on whether sufficient evidence exists to uphold the conviction. *Id.*

Expert testimony in general is more significant than lay testimony, as it creates "an aura of special reliability and trustworthiness." *See State v. Black*, 109 Wn.2d 336, 349, 745 P.2d 12 (1987). But a witness's toolmark identification

testimony is even more significant. A witness's toolmark identification "is likely to lead much more directly to a conviction." *Abruquah*, 296 A.3d at 990–91.

A reasonable probability exists that this evidence affected the outcome of Mr. Baker's trial. The identity of the shooter was hotly contested at trial. The prosecutor acknowledged this was the key issue in the case, as she acknowledged the question the jury needed to answer was whether Mr. Baker was indeed the shooter. 5/12/23RP 3651-52.

As previously discussed, the evidence that suggested Mr. Baker was the shooter was circumstantial and equivocal. *See* pgs. 58 to 61. Recognizing this, the State relied on Ms. Coric's testimony and cited her conclusions to convince the jury that Mr. Baker was indeed the shooter. 5/12/23RP 3566, 3657-58. Without Ms. Coric's unqualified testimony, there would have been considerably less evidence that would have tied Mr. Baker to the shootings. For this reason, this Court should reverse.

4. This Court should reverse Mr. Baker's conviction because the prosecutor engaged in prejudicial misconduct when she misstated the facts during her summation.

a. Defendants possess the right to a fair trial, and prosecutorial misconduct can deprive defendants of this right.

The Sixth and the Fourteenth Amendments to the United States Constitution and article I, section 22 of our State Constitution secure a defendant's right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecutor may deprive a defendant of this right if she engages in misconduct. 175 Wn.2d at 703.

While a prosecutor has wide latitude to persuade the jury based on the evidence she presented at trial, it is misconduct for a prosecutor to urge the jury to decide a case based on evidence she never produced. *State v. Pierce*, 169 Wn. App. 533, 553, 283 P.3d 1158 (2012); *accord State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). This is because it is

fundamental principle in our criminal legal system that a jury convict a person only based on the evidence the State presented at trial. *See State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007), *citing State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).

Because the jury knows the prosecutor is an officer of the State, it is particularly grievous for a prosecutor to mislead the jury regarding a critical fact. *Cf. State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015) (noting it is particularly egregious for a prosecutor misstate the law of the case).

When a defendant asserts the prosecutor engaged in misconduct, the defendant must show the prosecutor's conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. This Court assesses prejudice in the context of the entire record, the issues in the case, the instructions to the jury, and the circumstances at trial. *Id.*

b. The prosecutor engaged in prejudicial misconduct when she falsely claimed Mr. Baker explicitly acknowledged that he gave his "homey" Trenton Wood a ride on the day of the Lexington Avenue shooting.

As discussed, identity was critical to the State's case. Here, the prosecutor misstated a key "fact," which claimed Mr. Baker acknowledged something that directly tied him to the Lexington Avenue home at the time of the June 20 shooting. This false retelling of the facts unfairly bolstered the State's case, and this misconduct requires reversal.

During Mr. Baker's interrogation, he admitted that he was up for a day and a half on uppers, so he gave the police fuzzy details about his whereabouts during the timeframe of the shootings. Ex. 1009 (5:00-7:20, 10:32-10:45). After the police applied further pressure on Mr. Baker, he acknowledged giving two men a ride from Chevron to a house, but he did not remember their names. Ex. 1009 (14:40-15:48). When the detectives asked Mr. Baker if he gave someone a ride to get their lawnmower, Mr. Baker said "probably" and vaguely

acknowledged he might have done so. Ex. 1009 (18:26-19:12). He did not say the person's name. Indeed, the only person Mr. Baker mentioned by name was someone named "Carla," who was with him when the police arrested him. Ex. 1009 (10:03-10:05); 5/5/23RP 245. The detective who interrogated Mr. Baker acknowledged Mr. Baker did not mention anyone from the Lexington home's names. 5/11/23RP 3488.

During summation, the prosecutor pointed to the evidence it believed proved Mr. Baker was the shooter. 5/12/23RP 3652-54. The prosecutor cited to Mr. Baker's statements during his interrogation to advance its theory. 5/12/23RP 3653-54. The prosecutor then claimed that during the interrogation, Mr. Baker:

> admits being the homey -- or he admits Trent Wood is the homey that he took to get the lawnmower in the back. And then he took them back to 2010 Lexington and dropped him off and left.

5/12/23RP 3654.

This statement was patently false. During Mr. Baker's interrogation, he only half-heartedly acknowledged maybe giving someone a ride to pick up a lawn mower. Most importantly, Mr. Baker never told the detectives the name of the person who needed the ride in order to get the lawn mower, much less describe the person as his "homey."

The prosecutor's false representation tied Mr. Baker to the scene of the Lexington Avenue shooting and corroborated Mr. Wood's claim that Mr. Baker was the one who (a) gave him a ride to pick up the lawnmower; and (b) shot him in the head. This misrepresentation undermined Mr. Baker's defense and unjustly bolstered the prosecutor's case.

c. Because the shooter's identity was critical to the State's case, it is highly certain that this misconduct affected the verdict, and this Court should reverse.

"Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant has been prejudiced." *State*

v. Pete, 152 Wn.2d 546, 555, n.4, 98 P.3d 803 (2004). To assess whether this misconduct prejudiced Mr. Baker, this Court does not assess whether sufficient evidence exists to convict him; instead, this Court assesses whether the misconduct encouraged the jury to base its verdict on the prosecutor's improper arguments rather than the properly admitted evidence. *Glasmann*, 175 Wn.2d 710-11.

The prosecutor's misconduct substantially prejudiced Mr. Baker because it resolved the centrally disputed element in this case—identity—in the State's favor. *See Glasmann*, 175 Wn.2d at 708 (reversing due to prosecutorial misconduct because the misconduct addressed a critical element of the defendant's charge); *accord Allen*, 182 Wn.2d at 375 (reversing because the prosecutor misstated an element that was critically important to the defendant's case); *see also Miles*, 139 Wn. App. at 888 (reversing because the extraneous facts the prosecutor inappropriately introduced during trial went to the heart of the defendant's defense).

While Mr. Baker did not object to the prosecutor's misstatement of the facts, the prosecutor's misrepresentation of Mr. Baker's own statements was flagrant and ill-intentioned and thereby warrants reversal. This is because this misconduct undoubtedly influenced the jury's verdict. It encouraged the jury to find Mr. Baker guilty of this crime based on statements he never made.

This Court must grant Mr. Baker's right to a fair trial in full. *Glasmann*, 175 Wn.2d at 712. Accordingly, this Court should reverse.

5. Cumulative error deprived Mr. Baker of his right to a fair trial.

Mr. Baker maintains that every error identified in this brief, standing alone, warrants reversal. However, if this Court finds any of the above (a) constitutional violations; (b) evidentiary errors; and (c) instances of prosecutorial misconduct harmless in isolation, it should reverse because they unconstitutionally prejudiced Mr. Baker in the aggregate. "The

combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial." U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *accord State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

By its own admission, the State's case hinged on whether it could convince the jury that Mr. Baker was the shooter. All of the errors discussed in this brief unfairly bolstered the State's theory that Mr. Baker was the shooter. The erroneous in-court identifications and out-of-court identification pointed to Mr. Baker as the shooter. The faulty firearm identification evidence that tied the gun recovered in the blue truck to both shootings also pointed to Mr. Baker as the shooter. And the prosecutor's misrepresentation of Mr. Baker's statements during his interrogation also boosted the State's contention that Mr. Baker was the shooter.

The cumulative effect of these errors deprived Mr. Baker of his right to a fair trial. This Court should reverse his convictions and remand for a new trial. *See*, *e.g.*, *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversing due to cumulative error); *accord State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).

F. CONCLUSION

For the reasons stated in this brief, Mr. Baker asks this Court to reverse his convictions.

In compliance with RAP 18.7(b), counsel certifies the word processing software calculates the number of words in this document as 16,336 words. A motion to file an overlength brief is filed concurrently with this brief.

DATED this 30th day of December, 2024.

Respectfully submitted,

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