IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 25561-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MATTHEW L. MATHOT,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows convictions for felony murder, burglary, robbery, theft, and identity theft. The defendant murdered his brother and took his brother's checkbook, bankcards, wallet, and truck. He assigns error to a number of the court's rulings and, by claims of ineffective assistance of counsel, claims error that was not raised in the trial court. We conclude that the case was fairly, though imperfectly, tried. And we conclude that the overwhelming, untainted evidence of guilt would render most of the claimed errors harmless in any event. We therefore affirm the convictions.

FACTS

Mark Mathot's body was found partially buried on his property in Anatone,

Washington, on October 18, 2004. Experts determined that Mark had been shot in the head with a .22 long rifle or Ruger handgun and buried between September 2 and September 25, 2004. Investigators searched Mark's house and found a shoe print in blood on the floor. The last time Mark had been seen or heard from was September 2.

On September 1, Mark's brother, Matthew Mathot (Mr. Mathot), took a bus from Spokane, Washington, to Lewiston, Idaho. A few days after the bus trip, Mr. Mathot began to cash Mark's checks and use his bankcards. On September 4, Mark's neighbor saw Mr. Mathot at Mark's house. On September 5, Mr. Mathot told two people who wanted to buy Mark's property that he had already purchased it. On September 27, a friend went to Mark's house to look for Mark. He found Mr. Mathot at the house. Mr. Mathot told the friend that he bought Mark's house and Mark moved to Alaska.

On October 4, a sheriff's deputy visited Mark's property to look for him. The deputy saw Mr. Mathot at Mark's house. Mr. Mathot told the deputy that the phone was not working so he was not able to tell concerned family that Mark had moved to Alaska. In early October, Mr. Mathot drove Mark's truck to Oregon where he used Mark's name and bankcards. He was arrested on October 20. He had Mark's wallet, bankcards, checkbook, and truck. And his shoes had Mark's blood on them.

The State charged Mr. Mathot with first degree burglary, first degree murder (felony or premeditated), first degree robbery, second degree theft, and second degree identity theft. It also alleged that Mr.

Mathot was armed with a firearm when he committed the burglary, murder, and robbery.

Mr. Mathot was arraigned October 25, 2004. The court granted defense counsel's motion for a competency evaluation. And it ultimately found Mr. Mathot competent to stand trial.

Mr. Mathot moved to seal the court records to prevent adverse publicity through the local news media. The Tribune Publishing Company moved to intervene to oppose "any attempt to prevent access to court records or to close court proceedings of any type." Clerk's Papers (CP) at 8. The trial court granted the Tribune's motion to intervene. And it denied Mr. Mathot's motion to seal the record.

The court also granted the State's motion to conduct a portion of voir dire privately to determine whether prospective jurors had been influenced by the media and whether they could try the case impartially. Three weeks later, on August 7, 2006, jury selection began. After a jury was sworn in, the trial court denied Mr. Mathot's motion to change venue.

Mr. Mathot's trial began on August 8. The State objected to defense counsel's opening statement when counsel said Mark had committed acts of domestic violence. The court ordered counsel not to refer to acts of domestic violence or drug use in his opening statement.

Sergeant Thomas White testified for the State. He testified without objection about statements made to him and

documents examined by him. Other witnesses testified about Mark and Mr. Mathot's acrimonious relationship and that Mark had said he did not want Mr. Mathot at his house.

During Mr. Mathot's case-in-chief, John O'Shaughnessy testified that he had been friends with Mr. Mathot in junior high and high school and that Mr. Mathot had always been friendly. The prosecutor cross-examined Mr. O'Shaughnessy about violent acts by Mr. Mathot, again without objection by defense counsel.

The jury found Mr. Mathot guilty of first degree felony murder, first degree burglary, first degree robbery, second degree theft, and second degree identity theft. And the trial court sentenced him to nearly 50 years in prison.

DISCUSSION

Speedy Trial Right

The court delayed Mr. Mathot's trial for 18 months while experts evaluated his mental competency. The court did so over his objection. Mr. Mathot contends the trial court violated his rule-based[1] and constitutional[2] rights to a speedy trial. The question raised is whether the judge abused his discretion by delaying the trial to accommodate the competency evaluations. Our standard of review is abuse of discretion. *State v. Lopez*, 74 Wn. App. 264, 268, 872 P.2d 1131 (1994).

[1] CrR 3.3.

[2] U.S. Const. amend. VI; Wash. Const. art. I, § 22.

CrR 3.3. Proceedings related to whether a defendant is competent to stand trial are excluded periods when computing the time for trial. CrR 3.3(e)(1). Thus, "[a]n order for evaluation under RCW 10.77.060(1)(a) automatically stays the criminal proceedings until the court determines that the defendant is competent to stand trial." *State v. Harris*, 122 Wn. App. 498, 505, 94 P.3d 379 (2004). This time is excluded "because the evaluation process is unpredictable and beyond the court's control." *Id.*

A trial court has discretion to order a competency evaluation. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). But it must order one if it has reason to doubt the defendant's competency. RCW 10.77.060(1)(a); *Harris*, 122 Wn. App. at 505. Reasons to doubt competency include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). We defer to the trial judge's evaluation of these factors because they are not easily evaluated from a cold record. *State v. Crenshaw*, 27 Wn. App. 326, 330, 617 P.2d 1041 (1980), *aff'd*, 98 Wn.2d 789, 659 P.2d 488 (1983).

The court's order appears to be based on a motion by defense counsel, although that motion is not part of our record: "I'm going to sign the order for mental health evaluation that we, ah, prepared based upon the defense's motion." Report of Proceedings (RP) (Vol. A) at 61. There is no claim that defense counsel did not move for the evaluation. The only other complaint

by Mr. Mathot is that he did not need an evaluation. We conclude then that the court's order met the criteria for a continuance under CrR 3.3.

Sixth Amendment and Article I, Section 22. Trial delays sanctioned by CrR 3.3 may, nonetheless, violate a defendant's constitutional right to a speedy trial under U.S. Constitution amendment VI and Washington Constitution article I, section 22, if trial is not held within a reasonable time. *State v. Christensen*, 75 Wn.2d 678, 686, 453 P.2d 644 (1969); *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). We consider four factors to determine whether the delay here was reasonable: length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. *Monson*, 84 Wn. App. at 711.

Mr. Mathot claims his constitutional rights were violated because he was forced to wait in jail for more than one year for the competency evaluation and because he had to sign waivers to accommodate the delay. He also says the delay prejudiced him because defense witnesses forgot facts that were helpful to his case.

Mr. Mathot's trial was delayed just over one year for the evaluations. The first two evaluators disagreed on whether he was competent to stand trial; the court then ordered an evaluation by a third evaluator. The record shows only that Mr. Mathot did not want to be evaluated. RP (Vol. Sup-1) at 7; RP (Vol. A) at 54. Ultimately, we are not persuaded that he was denied his constitutional right to a speedy trial. The trial judge appropriately exercised his authority

to have Mr. Mathot evaluated and that caused this delay. The delay for this evaluation was appropriate.

Public Trial Right

Mr. Mathot next argues that the trial judge violated his and the public's right to an open public trial by conducting some of the jury voir dire in chambers. We review his assignment of error de novo. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009).

Criminal defendants and the public have a constitutional right to public trials. U.S. Const. amend. VI; Wash. Const. art. I, § 22. These rights "appl[y] to all judicial proceedings, including jury selection, [but it] is not absolute." *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), *petition for cert. filed*, 78 U.S.L.W. 3745 (U.S. June 7, 2010) (No. 09-1500). A trial court may close a courtroom[3] but, to do so, it must first consider the *Bone-Club*[4] factors. Those factors include identifying a compelling interest for closure, allowing an opportunity to object to closure, imposing the least restrictive means available to protect the interest, balancing competing interests, and narrowly tailoring the closure. *Strode*, 167 Wn.2d at 227-29; *State v. Erickson*, 146 Wn. App. 200, 211, 189 P.3d 245 (2008).

Mr. Mathot contends that the trial court closed a portion of voir dire without

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[3] *State v. Frederick*, 20 Wn. App. 175, 180, 579 P.2d 390 (1978); *see Strode*, 167 Wn.2d at 227-28.

[4] *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

considering the necessary *Bone-Club* factors. The record here suggests otherwise.

The State was concerned that questioning jurors in front of each other would contaminate the entire venire with knowledge and opinions about the case:

> [THE STATE]: One concern I have, Your Honor, and we dealt with that in our last murder trial, is when the question of publicity is raised, oftentimes, ah, if you ask the juror in front of the other, ah, for example, what he has heard about it, or what she's heard about it, you may end up tainting the pool.
>
> What we did in the Wilson case, if someone indicated that they had heard about it and the judge got beyond the, if you have heard about it, you haven't formed any opinions, and if someone indicates that they've gone beyond sort of scanning, we took them back into the chambers, asked them what they had heard, where they had heard it from, whether they formed any opinions, and so forth.
>
> So, I know that sometimes, when people are explaining what they've heard and – and where they are mentally, in front of the rest of the group, they sort of, ah, mess the process up.

RP (Vol. B) at 34. The State then moved to close a portion of the voir dire.

The trial court and defense counsel agreed with the State's concerns and agreed that the proper approach was to conduct a portion of the jury voir dire privately:

> THE JUDGE: I think we'll probably do that in chambers unless – the other option is to take everyone else out and do that in open court.
>
> *But unless somebody objects*, I think it's easier for us to retire in chambers.
>
> Would both parties be comfortable with that approach?
>
> [DEFENSE COUNSEL]: That would be acceptable, yes, Your Honor.
>
> THE JUDGE: Okay.
>
> And, you know, we want to be sensitive to the open nature of the process, but I agree that that sometimes just needs to be done in chambers.

> So, generally, we'll do it here in open court, and recess to chambers on the publicity issues once we get down to the, ah, substantive aspect of their prior knowledge.

RP (Vol. B) at 34-35 (emphasis added).

The colloquy shows Mr. Mathot's right to a fair trial by an impartial jury (preventing jury contamination) was the compelling interest for closure; the court provided an opportunity for objections; it considered an alternative to closure (questioning jurors alone in open court); it recognized the public's competing interest in leaving the courtroom open; and it closed jury selection only to examine a juror's prior knowledge of the case or the defendant. We conclude that the court considered the necessary *Bone-Club* factors before proceeding in chambers with some of the voir dire. And, later, the court again considered those factors when a newspaper reporter asked to be allowed into the closed portion of voir dire:

> Let's take up the request for the press to be back here.
> . . . .
> . . . [T]he reason we are in chambers is we're trying to avoid cross-contamination on sensitive things that both might be personal, or expressing some predisposition about the case. And I – to have that in the press, I think could, ah, prevent us from picking a jury here, ah, or make the jurors uncomfortable, so they wouldn't express their honest feelings. And these are people that wanted to express them in private. So, I want to preserve that privacy for the jurors, and I am balancing that against, ah, the need to know by the press.
> And so, we'll proceed without the press.

RP (Vol. D) at 111, 114-15. The court continued to consider Mr. Mathot's right to a fair trial by an impartial jury to be the

compelling interest that necessitated closure. We consider the newspaper's request to be an objection to the closure. And the court gave Mr. Mathot further opportunity to object as well. The court balanced the newspaper's (public's) right to open proceedings against the need (a need all parties and the court agreed on) to pick jurors who were untainted by the extensive pretrial publicity in this small, rural community. And it closed voir dire only to question certain jurors about whether pretrial publicity affected their abilities to be impartial.

The court in *Strode* concluded that the record there was "devoid of any showing that the trial court engaged in the detailed [*Bone-Club*] review," and so it could not determine whether the closure was proper. *Strode*, 167 Wn.2d at 228-29. Here, while the record is not perfect, it is sufficient for us to conclude that the trial court did not abuse its discretion by closing part of voir dire to the public.

Mr. Mathot's case received extensive pretrial publicity in this small, rural area of the state. Inevitably, some of the prospective jurors had heard, read, and formed opinions about the case. The court, then, had to protect the venire from those opinions to guarantee Mr. Mathot's right to a fair trial by an impartial jury. It was necessary and proper to close a portion of voir dire for the limited purpose of ascertaining certain jurors' abilities to be impartial. *Momah*, 167 Wn.2d at 151-52.

We would also conclude that Mr. Mathot knowingly, voluntarily, and intelligently

waived his right to a public trial:

> THE JUDGE: Would it be fair for me to say, based upon what you've said, that if you had an objection to not having this be an open hearing, that you would be waiving it by those comments?
> [DEFENSE COUNSEL]: I would waive. Yes, I would, Your Honor, definitely.
> THE JUDGE: Defendant, Mr. Mathot, would you agree with that?
> MR. MATHOT: I don't want the press.
> THE JUDGE: You don't want them back here [in the jury room]?
> MR. MATHOT: No.

RP (Vol. D) at 113-14; *Strode*, 167 Wn.2d at 229 n.3. The court closed a portion of voir dire after waiver by Mr. Mathot and consideration of the appropriate factors.

Change of Venue

Mr. Mathot next argues that all of the prospective jurors in this case had preconceived opinions about the case because it was highly publicized in a small community. He, therefore, contends that the court erred by denying his motion to change venue. We review a refusal to change venue for abuse of discretion. *State v. Crudup*, 11 Wn. App. 583, 586, 524 P.2d 479 (1974).

A defendant is entitled to an impartial jury trial "free from outside influences, including prejudicial publicity." *State v. Whitaker*, 133 Wn. App. 199, 210, 135 P.3d 923 (2006). We independently review the record to determine whether a probability of prejudice is so apparent that it was error to deny a motion to change venue. The factors

include

> (1) the . . . nature of the publicity; (2) the degree to which the publicity was circulated . . .; (3) the length of time elapsed from the . . . publicity to the date of trial; (4) the . . . difficulty . . . in the selection of [a] jury; (5) the familiarity of prospective . . . jurors with the publicity and the . . . effect . . .; (6) the challenges exercised by the defendant in selecting the jury . . .; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

Crudup, 11 Wn. App. at 587.

Local radio and television stations and a newspaper publicized Mr. Mathot's case in the small community of Clarkston-Asotin-Anatone in Washington state. But the news articles were published nearly two years before Mr. Mathot's trial started. The articles included information primarily from courtroom proceedings and documents, a statement from the Asotin County sheriff that Mr. Mathot was a person of interest in Mark's disappearance and that he had been using Mark's property and identification, the State's courtroom argument to set a $1 million bond for Mr. Mathot's release, the prosecutor's statement that his office's investigation of Mr. Mathot was ongoing, and a relative's comment that Mr. Mathot was unemployed. CP at 48-60. We conclude that this publicity was not inflammatory.

Many, but not all, prospective jurors knew about the case, and a few had opinions on Mr. Mathot's guilt. The court, however, carefully determined who had opinions; it

shielded the venire from those prospective jurors with opinions; it inquired as to whether those with opinions could be impartial; and it excused those who could not be impartial. Indeed, the court granted five of defense counsel's motions to dismiss jurors for cause. Defense counsel also used five peremptory challenges. The jurors ultimately selected to serve on the jury either represented under oath that they could be impartial or never said they had a problem being impartial in the first place.

We conclude that the judge did not abuse his discretion by denying Mr. Mathot's motion to change venue.

The Media's Intervention

Mr. Mathot next assigns error to the trial court's decision to allow the newspaper to intervene and oppose his motion to limit the press's access to court records and pretrial matters. Whether the press has standing to intervene in a criminal case is a question of law that we generally review de novo. *See State v. Bianchi*, 92 Wn.2d 91, 92, 593 P.2d 1330 (1979) (question reviewed by the court de novo, although court does not articulate a standard of review).

We have recently held that intervention by the media is not inappropriate after the proceedings have concluded. *State v. Mendez*, ___ Wn. App. ___, 238 P.3d 517, 523 (2010). Whether, when and to what extent the court can allow the media to intervene must be decided on a case-by-case basis. *See Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 62, 615 P.2d 440 (1980) ("Anyone

present when the closure motion is made must be given the opportunity to object to the closure. The number of objections, however, and the time necessary to present them must be subject to the trial court's inherent power to control the proceedings."). We need not decide the question here because the court allowed the press to intervene but ultimately ruled in Mr. Mathot's favor. Any error, then, would be harmless.

Trial Court's Actions During Defense Counsel's Opening Statement

Mr. Mathot contends that the court violated his right to counsel and his right to present evidence by calling a sidebar during defense counsel's opening statement and refusing to let his lawyer refer to evidence that the victim had been involved in drugs and acts of domestic violence. He argues that the interruption appeared to be a rebuke and that the evidence he wanted to refer to in his opening statement was relevant.

A court has discretion to control the content of opening statements. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). We review a court's exercise of that discretion for abuse. *Id.*

A criminal defendant has a constitutional right to counsel, which can be violated if a trial court says or does something in front of the jury that tends to impair or destroy defense counsel's influence or usefulness. *State v. Collins*, 66 Wn.2d 71, 74, 400 P.2d 793 (1965). The trial court here called counsel to a sidebar in response to the State's fourth objection to defense counsel's opening statement. It said nothing in front of the jury but, "Come to the side-bar on this."

RP (Vol. H) at 362. The statement was directed at both lawyers; it did not explicitly or implicitly rebuke counsel. We cannot conclude that the interruption impaired counsel's influence. And so we cannot conclude that the court abused its discretion by the way it handled the State's objection.

A criminal defendant also has a right to present evidence in his defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). But that evidence must be relevant. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006). That is, the evidence must make a material fact more or less likely. ER 401. Accordingly, "[e]ither party may, in the opening statement, refer to admissible evidence expected to be presented at the trial." *State v. Piche*, 71 Wn.2d 583, 585, 430 P.2d 522 (1967).

Here, defense counsel wanted to use the victim's drug and domestic violence history to argue that someone other than Mr. Mathot could have had a motive to kill Mark. But before those acts can be considered relevant and admissible, "'there must be such proof of connection with [the crime], such a train of facts or circumstances as tend clearly to point out some one besides the [accused] as the guilty party.'" *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932) (quoting *Greenfield v. People*, 85 N.Y. 75, 39 Am. Rep. 636 (1881)). Defense counsel failed to make this showing. He claimed only that the acts occurred sometime before the victim died. The trial court, then, properly barred defense counsel from referring to the acts in his opening statement.

Defense Expert

Mr. Mathot further contends that the court violated his right to present evidence by refusing to allow a defense investigator to testify as an expert on the chain of custody. He also asserts that defense counsel was ineffective for failing to defend the investigator's qualifications to do so.

Defense counsel wanted his independent investigator to opine that the State made a mistake when logging shoes and vials of blood into evidence. The court ruled that the investigator could testify about the discrepancies he found in the documents he examined but that an expert was not needed to determine whether those discrepancies were mistakes.

Expert opinion testimony is admissible only "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. Mr. Mathot fails to show how expert knowledge could have helped the jury better determine whether evidence was misidentified. The jury itself could see the discrepancies and determine whether they ultimately affected the reliability of the evidence offered by the State. We conclude the court did not abuse its discretion by refusing to admit the proffered opinion.

Ineffective Assistance—Sergeant White's Hearsay Testimony

We review claims of ineffective assistance of counsel de novo. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899

P.2d 1251 (1995). We begin with a strong presumption that counsel was effective. *Id.* at 335. Mr. Mathot must show that defense counsel's conduct was deficient and prejudicial to rebut that presumption. *Id.* at 334-35. To demonstrate prejudice, he must show that the trial's outcome would have been different but for counsel's conduct at trial. *Id.* at 335. For instance, failure to object to inadmissible hearsay that violates the confrontation clause can be ineffective assistance of counsel. *State v. Hendrickson*, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029 (2009).

Mr. Mathot contends defense counsel should have objected to several hearsay statements by Sergeant Thomas White. Hearsay is an out-of-court statement made by someone other than the testifying witness and offered for the truth of the matter asserted. ER 801(c). And Sergeant White's testimony included hearsay.

Sergeant White testified that Mark was a teacher and the personal representative of his mother's estate; Mr. Mathot lived in Denver, Colorado, in 2000; Ms. Mathot owned property in Anatone before she died; and no one at border patrol said Mr. Mathot's white van crossed the Canadian border like he said it did. Assuming, without deciding, that these statements are hearsay, they are first of all correct and no one suggests otherwise. And given the context and the evidence in this record, we cannot conclude that they are material and therefore prejudicial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) ("Evidentiary error is grounds for reversal only if it results in prejudice."). Therefore, counsel cannot be faulted for

not objecting. *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) (whether and when to object are tactical decisions).

Sergeant White testified about a bank receipt and a bus ticket; but both were admitted into evidence. Mr. Mathot argues, nonetheless, that the documents were inadmissible because the State did not show a chain of custody. Police found them in the truck Mr. Mathot was driving when he was arrested. And the truck was sealed upon Mr. Mathot's arrest until the sheriff's department in Asotin County searched it. That appears to us to be more than an adequate foundation to admit the documents. *See State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984) (State need not prove perfect chain of custody for evidence to be admitted). Deficiencies in the chain of custody go to the weight of the evidence and not its admissibility, in any event. *Id.* Again, it is easy to understand why counsel did not object. *Johnston*, 143 Wn. App. at 19.

Sergeant White also testified about the nature of the brothers' relationship and about Mr. Mathot's whereabouts around the time of Mark's death. RP 418-19, 422-23, 426, 431, 435-36. But the "declarants" testified during the trial and were, therefore, subject to cross-examination. Mr. Mathot's grandmother, aunt, and uncle testified that they knew Mr. Mathot and Mark and were aware that the brothers had a contentious, rugged, and shaky relationship that got worse after their mother died. RP at 612, 629-30, 668. Mary Knight testified that she met Mr. Mathot on a bus to Lewiston on September 1, 2004, and learned that Mr. Mathot "had

a job to do in Anatone." RP at 604-06. Mark's neighbor testified that he saw Mr. Mathot at Mark's house in Anatone around the time experts believe Mark died. Roberta and Scott Essy testified they also saw Mr. Mathot at Mark's property around the time of Mark's death; they planned to offer to buy the property from Mark. Again, it is difficult to see the necessary prejudice required to show ineffective assistance of counsel when these declarants testified and were subject to cross-examination and the sheriff merely repeated the testimony. ER 801(d)(1)(iii); *State v. Hancock*, 46 Wn. App. 672, 679, 731 P.2d 1133 (1987), *aff'd*, 109 Wn.2d 760, 748 P.2d 611 (1988). And it is also difficult to fault counsel for not objecting. The information was coming in one way or another.

Sergeant White testified that the telephone company said it received no report that Mark's house phone was not working. He testified that Mr. Mathot was facing eviction and his credit card debt had been sent to collection. He testified that Mr. Mathot's neighbors said his white van had been parked at his trailer since July 2004. No phone company employee, neighbor, landlord, or credit card representative testified. We assume, again without deciding, that the testimony was inadmissible hearsay. Mr. Mathot must still show that, "'but for [counsel's] deficient conduct, the outcome of the proceeding would have differed.'" *State v. Ashue*, 145 Wn. App. 492, 505, 188 P.3d 522 (2008) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). That showing has not been made here. And, given the evidence, any error would be harmless in any event. *State v. Palomo*, 113 Wn.2d

789, 798-99, 783 P.2d 575 (1989). The test is the "'overwhelming untainted evidence test.'" *Id.* (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). We look at only the "'untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.'" *Id.* (quoting *Guloy*, 104 Wn.2d at 426).

Here, the evidence meets that test. Mr. Mathot's financial motive to kill Mark was only one motive alleged by the State. The State also showed that Mr. Mathot hated his brother. Mr. Mathot had his brother's blood on his shoes and his brother's checks and credit cards in his possession. He drove Mark's truck. Mr. Mathot's attorney, then, was not ineffective for failing to object to Sergeant White's hearsay testimony and any error, even assuming error, was harmless.

Admission of Evidence of Mr. Mathot's Temper

Mr. Mathot contends that the court erred by using ER 803(a)(1) (present sense impression) to admit testimony that Mark said he and Mr. Mathot did not get along, he was afraid Mr. Mathot would react violently to news of their mother's will, and Mr. Mathot had an explosive temper. The court admitted each of these statements for different reasons. And we review admission of evidence under hearsay exceptions for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 188, 189 P.3d 126 (2008).

Again, hearsay is a statement made by someone other than the testifying witness and offered for the truth of the matter

asserted. ER 801(c). Hearsay is not admissible unless a hearsay exception applies. ER 802.

Brothers' Strained Relationship. Mr. Mathot's grandmother, aunt, and uncle testified that Mr. Mathot and Mark had a rugged, contentious, and shaky relationship. RP at 612, 629-30, 668. Mark's friend, Dave Dorion, testified that the brothers "didn't get along." RP (Vol. R) at 1002. A family friend, Bill Steibert, testified that the brothers' relationship was "all right, I guess." RP (Vol. R) at 1035. Mr. Mathot objected to only his grandmother's testimony. But he claims he had a standing objection to the admission of all statements made by Mark. The statements at issue here are not Mark's statements; they are the witness's own statements. So his standing objection did not apply.

The trial court admitted the testimony of Mr. Mathot's grandmother on the ground that she had personal knowledge of the brothers and their relationship. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. Here, Mr. Mathot's grandmother testified that Mr. Mathot and Mark were her grandsons and that she knew their relationship when they were young. That evidence is sufficient to allow her to testify to the nature of the brothers' relationship. Similarly, all the other witnesses who testified about the brothers' relationship had known the brothers for more than a decade and had personal knowledge of their relationship. The court, then, properly admitted

their testimony.

Violent and Vicious Disposition. Mr. Mathot's aunt testified that Mark said he feared that Mr. Mathot would react "violently and viciously" to the way their mother's will divided her estate:

> Q. Did you have conversations with Mark around the time of Loueen's funeral?
> A. Yes.
> Q. What did he tell you?
> A. He was very, ah, apprehensive. He was very scared.
> . . . .
> He said, when Matt – the day comes it's going to be bad. And it will be bad.
> And he just had a fear that Matt would react so violently and viciously to the fact that his mother died, because of the, ah, her will, or whatever, her finances.

RP (Vol. L) at 641-42. The trial court admitted this statement under ER 803(a)(3) to show Mark's mental state. Mr. Mathot contends that ER 803(a)(3) does not apply because the statement was one of memory or belief.

"A statement of the declarant's then existing state of mind . . . such as . . . mental feeling" is admissible hearsay, but "a statement of memory or belief to prove the fact remembered or believed" is generally not admissible hearsay. ER 803(a)(3). A statement expressing fear, like the statement at issue here, is admissible to show the declarant's then-existing mental feeling. *State v. Parr*, 93 Wn.2d 95, 99, 606 P.2d 263 (1980). The statement was not one of memory or belief. Mr. Mathot, then, failed to show the court

erred by admitting the statement.

Explosive Temper. Bill Steibert testified that Mr. Mathot and Mark had an "all right" relationship. RP (Vol. R) at 1035. The State then attempted to impeach Mr. Steibert's testimony by asking if he told a deputy during an interview that Mark said Mr. Mathot had an explosive temper. Mr. Steibert answered that Mark might have said that to him. The court allowed this testimony on the ground that it was offered to prove a prior inconsistent statement. A prior statement by a witness is not hearsay if the witness testifies and the statement is inconsistent with the testimony. ER 801(d)(1). And Mr. Mathot does not argue that those factors were not satisfied. Indeed, he does not analyze the factors at all. *See* Appellant's Br. at 31-33. We cannot conclude that the testimony was erroneously admitted.

Prosecutorial Misconduct—Witness John O'Shaughnessy

Mr. Mathot next contends that the prosecutor improperly impeached a character witness he called to testify on his behalf. We review claims of prosecutorial misconduct by considering the case's issues, the prosecutor's entire argument, the evidence addressed in the argument, and the jury instructions. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). We first analyze whether the prosecutor made improper comments. *Id.* We then analyze whether the statements likely affected the jury if the defendant objected to the comments. *Id.* If the defendant did not object, then we analyze whether the comment was so flagrant and

ill intentioned that its prejudice could not have been cured by an instruction. *Id.*

John O'Shaughnessy testified that he had been friends with Mr. Mathot in junior high and high school and that Mr. Mathot had always been friendly. The prosecutor then examined Mr. O'Shaughnessy about specific acts of misconduct by Mr. Mathot:

> Q. Mr. O'Shaughnessy, are you aware of, ah, an incident, where Mr. Matthew Mathot represented himself to other people as a tough guy?
> A. (No verbal response.)
> Q. Someone not to be messed with?
> A. No.
> Q. Were you aware that, ah, he had told his aunt that he had beaten up bums?
> A. No.
> Q. Were you aware that – of the incident where he assaulted his aunt?
> A. No.
> Q. Were you aware of the incident where he almost broke his female – younger female cousin's arm, because she changed the channel, while he was watching TV?
> A. No, sir.
> Q. What about animal cruelty?
> Were you ever aware of situations where Mr. Mathot, ah, was – while in Pullman, taking care of quail at the Agricultural Center, kicked quail to death, or stomped on quail?
> A. I wasn't aware of it until you mentioned it to me earlier today.
> Q. Are you aware of any other incidents of animal cruelty on the part of Mr. Matthew Mathot?
> A. One occasion, yes.
> Q. Would you tell us about it?
> A. Ah, I was fishing up Joseph Creek towards the Oregon side. A friend and I were comin' down the Grande Ronde River in the afternoon, and – and Matt and, ah, one of his friends from school were standin' on the bridge – the concrete bridge going over the Grande Ronde River, lookin' over.
> So, we stopped the pickup truck on the bridge and asked them what

> they were doin'.
>
> And Matt said that, ah, they were looking for their dog – or lookin' for his dog. They had thrown it in the rapids above the bridge, and didn't see it, so they were on the bridge hoping to see it float by.
>
> Q. Why did Matthew throw his dog in the river?
>
> A. I have no idea.

RP (Vol. BB) at 1597-98.

Mr. Mathot argues that the prosecutor's questions implied Mr. Mathot committed several violent acts under the guise of impeaching a witness. He argues that a person accused of a crime must be convicted by the evidence, not innuendo. *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). And impeaching a witness by referring to evidence that is never introduced violates the confrontation clause. *State v. Babich*, 68 Wn. App. 438, 445-46, 842 P.2d 1053 (1993).

The State may cross-examine a character witness about his knowledge of acts of misconduct by the defendant or rumors of such acts in the community. *State v. Donaldson*, 76 Wn.2d 513, 519, 458 P.2d 21 (1969); ER 405(a). The purpose is not to prove that the acts occurred but to impeach the testimony of the character witness. *Donaldson*, 76 Wn.2d at 519. "Accordingly, it is proper to preface questions in such situations in this state by either 'Did you hear,' 'Have you heard,' or 'Do you know.'" *Id.* at 518. And the prosecutor here prefaced each question with a similar phrase, "Were you aware," which shows he asked the questions for the right reason: to undermine the

character witness's credibility. The prosecutor, then, did not cross the line between "that testimony which discredits the defendant and that which is designed primarily to discredit the testimony of the character witness." *Id.* at 519. He did not commit prosecutorial misconduct, then, or violate the confrontation clause. And, because the prosecutor's cross-examination was proper, defense counsel was not ineffective for failing to object.

Sufficiency of the Evidence—Burglary

Finally, Mr. Mathot contends that the evidence does not show he unlawfully entered or remained in his brother's house. We review the record for substantial evidence. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), *abrogated by State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person commits first degree burglary if he enters or remains unlawfully in a building with the intent to commit a crime inside and is armed with a deadly weapon or assaults anyone while in or fleeing from the building. RCW 9A.52.020(1). "Entry is unlawful if made without invitation, license, or privilege." *State v. Gohl*, 109 Wn. App. 817, 823, 37 P.3d 293 (2001).

Mark did not want Mr. Mathot on

his property. *See*, *e.g.*, RP at 618, 712, 733, 1002. The jury could fairly infer from this and other evidence presented that Mark did not invite Mr. Mathot into his home. And several people saw Mr. Mathot at Mark's house throughout September and October. Substantial evidence, then, supports a finding that Mr. Mathot unlawfully entered and remained at Mark's house.

We affirm the convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

_____
Sweeney, J.

WE CONCUR:

_____
Korsmo, A.C.J.

_____
Brown, J.