Supreme Court No. (to be set)
Court of Appeals No. 41795-2-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Robert Maddaus
Appellant/Petitioner

Thurston County Superior Court Cause No. 09-1-01772-1
The Honorable Judge Christine Pomeroy

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Robert Maddaus, appellant below, asks the Court to review the decision of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Mr. Maddaus seeks review of the Opinion entered February 27, 2014. A copy is attached.

III. ISSUES PRESENTED FOR REVIEW

1. Is a CrR 3.6 motion "to suppress items taken from" a specified address and from "the vehicles located on the same property" sufficient to preserve review of the trial court's refusal to suppress all items seized from the address and vehicles pursuant to an invalid search warrant?

2. Is information that a suspect spent the night at his house following a homicide insufficient to establish probable cause to search the house, where the suspect allegedly hid the evidence at a nearby property but police did not find evidence at the nearby property?

3. Does the improper imposition of restraints violate an accused person's Fourteenth Amendment right to due process where there is a likelihood jurors saw the illegally-imposed restraints?

4. Does the improper imposition of a shock device and other restraints violate an accused person's Fourteenth Amendment right to due process even if jurors do not see the illegally-imposed restraints?

5. Did the trial court violate Mr. Maddaus's Sixth and Fourteenth Amendment right to confrontation by restricting cross-examination into Leville's bias, where Leville had engaged in criminal conduct but had not been charged at the time of his testimony?

6. Did the government's possession of a letter from Mr. Maddaus to his attorney create a presumption of prejudice that the government failed to rebut?

7. Did the trial judge infringe Mr. Maddaus's right to a fair trial by refusing to hold a hearing to determine how the government came into possession of a letter Mr. Maddaus wrote to his attorney?

8. May Privacy Act violations be raised for the first time on review, where illegally recorded conversations are introduced at trial without objection from the defense?

9. Where the outcome of trial hinges on the jury's assessment of credibility, does a prosecutor's flagrant and ill-intentioned misuse of a multimedia presentation including exhibits altered to elicit an emotional response constitute reversible misconduct?

10. Did Prosecutor Bruneau commit flagrant and ill-intentioned misconduct requiring reversal by disparaging the role of defense counsel, impugning counsel's integrity, and expressing personal opinions about the evidence?

11. Does a tampering conviction rest on insufficient evidence where the alleged target of tampering was not a witness and where the accused person had no reason to think the alleged target was about to be called as a witness or had information relevant to a criminal investigation?

12. Should the trial judge have instructed jurors on third-degree assault, based on the accidental discharge of bear mace during a struggle between Mr. Maddaus and Abear?

13. Should the trial judge have instructed jurors on third-degree assault, based on the alleged infliction of bruises by means of a paintball gun?

14. Must a trial court give a unanimity instruction when the prosecution charges assault with a deadly weapon and presents evidence suggesting the defendant used three different weapons to assault another person?

15. Must a trial court give a unanimity instruction when the prosecution charges attempted kidnapping and the evidence suggests that the accused attempted to kidnap two different people on separate occasions?

16. Did the trial court's instructions relieve the prosecution of its burden to prove second-degree assault where the court failed to adequately define the phrase "deadly weapon" for the jury?

17. Did the trial court's instructions relieve the prosecution of its burden to prove attempted kidnapping where the court provided an incorrect definition of "substantial step"?

18. Was Mr. Maddaus deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's failure to (a) object to the imposition of restraints, (b) object to inadmissible and prejudicial evidence, (c) propose proper instructions and object to erroneous instructions, (d) object to prosecutorial misconduct?

19. Did the erroneous imposition of firearm enhancements violate Maddaus's state and federal due process rights and his right to a jury determination of facts used to increase the penalty beyond the standard range?

20. As set forth in Mr. Maddaus's Amended Statement of Additional Grounds, did the prosecutor, the court, and defense counsel violate Mr. Maddaus's rights to due process, to the effective assistance of counsel, to his choice of counsel, to equal protection, to be free from unreasonable searches and seizures, to be free from unlawful intrusion into his private affairs and governmental invasion of his home, to appeal, to a fair trial by an impartial jury, to a verdict based solely on the evidence, to an unbiased tribunal, and to the appearance of fairness?

IV. STATEMENT OF THE CASE[1]

Shawn Peterson was shot on Capitol Way in Olympia in the very early morning of Nov. 16, 2009. RP[2] 503-505, 524-525, 533-536, 552-553, 617. Five people had been with Peterson in a Capitol Way apartment just before the shooting. Peterson and these five people—Matthew Tremblay, Jesse Rivera, Falyn Grimes, Daniel Leville, and Robert Maddaus—were all convicted felons, drug users, and (except for Rivera) drug dealers.[3] RP 494, 960, 1042, 1055, 1090, 1178, 1180, 1185, 1208, 1275-1276, 1302, 1321, 1390, 1394, 1538.

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[1] Additional facts relating to each issue will be outlined in the argument section.

[2] The trial transcript (RP) is numbered consecutively. Other parts of the verbatim report will reference the hearing date.

[3] Leville and Grimes lived in the apartment where they'd gathered just before the shooting.

The state persuaded all of them (but one) to provide statements implicating Robert Maddaus for the shooting. RP 1088-1093, 1116-1117, 1130-1134, 1207-1209, 1224, 1292-1293, 1388. As a result of their statements, Mr. Maddaus was charged with first-degree murder. RP 1040-1152, 1177-1231, 1266-1408.

The only witness who claimed to have seen Mr. Maddaus shoot Peterson was Tremblay (who was also the subject of "other suspect" evidence introduced by the defense at trial.) RP 1555-1557. Tremblay had done time for nine to twelve felony convictions before the shooting. RP 1362. Police arrested him, and he gave a statement where he confessed to multiple felony gun possessions and other crimes. RP (12/21/10) 58-59; RP 1369; CP 208-272. He also had two ounces of methamphetamine, stolen property, and $6000 cash, and he admitted that he made his living selling drugs. RP (12/21/10) 59-60; RP 1371. No charges stemmed from this criminal activity. RP (12/21/10) 60; RP 1408; CP 208-272. The state gave Tremblay use immunity for his testimony regarding Peterson's death. CP 208-272.

The defense theory at trial was that Tremblay shot Peterson. Tremblay admitted to friends that he'd shot Peterson, and expressed concern that Mr. Maddaus was being charged even though he, Tremblay, had fired the shots.[4] RP 1621, 1652-1658, 1711-1713.

[4] At trial, he denied having fired the shots as well as telling people that he did. RP 1400-1406.

Daniel Leville was another state witness. Like Tremblay, Leville had served time in prison (for eight felonies). RP 1089-1090. Like Tremblay, he was arrested multiple times between the shooting and Mr. Maddaus's trial. On one occasion, police watched him make a hand-to-hand drug delivery, and discovered heroin in his car. CP 208-272. Inside his apartment, they also found five bags of marijuana, drug paraphernalia with methamphetamine and heroin residue, a ledger detailing transactions with customers, and items implicating Leville in forgeries and identity thefts.[5] One arresting officer wrote "I anticipate a referral for a significant number of additional charges." CP 208-272. The state did not file any charges stemming from this incident. RP (12/21/10) 60-61.

Grimes also had several felony convictions under her belt. RP 1207. Like Leville, she did not face any charges relating to the evidence found in their shared apartment. CP 208-272. Grimes talked with her friends about the shooting, and told them that Tremblay had killed Peterson.[6] RP 1688, 1724.

Leville and Grimes conspired with Rivera to lie to the police about Rivera's presence on the night of the shooting. RP 1096, 1225. Rivera eventually gave a statement, but did not implicate Mr. Maddaus. RP 1210-1217, 1290-1300. He was granted immunity from prosecution after he

[5] Police also found a large number of electronic items and power tools (even though neither Leville nor Grimes had jobs).

[6] At trial, she denied having done so. RP 1218-1221.

changed his statement to implicate Mr. Maddaus in the shooting.[7] RP (12/21/10) 63.

The state's theory at trial was that Mr. Maddaus killed Peterson because he believed Peterson had stolen drugs and money from him. RP 1986-2015. Jessica Abear testified that she was at Mr. Maddaus's home during the robbery, and that Mr. Maddaus assaulted her to find out who had done the robbery. RP 645-50, 653-655, 679. Mr. Maddaus was charged with attempted first-degree kidnapping and second-degree assault, both with deadly weapon allegations.[8] CP 21-23.

While in custody awaiting trial, Mr. Maddaus's telephone calls were recorded by the Thurston County Jail. RP 1464-1509. As a result of these calls, Mr. Maddaus was charged with four counts of Tampering with a Witness. CP 22-23.

Mr. Maddaus was convicted of all charges, and the jury answered "yes" on each special verdict. CP 451-467. The sentencing court imposed life in prison without the possibility of parole. RP (2/8/11) 132. Mr. Maddaus timely appealed. CP 35.

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[7] Other witnesses who received benefits from the prosecution included Anthony Samlock (who pled guilty to one misdemeanor charge, even though the state filed probable cause for five felonies) and Amanda Harader, Tremblay's girlfriend (who did not get charged even though she was in possession of controlled substances and stolen property when she was arrested). RP (12/21/10) 56-58; RP 981-982.

[8] The Information used the following language to charge each crime: "Attempt to Commit Kidnapping in the First Degree While Armed with a Deadly Weapon – Firearm," and "Assault in the Second Degree While Armed with a Deadly Weapon – Firearm." CP 21-23.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review under RAP 13.4(b)(1)-(4) and hold that the prosecutor committed prejudicial misconduct requiring reversal.[9]

Factual Basis Prosecutor Bruneau made extensive use of a lengthy PowerPoint presentation during closing. CP 576-978.[10] Bruneau showed numerous exhibits that he'd altered by adding text and graphics. CP 911-913; 867, 868, 881, 885, 886, 889, 890, 891, 892, 902, 903, 904, 905, 907,940, 944, 978.[11] Many of these slides included a caption indicating their exhibit numbers. *See, e.g.,* slide 39 (CP 904), captioned "Exhibit 84." Some slides used animation (such as flashing text or words appearing in stages) and/or audio (such as excerpts from recordings admitted as exhibits).[12]

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[9] Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *see also State v. Hecht*, 71059-1-I, 2014 WL 627852 (Wash. Ct. App. Feb. 18, 2014). Even absent an objection, error may be reviewed if it is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann,* 175 Wn.2d at 704; *Hecht, at* __.

[10] The transcript contains no clear reference to the PowerPoint slides, which were projected on a large screen for the jurors to see. RP 1978-2089. Nor did Bruneau file a copy of his presentation with the trial court. Instead, counsel for Respondent was ordered to file a copy of the presentation. The materials she filed are now part of the record on appeal; however, the paper copy does not include the audio and animation jurors saw in the original presentation. CP 576-598.

[11] Bruneau also showed slides outlining language from the jury instructions, with words highlighted to emphasize the prosecution's interpretation of each instruction. CP 871, 873, 879, 883, 884, 895, 899, 916. Other slides contained only text summarizing the state's interpretation of the evidence. CP 907, 913, 914, 915, 918, 919, 920, 921.

[12] *See* CP 869, 870, 871, 873, 874, 875, 876, 877, 879, 880, 882, 884, 885, 886, 888, 893, 894, 895, 897, 899, 901, 902, 903, 905-938, 947, 949, 951, 953, 955, 957, 959, 961, 964, 967, 969, 971, 973, 975, 978. These animations and audio excerpts are available on the CD of the PowerPoint. The prosecuting attorney did not provide a copy of the CD to the court.

One slide, displayed twice during the presentation, showed a bloody close-up of Peterson, deceased, wearing handcuffs. To this Bruneau had added (in red type) a quotation attributed to Maddaus: "I'm not taking those cuffs off." CP 881 (Appendix B). The record does not reflect how long the slide remained on screen. RP 1978-2016; CP 881, 885.[13]

Bruneau's final slide displayed a photo similar to a mug shot. CP 978 (Appendix B). A yellow circle circumscribed the photograph, and Bruneau had superimposed the word "GUILTY" in red text over Maddaus's face. Eight white arrows pointed toward the yellow circle around Maddaus and the word "GUILTY". Each arrow originated at a word or phrase (written in yellow) indicating a reason Bruneau believed the evidence established Maddaus's guilt. CP 978. The record does not reflect how long this slide was shown, but it was the last slide used in the state's closing argument. CP 978.

Throughout his closing, Bruneau used words describing defense testimony as "poppycock," "unreasonable under the law," and "crazy." RP 1984. He also suggested that the defense investigator had been "duped" by Maddaus. RP 2074. He compared defense counsel's remarks to "the distractions that sometimes people create when they're passengers," and de-

[13] Police compared the handcuffs found on Peterson with handcuffs Maddaus had allegedly purchased; Bruneau added multiple arrows to one slide to indicate his opinion on the similarities between the two. CP 886. Another slide superimposed text outlining the prosecution's theory as to the sequence of events over an image of the handcuffs (which was still marked with red arrows). CP 907.

scribed counsel's argument as "the last gasp of this defendant, the last gasp, the last effort to develop lies to try to convince you of what he's not, that he's innocent, and he's not." RP 2077. Defense counsel did not object to these arguments. RP 2074-2077.

1. The convictions must be reversed because Bruneau engaged in the same misconduct condemned by the Supreme Court in *Glasmann* and by Division I in *Hecht.*

Prosecutorial misconduct can deprive an accused person of a fair trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *Glasmann,* 175 Wn.2d at 703; *Hecht,* at __. The state must rely on probative evidence and sound reason rather than arguments calculated to inflame the passions or prejudices of the jury. *Glasmann,* 175 Wn.2d at 704; *Hecht,* at __. A prosecutor who alters a photograph of the accused by adding the word "Guilty" commits prejudicial misconduct that is flagrant and ill intentioned. *Glasmann,* 175 Wn.2d at 703-707; *Hecht,* at __. Showing jurors a photograph of the accused with the added word "Guilty" is equivalent to submitting evidence that has not been admitted at trial.[14] *Glasmann,* 175 Wn.2d at 705-706; *Hecht,* at __. Displaying altered photos may influence jurors to stray from mandatory legal principles or to use less care in determining guilt, encouraging jurors to rely on emotion over reason. *Glasmann,* 175 Wn.2d at 706-707; *Hecht,* at __.

[14] Conduct of this sort is improper even when the unadmitted evidence is not sent to the jury room. *Glasmann,* 175 Wn.2d at 706.

The addition of the word "Guilty" to a photo also communicates the prosecutor's personal belief and is prejudicial misconduct. *Glasmann,* 175 Wn.2d at 706-707. The addition of the word "Guilty" can only be seen as an appeal to passion, prejudice, and emotion. *Id.*

Here, Bruneau showed an altered photo similar to the slides at issue in *Glasmann* and *Hecht.* The word "GUILTY" was superimposed in red over Maddaus's photo, conveying the prosecutor's personal opinion of Maddaus's guilt and appealing to the passions, prejudices, and emotional reactions of jurors.[15] CP 978. As in *Glasmann*, the word was written in red ("the color of blood and the color used to denote losses"), using capital letters. *Glasmann,* 175 Wn.2d at 708.The slide featured eight white arrows, pointing inward toward Maddaus's photo, and originating from words and phrases such as "Motive," "Fugitive," "False alibi attempt," etc. Appendix B; CP 978. Like the word "Guilty," these words and phrases, the slide's layout, and the eight arrows were intended to produce an emotional response rather than a rational one. *Id.*

Such misconduct is flagrant and ill-intentioned, and could not have been cured by an instruction had defense counsel objected. *Glasmann,* 175

[15] Additional slides showed other photographic exhibits, altered by superimposing red captions. Among them were (1) a photo of Shawn Peterson's body, covered in blood and still wearing handcuffs, with the caption "Defendant: 'I'm not taking those cuffs off…['']", (2) another copy of the same slide, (3) a photo of a trailer and several cars, captioned with, among other things, the phrase " 'Torture the truth out of her,'" (4) a photograph of handcuffs, with text, numerous red arrows, and the date superimposed over the image, (5) Maddaus's booking photo with the name "Chad Walker Vogt" superimposed across the top, with quotation marks, and (6) a photo of a car with the phrase "put Acura on hold, Jetta a priority…" superimposed. CP 881, 885, 904, 907, 943, 978.

Wn.2d at 707. The improper images pervaded the entire closing argument, accompanied by improper comments conveying the prosecutor's personal beliefs. *See* Opening Brief, pp. 51-52; RP 1984. As noted in *Glasmann,* "[h]ighly prejudicial images may sway a jury in ways that words cannot… [and thus] may be very difficult to overcome with an instruction." *Id.* Jurors are particular susceptible to this sort of misconduct when it occurs during closing arguments. *Id,* at 707-708 .

Bruneau's misconduct was especially egregious. Many altered slides were captioned with an exhibit number. By the time of closing, the jury had became accustomed to seeing evidence on screen after it had been admitted and publication approved by the judge. *See, e.g.,* RP 696 (publishing Exhibits 16-44 to the jury). Jurors may well have reasonably assumed that the judge approved the altered exhibits Bruneau used during his closing arguments. As in *Glasmann,* "[t]he prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts." *Id.,* at 708; *see also Hecht,* at __. The trial boiled down to a credibility contest between Maddaus on the one hand and Tremblay, Rivera, Grimes, and Leville on the other. By conveying his personal opinion and appealing to passion, prejudice, and emotion, the prosecutor improperly put his thumb on the scale.

The Court of Appeals' decision conflicts with *Glasmann* and *Hecht.* The court erroneously concluded that Maddaus's case differed from the circumstances in *Glasmann.* Op., p. 42. The court noted that the *Glasmann* defendant disputed the degree of crimes charged, while

Maddaus "adamantly denied culpability." Op., p. 42. The court does not explain how a difference in the defendant's theory changes the analysis.[16]

The Court of Appeals should have applied *Glasmann* in a straightforward manner, as Division I did in *Hecht.* In that case, the defendant "adamantly denied culpability,"[17] despite allegations that he'd solicited prostitutes and later threatened them. *Hecht,* at __. In *Hecht,* as here, the outcome turned on the jury's credibility determinations. *Hecht,* at __. In this case, as in *Hecht,* the prosecutor's improper conduct undoubtedly impacted the credibility contest between Maddaus and the state's witnesses. The Opinion also suggested that the photo of Mr. Maddaus differed significantly from the mug shot used in *Glasmann.* Op., p. 42. But any distinction does not affect the analysis.[18] Here, as in *Hecht,* "the prosecutor's graphics, though arguably less severe than those at issue in *Glasmann,* were clearly improper." *Hecht,* at __. The Supreme Court's focus in *Glasmann* was primarily on the *alterations* made to the image by the prosecutor, and not the appearance of the defendant. *Glasmann,* at 175 Wn.2d at 701-702, 705-706, 714.

Bruneau's efforts to manipulate jurors into convicting without critically examining the evidence denied Maddaus a fair trial. *Id.* According-

[16] Furthermore, Maddaus unsuccessfully sought to pursue an inferior degree offense with regard to the assault charge.

[17] Op., p. 4.

[18] Maddaus's photograph was equivalent to a mug shot—it was a staged photo, taken by the police, using the typical "mug shot" pose. CP 978.

ly, Maddaus's convictions must be reversed, and the case remanded for a new trial. *Id.*

2. The prosecutor infringed Mr. Maddaus's constitutional right to counsel by disparaging the role of defense counsel and impugning counsel's integrity.

A prosecuting attorney may not comment disparagingly on defense counsel's role or impugn counsel's integrity. *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). For example, a prosecutor who characterizes defense counsel's presentation "as 'bogus' and involving 'sleight of hand'" improperly impugns counsel's integrity. *Id.,* at 450. Here, the state went beyond the misconduct in *Thorgerson,* by claiming that the defense investigator had been "duped into being this defendant's agent," by likening defense counsel's argument to "the distractions that sometimes people create when they're passengers in a vehicle," and by declaring that counsel's arguments were "the last gasp of this defendant, the last gasp, the last effort to develop lies to try to convince you..." RP 2074-2075, 2079. These comments maligned the role of the defense team and impugned the integrity of defense counsel, suggesting that counsel and his investigator were involved—albeit unwittingly—in an effort to deceive the jury. *Id.* They infringed Maddaus's Sixth and Fourteenth Amendment right to counsel. His convictions must be reversed and the case remanded for a new trial. *Glasmann,* 175 Wn.2d at 714.

3. The prosecutor improperly expressed a personal opinion.

A prosecutor may not express a personal opinion as to credibility or guilt. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003); *State v. Reed,* 102 Wn.2d 140, 684 P.2d 699 (1984). Prejudicial misconduct occurs when counsel expresses a personal opinion rather than arguing an inference from evidence, because it infringes the due process right to a decision based on the evidence. *State v. Copeland*, 130 Wn.2d 244, 291, 922 P.2d 1304 (1996).

Here, Bruneau expressed his personal opinion by describing certain testimony as "poppycock," "unreasonable under the law," and "crazy." RP 1984. His choice of words show that he was expressing his personal opinion rather than drawing inferences. The misconduct was prejudicial.[19] *Copeland,* 130 Wn.2d at 291.

4. The Court of Appeals decision conflicts with *Glasmann* and *Hecht.*

Maddaus's case is controlled by *Glasmann.* The Court of Appeals' decision conflicts with *Glasmann,* and with Division I's resolution of the issue in *Hecht.* The Supreme Court should accept review pursuant to RAP 13.4(b)(1)-(4).

B. The Supreme Court should accept review under RAP 13.4(b)(1), (3), and (4), and hold that the unlawful imposition of a shock device and other restraints violated Mr. Maddaus's Fourteenth Amendment right to due process.

Factual Basis: Maddaus wore a shock device and a leg brace for trial. The court did not hold a hearing to address the restraints. Defense

[19] In addition, this misconduct was so flagrant and ill-intentioned that no curative instruction would have eliminated its effect.

counsel asked that the leg brace be removed; however, the court declined. RP 50-52. Prior to jury selection, Maddaus noted that jurors could see the restraints. RP 52. Without analyzing the need for restraints, the court rearranged the courtroom furniture. RP 52-55. On the second day of evidence, Maddaus pointed out that jurors could see the shock device. RP 628. The court ordered pieces of cardboard strategically placed to block jurors' views. RP 628-629.

5. Mr. Maddaus was entitled to attend trial free of shackles absent some "impelling necessity" for physical restraint.

A defendant in a criminal case is entitled to attend trial free of bonds or shackles except in extraordinary circumstances. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Restraints may not be used "'unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.'" *Finch,* 137 Wn.2d at 842 (quoting *State v. Hartzog,* 96 Wn.2d 383, 398, 635 P.2d 694 (1981) (emphasis in original)).

Restraints undermine the presumption of innocence, unfairly prejudice the jury, restrict the defendant's ability to assist in the defense of his case, interfere with the right to testify, and offend the dignity of the judicial process. *Finch,* 137 Wn.2d at 845; *Hartzog,* 96 Wn.2d at 399. On direct appeal, improper use of restraints is presumed prejudicial. *In re Davis*, 152 Wn.2d 647, 698-699, 101 P.3d 1 (2004).

Restraints may only be imposed if evidence shows an imminent risk of escape, intent to injure someone in the courtroom, or inability to

behave in an orderly manner. *Finch,* 137 Wn.2d at 850. Concern about potential danger is not sufficient; nor is a blanket policy. *Finch,* 137 Wn.2d at 852.. *Hartzog,* 96 Wn.2d at 403. Restraints should be used only as a last resort, and the court *must* consider less restrictive alternatives. *Finch,* 137 Wn.2d at 850.

The trial court must remain alert to any factor that may undermine the trial's fairness. *State v. Gonzalez*, 129 Wn. App. 895, 901, 120 P.3d 645 (2005). The court is constitutionally required to shield the jury from routine security measures. *Id.*

Here, jail staff imposed a shock device and a leg brace. Although Maddaus raised the issue multiple times, the court did not remove the restraints, explain the reason for their use, or hold a *Finch* hearing. RP 50-55, 628. The record does not show an imminent risk of escape, intent to injure someone in the courtroom, or lack of appropriate behavior. *Finch,* 137 Wn.2d at 850. Nor is there any indication that the court considered less restrictive alternatives. *Finch,* 137 Wn.2d at 850. The improper use of restraints is presumed prejudicial. *Davis*, 152 Wn.2d at 698-699.

The judge did nothing to ameliorate prejudice created in the jurors' minds by their observations on the first day of trial. RP 628. Furthermore, Maddaus was forced to sit through trial and to testify with his freedom of movement limited and with the possibility of electric shock looming over him. RP 1814-1898; s*ee, e.g., Wrinkles v. Indiana,* 749 N.E.2d 1179 (2001) (Wrinkles I). As a matter of law, this interfered with his ability to assist his attorney and with his right to testify. *Finch,* 137 Wn.2d at 845.

All of the *Finch* court's concerns are implicated here. In addition to the practical impact—prejudice, restriction of ability to assist, and interference with the right to testify—the restraints here "offend[ed] the dignity of the judicial process." *Finch,* 137 Wn.2d at 845. The illegal imposition of restraints violated Maddaus's due process rights. *Id.*

6. The Court of Appeals' decision conflicts with *Finch.*

The Court of Appeals should not have found the error harmless. Op., p. 19-20. First, the Court of Appeals incorrectly concluded that there was "no possibility of prejudice" because the record does not establish that jurors saw the restraints. Op., p. 20. In fact, the record shows that jurors likely saw the restraints on several occasions. RP 52-55, 628-629. Second, the Court of Appeals incorrectly determined that Maddaus made only "bare allegations" about interference with his ability to assist and with his ability to testify. Op., p. 19, n. 18. The Supreme Court has held (as a matter of law) that restraints necessarily interfere with the ability to assist counsel and the ability to testify. *Finch,* 137 Wn.2d at 845. Third, the Court of Appeals did not address the offense to the dignity of court proceedings. *Finch,*137 Wn.2d at 845; Op., p. 19-20.

The Supreme Court should accept review. The Court of Appeals decision conflicts with *Finch.* In addition, this case raises significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(1), (3), and (4). Maddaus's convictions must be reversed and the case remanded for trial. *Id.*

C. The Supreme Court should accept review under RAP 13.4(b)(4) and hold that Privacy Act violations may be raised for the first time on review.[20]

Factual Basis: While in jail awaiting trial, Maddaus's phone calls were recorded. Law enforcement officers reviewed these calls, and Maddaus was charged with four counts of Tampering with a Witness based on their content.[21] CP 22-23; RP 1465-1466.

Maddaus made each call to Chelsea Williams, who heard a recorded warning indicating that the calls would be recorded. RP 1418-1423, 1466-1509. During two of the calls, Williams accepted the conditions, and then connected with Theodore Farmer for a 3-way call. The warning was not replayed while Farmer was on the phone. RP 1523; Ex. 232, 234. During another call, Williams heard the warning, accepted the call, and then handed the phone to Grimes, who spoke with Maddaus and then passed the phone to Leville. RP 1490-1496. The warning was not replayed for either Grimes or Leville. Ex. 232, 234. A redacted version of each recording was played for the jury. RP 1466-1509; Ex. 237, 237a.

7. The Privacy Act must be construed in favor of privacy.

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[20] Questions of statutory interpretation are reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Appellate courts have discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5(a); *State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). The admission of evidence obtained in violation of the Privacy Act requires reversal unless "within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Porter*, 98 Wn. App. 631, 638, 990 P.2d 460 (1999).

[21] Counts VI through IX.

Washington's Privacy Act requires consent of all participants before a private conversation can be recorded. RCW 9.73.030(1).[22] The Act "puts a high value on the privacy of communications" and requires suppression even when recordings prove criminal activity. *State v. Christensen,* 153 Wn.2d 186, 201, 102 P.3d 789 (2004). *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980); RCW 9.73.050. An accused person has standing to object to the admission of any illegally recorded conversation, even if his or her privacy rights were not personally violated. *Williams* 94 Wn.2d at 544-546.

The Act must be strictly construed in favor of the right to privacy. *Williams* 94 Wn.2d at 548; *see also Christensen,* 153 Wn.2d at 201. Every part of the Privacy Act reflects the legislature's intent to provide strong protection to individual privacy rights. *Christensen,* 153 Wn.2d at 201. No language in the Act requires litigants to raise violations in the trial court or precludes litigants from raising violations for the first time on appeal. This is consistent with RAP 2.5(a), which permits appellate courts to consider any issue or argument raised for the first time on appeal. *Russell,* 171 Wn.2d at 122.

8. To give effect to the Privacy Act, Mr. Maddaus must be allowed to argue violations for the first time on appeal.

[22] Explicit consent is not required if "one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, that if the conversation is to be recorded that said announcement shall also be recorded." RCW 9.73.030(3).

Here, the state introduced three recordings made in violation of the Privacy Act. In each recording, Maddaus called Williams, who then arranged for Maddaus to speak with other parties, including Farmer, Grimes, and Leville. Because Farmer, Grimes, and Leville were parties to the recorded conversations, the jail was required to obtain their consent prior to recording. RCW 9.73.030(1). None of the three provided explicit prior consent. *See* Ex. 234, pp. 6, 25, 28, 46; Ex. 237, 237a. Nor did the telephone system announce to Farmer, Grimes, or Leville that the call was "about to be recorded" as permitted under RCW 9.73.030(3).[23] Furthermore, the announcement heard by Williams and Maddaus was made by the automated system, not by a "party."[24] Accordingly, each recording violated the Privacy Act and should not have been admitted.[25] RCW 9.73.030.

The Court of Appeals refused to consider Maddaus's Privacy Act claims. Op., p. 25. The Supreme Court should accept review under RAP 13.4(b)(4), hold that Privacy Act violations may be raised for the first time on review, and reverse Maddaus's convictions.[26]

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[23] Instead, the telephone system made the announcement when Williams answered the phone. Ex. 234.

[24] Thus, even if the others heard the announcement, consent could not be presumed under RCW 9.73.030(3).

[25] Additional argument regarding the Privacy Act claim is included in the section on ineffective assistance.

[26] The illegal recordings impact all of Maddaus's charges: during closing, the state used the recordings as circumstantial evidence to prove that Maddaus killed Peterson. RP 2003-2014.

D. The Supreme Court should accept review under RAP 13.4(b)(1)-(4) and hold that the trial court violated Mr. Maddaus's Sixth and Fourteenth Amendment right to confrontation.[27]

Factual Basis: Leville testified that shortly after Maddaus, Peterson, and Tremblay left the apartment, he heard shots. He said that when he looked out, he saw Maddaus walking behind Peterson, holding a gun. RP 1070-1076. He claimed he did not see Tremblay. RP 1076.

Maddaus attempted to cross-examine Leville regarding the prosecutor's failure to charge him with multiple crimes.[28] The court sustained an objection under ER 608(b). RP (12/21/10) 76; RP 1128.

Offered the opportunity to make a record, defense counsel explained his position: "It's clear he's committing crimes. He's just not charged, by the same prosecutor that's prosecuting Maddaus, and how is that fair?" RP 1129.

9. The restrictions on cross-examination violated Maddaus's confrontation right.

Where credibility is at issue, the defense must have wide latitude in cross-examining adverse witnesses. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980). A court must allow relevant[29] cross-examination unless the evidence is so unfairly preju-

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[27] Although evidentiary rulings are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the Sixth Amendment. *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992); *see State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). Where a limitation on cross-examination directly implicates the values protected by the Sixth Amendment's confrontation clause, review is *de novo*. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010).

[28] *See* CP 206-272.

[29] Even minimally relevant evidence is admissible unless the state shows a compelling interest to exclude prejudicial or inflammatory evidence. *Darden,* 145 Wn.2d at 621; *see also*

(Continued)

dicial to the state "as to disrupt the fairness of the trial." *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002).

An accused person "has a constitutional right to impeach a prosecution witness with bias evidence." *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Cross-examination designed to elicit witness bias directly implicates the Sixth Amendment. *Martin*, 618 F.3d at 727. Evidence that shows bias is admissible even if it would not be admitted as past conduct to show veracity under ER 608.[30] *United States v. Abel*, 469 U.S. 45, 50-51, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (interpreting F.R.E.)

An accused is entitled to cross-examine regarding any expectation that testimony might affect resolution of a pending investigation or charge. *Martin,* 618 F.3d at 727-730.[31] A witness may provide biased testimony "given under… [an] expectation of immunity," even if no promise has been made. *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931). The absence of an explicit agreement "does not end the matter;" nor does the fact that an accused is "permitted to examine other matters relating to [the witness's] alleged bias." *Martin,* 618 F.3d at 728-730.

ER 401, ER 402. Where evidence is highly probative, no state interest can preclude its introduction. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010).

[30] ER 608(b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence," but may be the subject of cross-examination if relevant to credibility.

[31] *See also United States v. Sarracino*, 340 F.3d 1148, 1167 (10th Cir. 2003) (Refusal to allow cross-examination violates the confrontation clause when "the impeachment material concern[s] possible, not pending, criminal charges.")

Leville's testimony raised "serious questions of credibility." *On Lee v. United States,* 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). He claimed that Maddaus was armed, that Tremblay was not, and that Maddaus stood behind Peterson with a gun just after the shots were heard. RP 1074-1078. This contradicted Maddaus's version of events. It corroborated Tremblay's. RP 1325-1351, 1356-58, 1850-1861.

Despite this, the trial judge limited cross-examination into Leville's recent uncharged criminal activity. RP (12/21/10) 76; RP 1128. This was error. The judge applied the wrong legal standard. The trial court confused relevance to show *veracity* (under ER 608) with relevance to show *bias*. Leville's criminal misconduct was not offered to prove veracity. Instead, it was offered to show that Leville was biased toward the government. As in *Martin,* Leville may have had "a desire to curry favorable treatment." *Martin,* 618 F.3d at 727.

10. The Court of Appeals decision conflicts with *Iniguez, Darden,* and *York.*

According to the Court of Appeals, the lower court made a "tenable" decision that evidence of Leville's uncharged crimes "was not relevant under ER 608." Op., p. 22. This is the same misunderstanding of bias evidence shown by the trial court. Maddaus did not offer prior bad acts to show Leville's lack of veracity. Instead, he sought to show Leville's *bias*: the government had the power to charge Leville with crimes. Given the importance of Leville's testimony, Maddaus should have been allowed

every possible opportunity to impeach Leville with evidence of his motive to curry favor with the government.

The Supreme Court should accept review under RAP 13.4(b)(1)-(4). The Court of Appeals' opinion conflicts with decisions of the Supreme Court and the Court of Appeals. This case also raises significant constitutional issues that are of substantial public interest. The restriction on cross-examination violated Maddaus's state and federal confrontation rights. *State v. Foster,* 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). His conviction must be reversed and the case remanded. *Id.*

E. The Supreme Court should accept review under RAP 13.4(b)(3) and (4) and suppress evidence seized pursuant to an invalid search warrant.[32]

Factual Basis: Prior to trial, Maddaus moved "to suppress items taken from" his address and from "the vehicles located on the same property." CP 1000-1016; RP (8/12/10) 54-60. The affidavit supporting the search warrant includes seven statements about to the property: (1) that Maddaus lived at the address, which was also on his driver's license; (2) that he did not answer when police knocked on the afternoon of Nov. 17th; (3) that his mother lives on the property and did not wish to cooperate with police; (4) that his car, registered to him at that address, was not on the property when police visited on Nov. 17th; (5) that police found numerous other cars registered to him when they visited; (6) that Emerald Akau

[32] Whether a search warrant meets the probable cause and particularity requirements is an issue of law reviewed *de novo. State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *State v. Reep,* 161 Wn.2d 808, 813, 167 P.3d 1156 (2007).

spent the night with him at his trailer on Nov. 16 (the night after the shooting) and left him there the next morning; and (7) that the property is about a mile from Lundy's residence, where (according to Tremblay) Maddaus allegedly left items following the shooting. CP 5-8.

The police had already searched Lundy's property and found nothing of evidentiary value. CP 8. From this, the affiant concluded that the evidence had been removed from Lundy's property and "may be concealed in the home, mobile home or outbuildings" at Maddaus's property. CP 8.

The court denied the suppression motion. RP (8/12/10) 60; CP 2-3. At trial, the state introduced evidence discovered during the search, including a handgun (not the murder weapon) and photos taken during the search. RP 667, 816-823. Included in the pictures were a paintball gun, drug paraphernalia, and ammunition for various types of guns. RP 816-821.

11. The affidavit did not provide probable cause to search the home.

An affidavit in support of a search warrant "must state the underlying facts and circumstances on which it is based." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The facts must establish a reasonable inference that evidence of a crime will be found at the place to be searched. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *Thein,* 138 Wn.2d at 140. Generalizations cannot provide the individualized

suspicion required. U.S. Const. Amend. IV; Wash. Const. art. I, § 7. *Thein,* 138 Wn.2d at 147-148.

Here, the affiant had no basis to believe evidence would be found at the residence (or elsewhere on the property). The affidavit contains only innocuous facts about the residence, does not suggest a nexus between the crime and the address, and does not show that the property would hold any of the specific items listed. CP 5-8. The warrant is based on the theory that police should be allowed to search the home of anyone suspected of a crime, because a suspect might keep evidence at home. *Thein* rejected this approach. The fact that a suspect lives somewhere does not create probable cause to search that place. *Thein,* 138 Wn.2d at 141.

The Court of Appeals erroneously declined to address the seizure of items other than the handgun, claiming that Maddaus "moved to suppress only the firearm," and "did not seek to suppress any other items…" Op., p. 15. This is false. Maddaus did not limit his motion in any way. Instead, he sought suppression of "items taken from the [specified] address… and the vehicles located on the same property." CP 10-11. Furthermore, his arguments—based on *Thein*—applied equally to all items seized pursuant to the warrant, not just the gun. CP 1000-1016. The Court of Appeals should have considered Maddaus's arguments as to all items.[33]

[33] In addition, the unlawful seizure of evidence pursuant to an invalid search warrant creates a manifest error affecting a constitutional right, and thus can be considered for the first time on review. RAP 2.5(a)(3). The unlawful seizure is manifest because all of the information necessary for review is in the record, and the error had "practical and identifiable consequences"—the admission of the unlawfully seized evidence, which the jury used to

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The Court of Appeals also erroneously concluded that the affidavit provided probable cause that the gun would be found at the residence. Op., pp. 16-18. The court pointed to

> two specific facts that provided probable cause… (1) There was close physical proximity between Maddaus's residence and Lundy's residence, where Maddaus had visited immediately after the shooting; and (2) Maddaus had spent the night following the shooting at his residence… Op., p. 17.

These facts do not establish probable cause. The police did not present any information suggesting that Maddaus brought home anything related to the homicide or to drug dealing activity. Indeed, the affidavit suggests otherwise. CP 8.

The search warrant was not based on probable cause. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4). The court should order suppression of all evidence derived from execution of the warrant and reverse the convictions in Counts I-V. *State v. Eisfeldt*, 163 Wn.2d 628, 640-41, 185 P.3d 580 (2008).

12. The search warrant authorized seizure of items for which probable cause did not exist and failed to describe the things to be seized with sufficient particularity.

The particularity and probable cause requirements for search warrants are inextricably interwoven. *State v. Perrone,* 119 Wn.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it au-

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convict Maddaus. *See State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008); RAP 2.5(a)(3).

thorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.[34] *State v. Maddox,* 116 Wn. App. 796, 805, 67 P.3d 1135 (2003). An overbroad warrant is not cured by narrow execution of the warrant. *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone* 119 Wn.2d at 547. The particularity requirement must "be accorded the most scrupulous exactitude" in such circumstances. *Stanford,* 379 U.S. at 485.

In this case, the affidavit lacks probable cause for a number of items listed in the warrant.[35]

Firearms. The affidavit does not justify seizure of all firearms: witnesses referred only to a handgun; thus, there was no basis to believe rifles, shotguns, or other firearms would have evidentiary value.[36] Nor

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[34] One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone,* 119 Wn.2d at 545. The requirement also prevents law enforcement officials from engaging in a "'general, exploratory rummaging in a person's belongings…'" *Perrone* 119 Wn.2d at 545 (citations omitted). Conformance with the rule "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone*, 119 Wn.2d at 546.

[35] Furthermore, nothing in the affidavit refers to "clothing with apparent blood evidence." Nor does the affidavit provide any basis to conclude that Maddaus wore "blue jeans, a dark colored hooded sweatshirt, a dark colored baseball style hat…" CP 5-8.

[36] The blanket directive to seize "any firearms" likely also infringes the right to bear arms. *See* U.S. Const. Amend. II; Wash. Const. art. I, § 24.

does the affidavit justify seizure of "packaging for handguns… new bullets, packaging for bullets, receipts or documentation for firearms or any firearm related items." CP 5-8.

Materials protected by the First Amendment. The warrant authorizes police to peruse and potentially seize writings, recordings, and computer files possessed by Maddaus, no matter how private. This authorization was made without probable cause, and without describing the materials with the "scrupulous exactitude" required by the First Amendment. *Stanford,* 379 U.S. at 485.

The affidavit does not explain why "notes and records to establish dominion and control"—presumably of Maddaus's residence—would be helpful to the investigation. CP 5-8. Nor does the affidavit contain facts suggesting that Maddaus kept "notes and records that relate to the distribution or sales of controlled substances."[37] CP 5-8. It does not justify the seizure of "any computers…that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus." The directive to seize "any computers" authorizes seizure even if the officers had already located the laptop and desktop at the Grimes/Leville apartment.[38] None of the witnesses

[37] None of the witnesses interviewed made reference to written notes or records relating to drug dealing; no one told the police that Maddaus kept a ledger, a list of customers, or anything else relating to the drug business. CP 5-8.

[38] It also allows seizure of tablet computers (such as Apple's iPad or Motorola's Xoom), netbooks, handheld PDAs, servers, or even mainframes, even though no mention is made of such technology in the affidavit. CP 4-11.

mentioned disks, thumb drives, CDs, DVDs, external hard drives, or other media storage devices. CP 4-11.

The affidavit does not justify seizure of *all* "cell phones…that could be used to communicate between the victim and suspect or could contain an [sic] recording of subjects speaking about the robbery of Robert Maddaus."[39] There is no indication that Maddaus used more than one phone to communicate with Peterson, with the unnamed informant mentioned in the affidavit, or with Lundy. CP 5-8. The affidavit does not provide a basis to seize "any surveillance equipment." Although information about missing surveillance recordings was brought out at trial,[40] nothing in the affidavit refers to surveillance equipment, cameras, related devices, or surveillance recordings.[41] CP 4-11. Finally, although the affidavit refers to handcuffs, there is no indication that Maddaus possessed "packaging for handcuffs and documentation or receipts for handcuffs."[42] CP 5-8.

Drugs and paraphernalia. Although Maddaus was understood to be a drug dealer, none of the witnesses made specific reference to any

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[39] A cell phone is much more than a telephone: it holds the same kind of personal data that can be stored on a computer, in addition to phone records and texts. A warrant authorizing seizure of a cell phone requires the close scrutiny demanded by the First Amendment.

[40] *See* RP 814, 1071.

[41] Because such equipment could contain sensitive materials protected by the First Amendment—including home photos, home movies, etc.—the authorization to seize these devices must be subjected to heightened scrutiny. *Zurcher,* 436 U.S. at 564; *Perrone,* 119 Wn.2d at 547. Given the absence of any reference to these items, the requirement of probable cause is not met under this heightened standard.

[42] Because a search for documentation and receipts allows police to peruse written materials, these items are included under this section (relating to materials protected by the First Amendment).

drugs in his possession, or to "associated paraphernalia that is associated with the use, distribution and sales of narcotics to include methamphetamine." Apparently, the officers presumed that Maddaus would necessarily be in possession of such items. The concrete references to his drug business suggested that he may have relied on others (such as the decedent) to conduct the hands-on aspects of the venture. CP 4-11.

The affidavit does not establish probable cause for most of the items listed. The warrant was overbroad, and the search unconstitutional. *Riley*, 121 Wn.2d at 29.

The Court of Appeals erroneously refused to review Maddaus's overbreadth challenge. Op., p. 18 (citing ER 103). The illegal seizure of numerous items of evidence was manifest error affecting Maddaus's rights under the Fourth Amendment and art. I, § 7.[43] All of the information necessary to resolve the issue can be found in the record. Furthermore, the error was manifest because it had "practical and identifiable consequences at trial." *Nguyen*, 165 Wn.2d at 433; RAP 2.5(a)(3).[44] Absent the illegal seizure, the jury would not have received evidence seized under the warrant.

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[43] The Court of Appeals faults Maddaus for failing to specifically cite RAP 2.5(a)(3) or the standards set forth therein. Op., p. 18. Maddaus had no reason to specifically argue for review under RAP 2.5, because the state did not challenge his right to argue overbreadth for the first time on review. See Brief of Respondent, pp. 19-26.

[44] Even if the error did not qualify as manifest error, the court should have exercised its discretion to consider Maddaus's overbreadth claims. RAP 2.5(a); *Russell,* 171 Wn.2d at 122.

The Supreme Court should accept review under RAP 13.4(b)(3) and (4). The court should reverse Maddaus's convictions in Counts I-V and suppress the evidence derived from the overbroad search warrant. *Riley*, 121 Wn.2d at 30.

F. The Supreme Court should accept review under RAP 13.4(b)(1), (3), and (4), and hold that the interception of a letter Mr. Maddaus wrote to his attorney infringed his constitutional right to counsel.

Factual Basis: Prior to trial, Maddaus wrote a long letter telling his attorney what he knew about events leading up to Peterson's death. RP (12/21/10) 46; CP 206-272, 281-293. The prosecutor's office received a copy of that letter, sent anonymously through the mail. CP 278-280, 308-377. Maddaus had followed the jail's procedure for copying confidential legal materials by giving the document to a corrections officer to copy the document and return both copies without reading them. RP (12/21/10) 54-55; CP 308-377. The envelope received by the prosecutor had been affixed with a label unavailable to jail inmates, and had been addressed using a marker unavailable to inmates in Maddaus's part of the jail. RP (12/21/10) 55-56; CP 273-277.

Maddaus sought an evidentiary hearing to determine how the letter was copied, how it was sent to the prosecutor, and who had seen or reviewed it. RP (12/21/10) 51, 64, 74. Prosecutor Bruneau claimed he hadn't reviewed the letter, and that it was in a locked cabinet. RP (12/21/10) 69-71.

Judge Pomeroy ordered the copy to be sealed in an envelope and taken into evidence by the police. RP (12/21/10) 46, 52, 75. She denied Maddaus's request for a hearing. RP (12/21/10) 75. Maddaus later attempted to raise the issue again, but the court did not address the issue on the record. CP 308-377.

13. The trial judge should have dismissed the prosecution[45] after learning that Mr. Maddaus's confidential letter to his attorney was anonymously delivered to the prosecutor's office.

The right to counsel "unquestionably includes the right to confer privately." U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Fuentes*, -- Wn.2d --, 318 P.3d 257, 262 (Wash. 2014). Interception of attorney-client communication is presumptively prejudicial. *Id.* The burden is on the state to show beyond a reasonable doubt that the accused person was not prejudiced. *Id.*

In this case, someone—possibly even a sheriff's deputy employed by the Thurston County Jail—made a copy of Maddaus's letter to his attorney and delivered it to the prosecuting attorney. RP (12/21/11) 51, 53, 54, 56, 74; CP 208-280, 294-303, 308-377. Despite this, the court refused to hold an evidentiary hearing.[46] RP (12/21/11) 75.

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[45] Maddaus requested dismissal in his amended SAG. *See* Amended SAG, pp. 1 – 16.

[46] Under these circumstances, "the superior court abused its discretion by failing to resolve… critical factual questions."*State v. Garza*, 99 Wn. App. 291, 301, 994 P.2d 868 (2000). At the very least, the case must be remanded for an evidentiary hearing, as requested in Appellant's Opening Brief at 38-43. *Fuentes,* at __. It should be noted, however, that Maddaus requested a remedy of dismissal. S*ee* Amended SAG, pp. 1 – 16.

The interception of this communication and the receipt of the letter by the prosecuting attorney's office prejudiced Maddaus. *Fuentes,* at __. At the limited hearing held by the trial court, the government failed to prove beyond a reasonable doubt that the error was harmless. RP (12/21/11).

14. The Court of Appeals decision conflicts with *Fuentes.*

The Court of Appeals did not have the benefit of the *Fuentes opinion.* As *Fuentes* makes clear, the prosecution bears a significant burden when questions are raised about the receipt of communications between an accused person and his or her attorney. *Fuentes,* at __.

The Supreme Court should accept review under RAP 13.4(b)(1), (3), and (4) and reverse the Court of Appeals. The lower court's decision conflicts with *Fuentes,* and the case presents a significant constitutional issue that is of substantial public interest. Maddaus's conviction must be reversed, and the charges dismissed with prejudice.[47] *Fuentes,* at __. In the alternative, the case must be remanded for an evidentiary hearing. *Id.*

[47] Although appellate counsel sought remand for an evidentiary hearing in Appellant's Opening Brief, Maddaus requested dismissal in his amended SAG. *See* Amended SAG, pp. 1 – 16.

G. The Supreme Court should accept review under RAP 13.4(b)(3) and (4) and hold that Mr. Maddaus's tampering conviction (Count 6 or 7) violated his Fourteenth Amendment right to due process because the evidence was insufficient for conviction.[48]

Factual Basis. The prosecution alleged that Maddaus attempted to induce Farmer to provide a false alibi. RP 1246, 1475-1478, 1507-1509; 1998, 2003-2014, 2074, 2076. Farmer had no prior connection to the homicide.[49] Nothing in the trial record indicates that Farmer had any knowledge or information about the shooting, or that he could be used as a witness in the case.

15. Farmer was not a witness, a potential witness, or a person with information relevant to the homicide at the time Mr. Maddaus contacted him.

The state was required to prove beyond a reasonable doubt that the alleged tampering occurred at a time when Farmer was a witness, when Maddaus had reason to believe that Farmer was about to be called as a witness in any official proceeding, or when Maddaus had reason to believe that Farmer might have information relevant to a criminal investigation. CP 22-23, 441; *see also* RCW 9A.72.120(1).

The prosecution did not present such evidence. Instead, the evidence showed that Maddaus contacted Farmer at a time when Farmer had no connection to the homicide. Under the state's theory, Maddaus reached

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[48] The interpretation of a statute is reviewed *de novo,* as is the application of law to a particular set of facts. *Engel,* 166 Wn.2d at 576; *In re Detention of Anderson*, 166 Wn.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel,* 166 Wn.2d at 576.

[49] By coincidence, Farmer had previously been recruited as a confidential informant and directed to set up controlled buys from Maddaus. Op., p. 45.

out to Farmer hoping to convince him to help fabricate an alibi. RP 1998, 2003-2014, 2074, 2076. Farmer was not a witness, was not about to be called in an official proceeding, and was not in possession of information relevant to a criminal investigation. RP 1235-1258. Given the evidence (as presented), the prosecution could have charged Maddaus with an attempt to commit first-degree perjury (as an accomplice). *See* RCW 9A.72.020. The prosecution's failure to charge the correct crime does not permit conviction for the wrong crime.

The Court of Appeals erroneously decided that "Farmer was a potential witness by virtue of his prior arrangements with the police to set up a controlled buy with Maddaus and Farmer's subsequent phone calls to Maddaus's cell phone for this purpose on the days immediately preceding or following the murder." Opinion, pp. 45-46. This reasoning supports Maddaus's position that the evidence was insufficient for conviction.

Even if Farmer was a "potential witness"—with regard to Maddaus's drug crimes—his status as a confidential informant meant that Maddaus did not have "reason to believe [Farmer was] about to be called as a witness in any official proceeding." RCW 9A.72.120(1). Maddaus could not have known that Farmer had "information relevant to a criminal investigation" into his drug crimes, because Maddaus had no idea that the police had targeted him for investigation of drug dealing. RCW 9A.72.120(1). Further,

the alleged attempts to establish an alibi had nothing to do with Farmer's knowledge of Maddaus's drug dealing.[50]

The Supreme Court should accept review under RAP 13.4(b)(3) and (4), reverse Maddaus's tampering conviction (as to Farmer), and dismiss the charge with prejudice.

H. The Supreme Court should accept review under RAP 13.4(b)(3) and (4) and hold that the trial court infringed Mr. Maddaus's statutory and constitutional right to instruction on an inferior degree offense.[51]

Factual Basis. The state alleged that Maddaus "tortured" Jessica Abear to get her to tell him who had robbed him. CP 22. Abear alleged Maddaus hit her in the head with the butt of a handgun, sprayed her with bear mace, ripped off her clothing and shot her with a paintball gun, and tried to shoot her in the foot with the handgun. RP 654-655. When he pulled the trigger, the gun didn't fire. RP 654. Maddaus denied that he had assaulted Abear with a handgun or a paintball gun. RP 1821-1828, 2051-2053. He stated he had scuffled with Abear over the mace, and they both got sprayed. RP 1818, 1824.

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[50] The Court of Appeals' decision requires a strained reading of the statute, which applies when a person attempts to influence testimony or cooperation on a matter for which a person is a witness or potential witness. RCW 9A.72.120(1). The Court of Appeals stretches the statute to cover attempts to influence testimony or cooperation on matters unrelated to (or only tangentially related to) the case on which the person is a potential witness.

[51] A refusal to instruct on an inferior-degree offense is reviewed *de novo*, if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wn. App. 211, 214, 56 P.3d 618 (2002). An abuse of discretion standard applies if the refusal was based on a factual dispute. *Id,* at 214. The evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

Maddaus proposed jury instructions on third-degree assault. CP 388-396. The court declined to give the instruction: "there is no evidence of criminal negligence… it's simply assault in the second degree or not guilty." RP 1952. During closing, Bruneau argued that Maddaus had used both a handgun and a paintball gun to assault Abear. RP 1993-1994.

16. The refusal to instruct on third-degree assault denied Mr. Maddaus his statutory right to have the jury consider applicable inferior-degree offenses.

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003; RCW 10.61.010. These statutes guarantee the "unqualified right" to inferior degree instructions if there is "even the slightest evidence" that the accused person may have committed only that offense. *State v. Parker,* 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984). The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *Fernandez-Medina,* 141 Wn.2d at 456-457. The right is "absolute," and failure to give such an instruction requires reversal. *Parker,* 102 Wn.2d at 164.

Here, there was at least "slight[] evidence" that Maddaus was only guilty of third-degree assault. A reasonable juror could have believed that he did not assault Abear with the handgun or the paintball gun, but that he did inflict bodily harm with criminal negligence by means of the bear mace. *See* CP 391*; see also* RCW 9A.36.031(1)(d)(f). Alternatively, a rea-

sonable jury could have concluded that none of the implements (including the malfunctioning handgun) qualified as a deadly weapon.[52]

The trial judge applied the wrong legal standard in denying Maddaus's request. Proof of an intentional act satisfies the requirement that a person act with criminal negligence. *See* RCW 9A.08.010(2).[53] The court focused on criminal negligence, when it should have considered evidence suggesting that the assault occurred with a non-deadly weapon. The failure to instruct on third-degree assault violated Maddaus's unqualified right to have the jury consider the inferior degree offense. RCW 10.61.003; RCW 10.61.010; *Parker,* 102 Wn.2d at 163-164; *Fernandez-Medina,* 141 Wn.2d at 456. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

17. The refusal to instruct on third-degree assault denied Mr. Maddaus his Fourteenth Amendment right to due process.[54]

Refusal to instruct on an inferior-degree offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty,* 844 F.2d 1023, 1027 (1988); *see Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In

[52] The state made no effort to prove operability, as required under the law of the case. CP 448; *see State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (citing *State v. Pam,* 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989) *opinion corrected,* 787 P.2d 906 (1990) (*Brown* I)).

[53] RCW 9A.08.010(2) allows, *inter alia,* proof of an intentional act to substitute for an act done with criminal negligence.

[54] The Supreme Court is currently considering the availability of a due process claim for failure to instruct on an included offense. *See State v. Condon,* 178 Wn.2d 1010, 311 P.3d 26 (2013).

capital cases, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard..."). [55] Without the lesser degree instruction, the jury was forced to either acquit or convict Maddaus; they did not have "the 'third option' of convicting on a lesser included offense..." *Beck,* 447 U.S. at 634.

18. The refusal to instruct on third-degree assault denied Mr. Maddaus his state constitutional right to have the jury consider applicable lesser included offenses.[56]

Washington's jury trial right is broader than the federal right. Wash. Const. art. I, §§ 21, 22. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995). *Gunwall* analysis establishes a state constitutional right to have the jury instructed on applicable inferior-degree offenses. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The language of the constitutional provision. "The term 'inviolate' [in art. I, § 21] connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). The direct and mandatory language ("shall have the right") of art. I, § 22 also implies a high level of protection. An accused

[55] The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck,* 447 U.S. at 638, n.14. Some federal courts only review a state court's failure to give a lesser-included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice..." *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

[56] This argument parallels the statutory and federal constitutional arguments raised above. It is included (in part) because any independent state constitutional right to a lesser-included or inferior-degree instruction may be stronger than the corresponding federal right.

person's right to jury consideration of an inferior-degree offense remains the same as in 1889, and "must not diminish over time," *Sofie,* 112 Wn.2d at 656.

Comparison with federal provision. Art. I, § 21 has no federal counterpart; the state constitution thus provides broader protection. *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

State constitutional and common law history. Art. I, §21 "preserves the right as it existed at common law in the territory at the time of its adoption." *Mace,*98 Wn.2d at 96. In 1889, the lesser-included offense doctrine was well-established under the common law. *Beck* 447 U.S. at 635 n. 9.[57] The territorial court declared "There is no better settled principle …than that under an indictment for a crime of a high degree, a crime of the same character, of an inferior degree, necessarily involved in the commission of the higher offense charged, may be found." *Clarke v. Washington Territory,* 1 Wash. Terr. 68, 69 (1859). Against this backdrop, the framers decided that "[i]n criminal prosecutions the accused shall have the right" to a jury trial, and that the jury trial right "shall remain inviolate." Wash. Const. art. I, §§ 21, 22.

Preexisting state law. Just one year before adoption of the state constitution, the court noted that a jury had the power to convict an accused person "'of any offense, the commission of which is necessarily in-

[57] Citing 2 M. Hale, Pleas of the Crown 301-302 (1736)[57]; 2 W. Hawkins, Pleas of the Crown 623 (6th ed. 1787); 1 J. Chitty, Criminal Law 250 (5th Am. ed. 1847); T. Starkie, Treatise on Criminal Pleading 351-352 (2d ed. 1822).

cluded within that with which he is charged in the indictment.'" *Timmerman v. Territory,* 3 Wash. Terr. 445, 449 (1888) (quoting Territorial Code of 1881, Section 1098). This language endures in the current statutory provision. *See* RCW 10.61.006.

Structural differences between federal and state constitutions. The fifth *Gunwall* factor always points toward pursuing an independent state constitutional analysis. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 713, 257 P.3d 570 (2011).

Particular state interest. The right to a jury trial is a matter of state concern; there is no need for national uniformity on the issue. *State v. Smith*, 150 Wn.2d 135, 152, 75 P.3d 934 (2003).

All six *Gunwall* factors favor an independent application of art. I, §§ 21, 22 of the Washington Constitution. Our state constitution protects a person's right to have the jury consider inferior-degree offenses. The trial judge's failure to instruct on third-degree assault violated these provisions.

19. The Supreme Court should accept review of Mr. Maddaus's statutory and constitutional claims.

The Court of Appeals erroneously rejected Maddaus's claim, concluding that the facts introduced at trial did not support third-degree assault.[58] Op., p. 31. But the court's own summary of Maddaus's testimony establishes facts sufficient to support the instruction: he "grabbed the mace

[58] The Court of Appeals did not mention Maddaus's constitutional challenges to the trial court's refusal.

from Abear's hands and... it inadvertently went off, spraying them both." Op., p. 31. This shows an assault, with criminal negligence, by means of an instrument capable of causing bodily harm. Abear's own testimony about the effects of the mace proves she suffered bodily harm. RP 654-655. The lower court concluded, despite this, that Maddaus's theory was that he did not assault Abear. Op., p. 31.

Abear's version also supports instructions on third-degree assault, when taken in a light most favorable to the defense. Abear testified that Maddaus shot her with a paintball gun and caused bruises, and that he pulled the trigger on a handgun, but the gun didn't fire. Viewed in a light most favorable to Maddaus, jurors might well have concluded that he assaulted her with a weapon that did not qualify as a deadly weapon. In other words, if jurors believed Abear, they still could have concluded Maddaus committed third-degree assault but not second-degree assault.

The Supreme Court should accept review under RAP 13.4(b)(3) and (4) and hold that the trial court violated Maddaus's statutory and constitutional rights to instruction on an inferior degree offense.

I. The Supreme Court should accept review under RAP 13.4(b)(3) and (4) and hold that the convictions in Counts 3 and 4 violated Mr. Maddaus's right to a unanimous verdict.[59]

Factual Basis. The state presented evidence that Maddaus assaulted Abear with bear mace, a paintball gun, and a handgun. RP 654-655.

[59] Failure to give a unanimity instruction may be reviewed for the first time on appeal if it had practical and identifiable consequences at trial. *Nguyen*, 165 Wn.2d at 433; RAP 2.5(a)(3). The court also has discretion to review any issue argued for the first time on review. *Russell,* 171 Wn.2d at 122.

The court's instructions did not specify the weapon allegedly used. CP 413-450. The prosecuting attorney referred to all three weapons in his closing argument. RP 1393-1394. The state also presented evidence that Maddaus talked about taking Abear somewhere to torture her, and that he later abducted Peterson at gunpoint.[60] RP 656-657, 1056-1076. The court's instructions did not name the victim of the attempted kidnapping charge. CP 22, 435-439.The prosecutor argued that Maddaus abducted both Abear and Peterson.[61] RP 1979, 1985, 1987-1989, 1992. The court did not give the jury a unanimity instruction as to either the assault or the attempted kidnapping. CP 413-450.

20. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.[62] Art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). If the prosecution presents evidence of multiple acts, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). In the absence of an election, failure to provide a unanimity instruction is presumed prejudicial.[63] *Coleman,* 159 Wn.2d at

[60] This later offense was the underlying crime in the felony murder charge.

[61] At one point, he referred to the kidnapping of Abear as Count III, but only in passing. RP 1979.

[62] The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon,* 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

[63] Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002).

512. Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt, overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id,* at 512.

21. The assault conviction infringed Mr. Maddaus's right to jury unanimity because the prosecution relied on evidence of three different potentially deadly weapons.

The state presented evidence that Maddaus assaulted Abear with three different weapons: bear mace, a handgun, and a paintball gun.[64] RP 654. They all may have qualified as deadly weapons.[65] *See* RCW 9A.04.110(6). Despite this, the state failed to elect one weapon as the basis for Count IV, and the court failed to give a unanimity instruction. CP 413-4560. This violated Maddaus's constitutional right to a unanimous jury,

[64] This case does not turn on the exception allowing courts to dispense with a unanimity instruction where multiple acts are part of a single continuing course of conduct, even though Abear described several assaults occurring in sequence. *See, e.g., State v. Boyd,* 137 Wn. App. 910, 923, 155 P.3d 188 (2007). This is because the state produced evidence of three weapons: the mace, the handgun, and the paintball gun. Testimony that Maddaus used three different weapons presented jurors with three different acts to consider, regardless of the timing of the acts. Because of this, a unanimity instruction was required. *See, e.g.,United States v. Rocha,* 598 F.3d 1144, 1157 (9th Cir. 2010) (applying federal law) ("The jury was instructed in a special verdict to check whether it unanimously found beyond a reasonable doubt that Rocha used 'his hands' or 'a concrete floor' or both as a dangerous weapon"). In the absence of an election or a unanimity instruction, a divided jury might vote to convict if some jurors thought the mace qualified as a deadly weapon, while others focused on the paintball gun or the handgun. Conviction by a jury divided in this manner violates Maddaus's right to juror unanimity. Thus, under *Coleman,* an instruction was required, even though the acts occurred in sequence.

[65] The prosecution failed to prove that the handgun used in this assault was an operable firearm. Abear testified that she didn't know much about guns, that she couldn't describe the difference between a revolver and a pistol, and that the handgun "looked a little" like one depicted in Exhibit 159. RP 670.

and gives rise to a presumption of prejudice.[66] *Coleman,* 159 Wn.2d at 511-512.

The Court of Appeals did not address this argument. Apparently, the court believed Maddaus's challenge was to the deadly weapon enhancement, and not the underlying assault conviction. Op., p. 32. This is incorrect. *See* Opening Brief, pp. 70-72. The assault conviction itself infringed Maddaus's right to a unanimous verdict, because some jurors could have concluded that only the (nonfunctioning) handgun qualified as a deadly weapon, while others concluded that only the paintball gun or only the mace qualified.

Maddaus's conviction must be reversed, and the case remanded for a new trial. *Coleman,* 159 Wn.2d at 516-517. At retrial, if the same evidence is presented, either the state must elect a single weapon as the basis for its charge, or the court must give a unanimity instruction. *Id.*

22. The attempted kidnapping conviction infringed Mr. Maddaus's right to jury unanimity because the prosecution relied on evidence of two separate attempted kidnappings.

The state presented evidence of two kidnapping attempts: one involving Abear and one involving Peterson. RP 656, 657, 1056-1070. Although the Information referenced Abear, nothing in the instructions made clear that Count III pertained to her and not to Peterson. CP 22, 433-439.

[66] As a matter of law, it creates a manifest error affecting a constitutional right, and thus can be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009) (failure to give a unanimity instruction is "deemed automatically [to be] of a constitutional magnitude.")

Instead, the instruction defining kidnapping used the phrase "abducts another person" without naming the alleged victim. CP 435. Because of this, jurors were free to convict on Count III for the incident involving Abear or for the incident involving Peterson.

The issue was further confused because the instructions on felony murder *did* relate a kidnapping to Peterson (as the felony underlying the murder charge). *See* CP 423, 425, 426. In addition, the prosecutor referred to both kidnapping incidents in closing, and made only one passing reference tying Count III to the incident involving Abear. RP 1979, 1985, 1987-1989, 1992.

In light of this, the court should have provided a unanimity instruction or required the prosecutor to make an election. *Coleman,* 159 Wn.2d at 511-512. The court's failure to provide a unanimity instruction violated Maddaus's right to a unanimous jury: some jurors might have voted to convict based on the Abear incident while others voted to convict based on the Peterson incident.[67] *Id.* The conviction for Count III, Attempted Kidnapping in the First Degree, must be reversed and the charge remanded for a new trial. *Id.*

The Court of Appeals erroneously rejected Maddaus's argument. Op., p. 33. The court concluded that the prosecutor's passing reference to Abear qualified as an election on the attempted kidnapping charge. Op., p.

[67] This creates a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Locke*, 175 Wn. App. 779, 802, 307 P.3d 771 (2013); *O'Hara*, 167 Wn.2d at 101. In the alternative, the court should exercise discretion to accept review. *Russell,* 171 Wn.2d at 122.

33. But this brief, passing reference must be weighed against the prosecutor's discussion regarding the kidnapping of Peterson. When considered as a whole, the prosecutor's closing argument did not constitute an election making clear to jurors they were only to consider Abear as the victim in Count 4.

23. The Supreme Court should accept review.

Maddaus's assault and attempted kidnapping convictions infringed his state constitutional right to a unanimous verdict. This case raises significant constitutional issues that are of substantial public interest and should be reviewed by the Supreme Court. RAP 13.4(b)(3) and (4).

J. The Supreme Court should accept review under RAP 13.4(b)(3) and (4) and hold that Mr. Maddaus's assault and attempted kidnapping convictions violated due process because the court's instructions relieved the state of its burden to prove the essential elements.[68]

Factual Basis. The court did not define the phrase "deadly weapon" for the jury; instead, the court instructed jurors that "A firearm, whether loaded or unloaded, is a deadly weapon." The court defined "substantial step" as "conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP 446. Defense counsel did not object to either definition, and did not propose alternative definitions. CP 388-396; RP 1946-1951.

24. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

[68] The adequacy of jury instructions is reviewed *de novo*. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Failure to instruct as to every element violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). An omission or misstatement that relieves the state of its burden to prove every element violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (Brown II).

25. The court's instructions did not require the prosecution to prove that Mr. Maddaus assaulted Abear with a deadly weapon, an essential element of second-degree assault.

The prosecution was required to prove that Maddaus assaulted Abear with a deadly weapon. CP 22; RCW 9A.36.021. The phrase deadly weapon "means any explosive or loaded or unloaded firearm, and… any other weapon, device, instrument, article, or substance… which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6); *see also* WPIC 2.06, 2.06.1. The court did not provide this definition to the jury. Instead, the court instructed the jury that "[a] firearm, whether loaded or unloaded, is a deadly weapon." CP 446. Based on WPIC 2.06, this instruction applies where "the only weapon al-

leged is a firearm," because it does not contain the full definition explaining what constitutes a deadly weapon. *See* Note on Use, WPIC 2.06.

This case involved three weapons. Arguably, none of them qualified as a firearm. The court should have provided the full definition as well as the short firearm definition. *See* Note on Use, WPIC 2.06; Note on Use, WPIC 2.06.1. By failing to provide the definitions, the court relieved the state of its burden to prove that Maddaus assaulted Abear with a deadly weapon. If jurors were not convinced beyond a reasonable doubt that Maddaus assaulted Abear with a working firearm, they might still have voted to convict based the bear mace or the paintball gun.

The Court of Appeals erroneously decided that the court's instructions "narrowed the jury's consideration of deadly weapon... to a 'firearm, whether loaded or unloaded.'" Op., p. 34 (quoting CP 446). This is not quite true. The trial court did tell jurors that a firearm qualifies as a deadly weapon. But the court did *not* tell them they were barred from considering other weapons, including the paintball gun and the bear mace. Furthermore, the instructions made clear that only an operable gun qualified as a firearm. CP 448. Thus, the court did not "narrow" the jury's consideration, and the presumption that jurors followed the court's instructions does not apply. In light of the state's failure to prove the firearm's operability, some jurors might well have focused on the paintball gun and the bear mace. RP 654-655.

The assault conviction violated Maddaus's Fourteenth Amendment right to due process. U.S. Const. Amend. XIV; *Winship,* 397 U.S. at 364;

Aumick, 126 Wn.2d at 429. The Supreme Court should accept review under RAP 13.4(b)(3) and (4), reverse the conviction, and remand the charge for a new trial. *Id.*

26. The court's instructions relieved the state of its burden to prove that Mr. Maddaus engaged in conduct corroborating the specific intent to commit kidnapping.

An attempt conviction requires proof that the accused took a "substantial step" toward commission of the crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978); *Aumick,* 126 Wn.2d at 427. The trial court's "substantial step" instruction differed from the language adopted by the *Workman* court, defining it instead (in relevant part) as "conduct that strongly *indicates a* criminal purpose..." CP 438 (emphasis added).

The instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word "corroborate" means "to strengthen or support with *other* evidence; [to] make *more* certain." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company), *emphasis added*. The *Workman* court's choice of the word "corroborative" requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused's conduct. Instruction No. 22 removed this requirement by employing the word "indicate" instead of "corroborate;" under Instruction No. 22, there is no requirement

that intent be established by independent proof and corroborated by the accused's conduct. CP 438.

In addition, the instruction given here requires only that the conduct indicate *a criminal purpose,* rather than *the* criminal purpose. This is similar to the problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts,* 142 Wn.2d 471, 513, 14 P.3d 713 (2000).[69] As in *Roberts*, the language used in Instruction No. 22 permits conviction if the accused person's conduct strongly indicates intent to commit *any* crime.

The instruction relieved the state of its burden to prove the "substantial step" element of attempted kidnapping.[70] The instruction did not require the state to provide independent corroboration of the specific intent to commit kidnapping.

The Court of Appeals upheld the flawed instruction, noting that courts have used the words 'corroborate' and 'indicate' interchangeably "without criticism." Op., p. 35. Under such reasoning, any issue of first impression could be dispensed with simply by noting that it has not previously been discussed. The Court of Appeals also concluded that the in-

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[69] (Accomplice instructions erroneously permitted conviction if the defendant participated in "a crime," even if he was unaware that the principal intended "the crime" charged). S*ee also State v. Cronin,* 142 Wn.2d 568, 14 P.3d 752 (2000).

[70] This creates a manifest error affecting Maddaus's right to due process, which may be raised for the first time on review. RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. *See Russell,* 171 Wn.2d at 122. In addition, Maddaus argues that his attorney deprived him of the effective assistance of counsel by failing to object or propose a proper instruction.

structions, when read "together as a whole," cured any problems. But no instruction contained the 'corroboration' requirement. Even if the specific intent requirement is adequately communicated through the (conflicting) instructions cited by the court, these instructions do nothing to convey the requirement of corroboration.

The attempted kidnapping conviction violated Maddaus's Fourteenth Amendment right to due process. U.S. Const. Amend. XIV; *Winship,* 397 U.S. at 364; *Aumick*, 126 Wn.2d at 429.. The Supreme Court should accept review under RAP 13.4(b)(3) and (4), reverse the conviction, and remand the charge for a new trial.

K. The Supreme Court should accept review under RAP 13.4(b)(3) and (4) and hold that Mr. Maddaus was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.[71]

1. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

An appellant claiming ineffective assistance must show deficient performance and prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Any strategy "must be based on reasoned decision-making…" *Strickland,* 466 U.S. at 690-691. Furthermore, the record must show an actual strategy: courts should not "fabricate tactical decisions on

[71] An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

behalf of counsel." *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009); *see also State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996).

2. Counsel provided ineffective assistance by failing to object to the imposition of restraints.

Failure to object to improper restraint is not "an objectively reasonable tack under prevailing norms of professional behavior." *Wrinkles v. Buss*, 537 F.3d 804, 813-815 (2008) (Wrinkles II); *Roche v. Davis*, 291 F.3d 473, 483 (2002).

Here, counsel made only a tepid objection to the restraints, based solely on the possibility that jurors might see them. RP 50-55, 628. Counsel's failure to cite a basis for the objection and demand a *Finch* hearing was objectively unreasonable. *Wrinkles* II; 537 F.3d 804; *Roche,* 291 F.3d at 483.

Maddaus was prejudiced by his attorney's deficient performance. Had counsel objected to the restraints, Maddaus would have received the *Finch* hearing to which he was entitled. Nothing in the record supports imposition of restraints, thus he would have appeared at trial "with the appearance, dignity, and self-respect of a free and innocent man." *Finch,* 137 Wn.2d at 844. The shock device would not have been a constant presence as he tried to help his attorney, and as he testified.

Furthermore, there is a reasonable possibility that jurors saw Maddaus's restraints, despite the arrangements made by the judge. RP 50-52; RP 628. Jurors had a view of Maddaus's legs on the first day of trial,

and could not help but notice the strategically placed sheets of cardboard on subsequent days. RP 630.

The Court of Appeals erroneously decided that Maddaus was not prejudiced, and thus could not claim ineffective assistance. Op., p. 20. According to the court, no prejudice can be shown because Maddaus didn't prove jurors actually saw the restraints. Op., p. 20. This is incorrect. Maddaus was prejudiced because he was not afforded a *Finch* hearing. Thus, he did not have the opportunity for an evidence-based decision on the need for restraints. As a consequence, he was not brought before the court "with the appearance, dignity, and self-respect of a free and innocent man." *Finch,* 137 Wn.2d at 844. Furthermore, because he was fitted with a shock device, every moment of trial was clouded by the possibility that his jailors might administer a painful and debilitating electric shock, whether by accident or in response to a perceived threat.

A proper objection would have alerted the court to the need for a *Finch* hearing, and allowed Maddaus to present the case for allowing him to appear without restraint. A reasonable attorney would have acted to protect Maddaus's right to appear in court free from restraint. Because counsel failed to object, Maddaus was deprived of the effective assistance of counsel. His convictions must be reversed and the case remanded for a new trial. *Finch.*

3. Counsel provided ineffective assistance by failing to object to inadmissible and prejudicial evidence.

Counsel failed to seek suppression of telephone calls recorded in violation of the Privacy Act. As noted elsewhere in this brief, the calls were played for the jury even though they violated the Privacy Act. There was no strategic reason for counsel's failure to object; the recordings were highly prejudicial because they allowed the prosecutor to argue that Maddaus conspired to introduce perjured testimony, and sought to establish a false alibi. A motion to suppress would likely have been granted, because Farmer, Grimes, and Leville did not give consent prior to being recorded. Counsel's failure to object was unreasonable under the first prong of the *Strickland* test. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The error was prejudicial, because the calls proved to be a significant part of the prosecution's case—not just as the basis for the tampering charges, but also as circumstantial evidence that Maddaus shot Peterson. The prosecutor played the recordings during closing, highlighting the conversations as proof of Maddaus's guilt. RP 1997-2014, 2076. Without the calls, there is a reasonable probability that the outcome of the trial would have been different.

The Court of Appeals refused to address the Privacy Act violation directly, because of counsel's failure to object. Op., p. 25. The court also denied Maddaus's ineffective assistance claim, finding that a Privacy Act objection would have failed.[72] Counsel's failure to seek suppression of the

[72] Without citation to any authority, the court asserted that Maddaus lacked standing to assert a Privacy Act violation. Op., p. 27 n. 24. This is incorrect. The Supreme Court has

(Continued)

illegal recordings violated Maddaus's right to the effective assistance of counsel. *Saunders,* 91 Wn. App. at 578. A successful motion would have precluded the prosecutor's use of this damaging testimony at trial.

Counsel also erroneously failed to object to hearsay that bolstered Abear's testimony. A prior consistent statement may only be admitted if "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1). Prior consistent statements may only be used in this way when made "prior to the time that the motive to fabricate arose." *State v. Brown*, 127 Wn.2d 749, 758 n.2, 903 P.2d 459 (1995) (Brown III).

Johnstone testified that he'd interviewed Abear and obtained a statement that was "similar to her testimony here at trial." RP 826. Counsel did not object, and the evidence was admitted without restriction.[73] Counsel should have objected, because the evidence did not qualify as a prior consistent statement under ER 801(d)(1): any motive to fabricate

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interpreted the Privacy Act to confer standing upon a defendant even if s/he is not a participant in the conversation. *Williams,* 94 Wn.2d at 544-546. The court's reasoning applies equally to participants who seek to enforce the rights of other participants. *Id.* The Court of Appeals also suggested that no person could have a reasonable expectation of privacy in a phone call originating from jail. Op., p. 27-28 (citing *State v. Modica*, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008)). The court's citation to *Modica* is inapt: in *Modica,* both participants in the conversation heard the announcement informing them that the call was being recorded, and both participants discussed the fact that the calls were recorded. *Id.* Here, by contrast, there is no indication that Grimes and Leville knew the calls were recorded.[72] Furthermore, in *Modica,* the Supreme Court cautioned that it was not holding "that a conversation is not private simply because the participants know it will or might be recorded or intercepted." *Id.,* at 88. *Modica* does not support the Court of Appeals' position.

[73] Counsel did object to the prior question, which also addressed the prior consistent statement. The court sustained the objection. It is unclear why counsel abandoned his objection after the prosecutor rephrased the question. RP 825-826.

arose before the statement was provided. *Brown* III, 127 Wn.2d at 758 n. 2. Maddaus denied assaulting or attempting to kidnap Abear, and the defense strategy involved discrediting her story. No strategy supports allowing Detective Johnstone to bolster Abear's testimony. Counsel's failure to maintain his objection constituted deficient performance.

Maddaus was prejudiced, since Abear's testimony was the only direct evidence of the assault and attempted kidnapping charges. She also suggested that Maddaus was enraged and violent, thus supporting the prosecution's allegation that he had murdered Peterson. Furthermore, Abear undermined Maddaus's testimony that he was not armed during the confrontation with Peterson, and that he was unaware of the firearm that was eventually found in his home. RP 1874-1875. By allowing Johnstone to bolster Abear's testimony through "mere repetition," counsel significantly undermined the defense case. *Brown* III, 127 Wn.2d at 758 n. 2.

The Court of Appeals concluded that the Johnstone's testimony did not involve hearsay. Op., p. 29. This ignores the context of the testimony. Johnstone clearly implied that Abear had given a prior consistent statement. The prosecutor had no reason to let jurors know that there was "overlap between the subject of Johnstone's interview of Abear and her trial testimony." Op., p. 29. The court's conclusion fails to address the problem of artful questioning designed to elicit hearsay indirectly. *See* Opening Brief, p. 84 (citing *Gochicoa v. Johnson*, 118 F.3d 440, 446 (5th Cir. 1997)).

Counsel's failure to object deprived Maddaus of the effective assistance of counsel. *Saunders,* 91 Wn. App. at 581. The convictions must be reversed and the case remanded to the trial court for a new trial. *Id.*

4. Counsel provided ineffective assistance by failing to object to improper instructions and by failing to propose proper instructions.

Defense counsel must be familiar with the instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). Failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007); *see also State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004).

Here, counsel unreasonably failed to ensure the jury received proper instruction defining the phrases "substantial step" (as applied to the attempted kidnapping charge) and "deadly weapon" (as applied to the second-degree assault charge).

A reasonably competent attorney would have been familiar with the correct legal standards, and would have proposed instructions making clear the prosecutions burden. Counsel not only failed to propose proper instructions, but also failed to object to the instructions given. RP 1946-1952; CP 388-396. There is "no conceivable legitimate tactic" explaining counsel's failure to object and failure to propose proper instructions. *Reichenbach,* 153 Wn.2d at 130. Nor is there any basis to conclude that counsel was pursuing a strategy that required him to refrain from objecting or proposing proper instructions. *Hendrickson,* 129 Wn.2d at 78-79.

The failure to propose proper instructions prejudiced Maddaus. A reasonable juror could have entertained doubts about whether or not Maddaus took a substantial step corroborating intent to kidnap Abear. Furthermore, jurors were not instructed in a manner allowing them to properly evaluate the three weapons used during the alleged assault. CP 446.[74]

Counsel's failure to ensure that jurors received proper instructions defining "substantial step" and "deadly weapon" deprived Maddaus of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Tilton,* 149 Wn.2d 775. The Supreme Court should accept review, reverse the assault and attempted kidnapping convictions, and remand the charges for a new trial. *Id.* This case presents significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

5. Counsel provided ineffective assistance by failing to object to prosecutorial misconduct in closing.

A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'" *Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland,* 466 U.S. at 687-88). Under most circumstances,

> At a minimum, an attorney [faced with] improper closing arguments should request a bench conference... [to] lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the

[74] As outlined previously, the Court of Appeals erroneously believed the court's instructions adequate. Opinion, pp. 34-35. But nothing limited the jury's consideration in the manner described by the Court of Appeals, regarding the "deadly weapon" element of second-degree assault. Nor did the instructions as a whole convey the requirement of a substantial step corroborating the intent to kidnap.

> continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, 426 F.3d at 386 (citation omitted).

Here, counsel should have objected to the flagrant and ill-intentioned misconduct of prosecutor Bruneau. Just as a prosecutor "must be held to know" that the misconduct engaged in here is improper, so, too, must defense counsel be charged with knowledge that the attempt to influence deliberations through "deliberately altered" evidence constitutes objectionable misconduct. *See Glasmann,* 175 Wn.2d at 706. As in *Glasmann,* the misconduct here during closing was pervasive, flagrant, and ill intentioned: Bruneau expressed his personal opinion, used the power and prestige of his office to sway jurors, relied on appeals to emotion, passion, and prejudice rather than reason, and displayed exhibits that had been deliberately altered to manipulate jurors into voting guilty.

Ample precedent was "available... and clearly warned against the conduct here." *Glasmann,* 175 Wn.2d at 707.[75] Counsel's performance thus fell below an objective standard of reasonableness: Maddaus's lawyer

[75] Counsel should also have objected when Prosecutor Bruneau referred to defense testimony as "poppycock," "unreasonable under the law," and "crazy," when he suggested that the defense investigator had been "duped" by Maddaus, when he described defense counsel's arguments as a distraction, and when he referred to the defense argument as "the last effort to develop lies..." RP 1984, 2074, 2075, 2077. Because the prosecutor expressed personal opinions and disparaged the defense team, counsel's failure to object constituted deficient performance. At a minimum, counsel should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Maddaus was prejudiced by the error. The improper multimedia show substantially increased the likelihood that jurors would vote guilty based on improper factors. *See Glasmann,* 175 Wn.2d at 712. The failure to object deprived Maddaus of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley,* 426 F.3d at 386. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

The Court of Appeals erroneously characterized trial counsel's failures to object as trial strategy. But this characterization cannot shield counsel's errors in this case. If counsel did not wish to draw the jury's attention to the prosecutor's repeated efforts to undermine the fairness of the trial, he could have asked for a sidebar or raised the issue outside the jury's presence. This is especially true for Bruneau's multimedia presentation. If Bruneau did not share his slides with counsel prior to closing argument, counsel should have objected when the first slide was projected, and asked the court to review the slides outside the jury's presence.

Allowing a prosecutor to seriously undermine the entire fairness of a criminal trial cannot be a reasonable trial strategy under any circumstances. Flagrant misconduct as pervasive as that committed by Bruneau should not have been allowed to go unchallenged throughout the prosecutor's entire closing argument. Counsel should have objected to ensure that

Maddaus received a trial consistent with the protections embodied in the Fourteenth Amendment.

6. The Supreme Court should accept review.

Defense counsel's numerous errors prejudiced Maddaus. This case raises significant constitutional issues that are of substantial public interest and should be reviewed by the Supreme Court. RAP 13.4(b)(3) and (4). The convictions must be reversed and the case remanded for a new trial.

L. The Supreme Court should accept review under RAP 13.4(b)(1)-(4) and hold that firearm enhancements (on Counts I, III, IV) violated Mr. Maddaus's state and federal right to due process and to a jury trial.[76]

Factual Basis. The state sought enhancements on Counts I, III, and IV, alleging that Maddaus "was armed with a deadly weapon, a fire-arm." CP 21. The enhancement for the assault charge added "to wit: a semi-automatic pistol." CP 22. The court instructed the jury to determine, whether or not "the defendant was armed *with a deadly weapon* at the time of the commission of the crime." CP 447 (emphasis added).[77] The court did not define the term "armed" for the jury.

All three special verdict forms shared the same basic format: "Was the defendant… armed with a firearm at the time of the commission of the crime…?" The jury answered "yes" to each special verdict, and the court imposed firearm enhancements. CP 24-34, 452, 457, 465.

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[76] The adequacy of jury instructions is reviewed *de novo*. *Gregoire* 170 Wn.2d at 635. Instructions must make the relevant legal standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.

[77] In the same instruction, the court also instructed jurors that "A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." CP 447.

1. The sentencing court lacked authority to impose firearm enhancements because Mr. Maddaus was charged with deadly weapon enhancements.

Facts that increase the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. *In re Personal Restraint of Delgado*, 149 Wn. App. 223, 232, 204 P.3d 936 (2009) (citing *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)). A sentencing court may not impose a firearm enhancement when the state has charged a deadly weapon enhancement. *Delgado, at* 234 (citing *Recuenco*, 163 Wn.2d 428). A person can only be sentenced for enhancements actually charged by the prosecution, and imposition of a firearm enhancement without prior notice violates due process. *Delgado,* 149 Wn. App. at 234-235. A firearm enhancement may only be imposed if the state proves the offender was armed with a working firearm, and if jury instructions outline the requirements for a firearm (not just deadly weapon) special verdict. *Id.*

Here, the Court of Appeals erroneously found the charging language sufficient to charge firearm enhancements. Op., pp. 46-50. This is incorrect. Nothing in the charging language made clear that the state hoped to seek a firearm enhancement *as opposed to* a deadly weapon enhancement. Even when construed liberally, the Information did not distinguish the firearm enhancement from the less serious deadly weapon enhancement. A person reading the Information would have notice that the

state sought an enhancement, but would be forced to guess at the type of enhancement.

Nor does the citation to subsection (3) of RCW 9.94A.533 solve the problem. Reference to a numerical code section cannot cure a deficiency in the charging document. *City of Auburn v. Brooke*, 119 Wn.2d 623, 635, 836 P.2d 212 (1992).

Under *Recuenco* and *Delgado,* Maddaus's firearm enhancements must be vacated and the case remanded for sentencing with deadly weapon enhancements. The Information alleged that Maddaus "was armed with a deadly weapon, a firearm." CP 21-22. Upon a proper finding, this language authorized deadly weapon enhancements; the sentencing court was not authorized to impose the lengthier firearm enhancements. *Recuenco,* 163 Wn.2d at 434-442.

2. The sentencing court lacked authority to impose firearm enhancements because the jury was instructed to determine whether or not Mr. Maddaus was armed with a deadly weapon.

A sentencing enhancement may not be imposed absent proper instructions on the state's burden to prove the "elements" of the enhancement. *Delgado*, 149 Wn. App. at 231-236. Here, the court specifically directed jurors to determine whether or not Maddaus was armed with a deadly weapon. CP 447. Because of this, the sentencing court erred by imposing firearm enhancements. *Id.* The enhancements must be vacated and the case remanded for correction of the judgment and sentence.[78] *Id.*

[78] Division I has applied a harmless error analysis under similar circumstances to uphold a firearm enhancement imposed after the jury was instructed regarding a deadly weapon

(Continued)

3. The court's instructions relieved the prosecution of its burden to prove that Mr. Maddaus was "armed" at the time of each crime.

Firearm and deadly weapon enhancements may be imposed only if a person is "armed." *See* RCW 9.94A.533; RCW 9.94A.825. A person is "armed" if the weapon is easily available, readily accessible, and has some nexus with the person and the crime. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (Brown IV). Possession is insufficient by itself to establish that a person is "armed" under the statutes, and cannot support imposition of firearm or deadly weapon enhancements. *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

In this case, the trial court failed to provide the legal definition of "armed." CP 413-450. Thus, the court's instructions allowed a "yes" verdict even if the jury found that Maddaus merely possessed a firearm at the time of each crime. *Gurske,* 155 Wn.2d at 138. This relieved the prosecution of its burden, and violated his Fourteenth Amendment right to due process. *Aumick*, 126 Wn.2d at 429. Accordingly, the enhancements must be vacated and the case remanded to the trial court for correction. *Id.*

4. The Court of Appeals' decision conflicts with *Recuenco* and *Delgado.*

The Supreme Court should accept review because the Court of Appeals' decision conflicts with *Delgado* and *Recuenco.* Furthermore, this case raises significant constitutional questions that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(1)-

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enhancement. *See In re Personal Restraint of Rivera,* 152 Wn. App. 794, 218 P.3d 638 (2009). The *Rivera* decision appears to conflict with *Recuenco,* and should not be followed.

(4). Maddaus's firearm enhancements must be vacated. *Delgado,* 149 Wn. App at 231-236.

M. The Supreme Court should accept review (under RAP 13.4(b)(3) and (4) of arguments raised in Mr. Maddaus' Amended Statement of Additional Grounds.

1. The trial court failed to take appropriate action when the prosecutor knowingly failed to disclose exculpatory evidence, witness statements, and other discoverable information.

The trial court should have granted a continuance, declared a mistrial, or dismissed the charges because the prosecutor failed in his obligation to provide ongoing discovery. *See* Amended SAG, pp. 16-27, 32-34. Defense counsel indicated that the discovery violations rendered him unable to go to trial. The court's failure to address the discovery violations infringed Maddaus's state and federal rights to due process, the effective assistance of counsel, and equal protection. U.S. Const. Amends. V, VI, XIV; Wash. Const. art. I, §§ 3, 22.

2. The search warrant affidavit contained false statements, and the trial judge upheld the search warrant based in part on information not contained in the affidavit.

Maddaus's convictions were based in part on evidence unlawfully seized pursuant to an invalid search warrant. *See* Amended SAG, pp. 27 – 32. The search warrant affidavit contained material misrepresentations made in reckless disregard for the truth. Furthermore, the trial court cited information not contained in the affidavit as a basis for upholding the search. The unlawful seizure of the evidence (and it use at trial to convict

Maddaus) infringed his rights under the Fourth and Fourteenth Amendments and art. I, §§ 3, 7, 22.

3. The trial court erroneously refused to allow Mr. Maddaus to seek new counsel despite learning that defense counsel was unprepared to go to trial.

When retained counsel notified the court that he was unprepared to go to trial, Maddaus sought permission to obtain a new attorney. Amended SAG, pp. 34-36. The trial court's denial of this request infringed Maddaus's right to the effective assistance of counsel, his right to choice of counsel, his right to equal protection, and his right to appeal. U.S. Const. Amends. V, VI, XIV; art. I, §§ 3, 22.

4. The prosecutor improperly failed to provide defense counsel an advance copy of the PowerPoint presentation used at trial and failed to file a copy of the actual presentation used.

Although prosecutor Bruneau made extensive use of a PowerPoint presentation during closing, he neither filed the presentation nor provided defense counsel an advance copy. Defense counsel failed to object. *See* Amended SAG, pp. 36 – 44. The PowerPoint was rife with obvious misconduct; however, the trial judge did not step in to prevent prejudice to Maddaus. These errors denied Maddaus his right to due process, to a fair trial by an impartial jury, to the effective assistance of counsel, to equal protection, and to a verdict based on the evidence. U.S. Const. Amends. V, VI, XIV; art. I, §§ 3, 22.

5. A biased judge presided over Mr. Maddaus's trial.

Judge Pomeroy demonstrated bias in favor of the prosecution. *See* Amended SAG, pp. 45 – 32. This violated the appearance of fairness doc-

trine, and infringed Maddaus's rights to due process, the effective assistance of counsel, and equal protection. U.S. Const. Amends. V, VI, XIV; art. I, §§ 3, 22.

6. The prosecutor and the trial court failed to ensure the existence of a complete record of the proceedings.

Prosecuting attorney Bruneau's complete PowerPoint presentation was not made part of the record. Months after Bruneau had been fired from the office, the prosecution attempted to recreate the presentation from files discovered on office computers. *See* Amended SAG, pp. 47- 49. Only a paper copy of the reconstructed presentation has been filed; the complete electronic copy has not been made a part of the record. In addition, the trial court failed to hold a hearing to investigate interference with the attorney-client relationship, and the government destroyed information that would have shed light on the manner in which the prosecuting attorney obtained a copy of Maddaus's letter to his attorney. These errors infringed Maddaus's right to due process, to the effective assistance of counsel, to equal protection, and to a direct appeal. U.S. Const. Amend. V, VI, XIV; art. I, §§ 3, 22.

7. Cumulative error infringed Mr. Maddaus's constitutional rights and resulted in a proceeding that was fundamentally unfair.

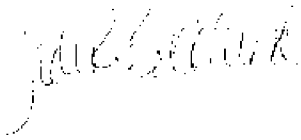
Even if the errors raised on appeal do not merit relief when considered individually, their cumulative effect requires reversal of Maddaus's convictions. *See* Amended SAG, p. 50.

VI. CONCLUSION

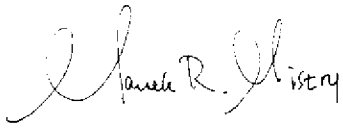
The Supreme Court should accept review under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision conflicts with *Finch, Iniguez, Darden, York, Fuentes, Glasmann, Hecht, Recuenco,* and *Delgado.* Also, this case raises significant state and federal constitutional issues, and presents issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

Respectfully submitted March 31, 2014.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Robert Maddaus, DOC #975429
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

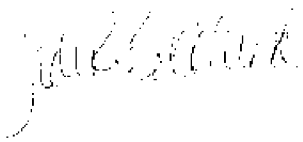
and I sent an electronic copy through the Court's online filing system, with the permission of the recipient(s) to:

Thurston County Prosecuting Attorney
PAOAppeals@co.thurston.wa.us

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 31, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX A:

COURT OF APPEALS OPINION

FILED FEBRUARY 27, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT JOHN MADDAUS, Appellant.	No. 41795-2-II ORDER GRANTING RECONSIDERATION IN PART AND DENYING IN PART BY AMENDING MAJORITY

Appellant Robert John Maddaus has filed a motion for reconsideration of our unpublished opinion filed on September 20, 2013. We grant Maddaus's motion for reconsideration, in part, by making the following changes to our unpublished opinion filed September 20, 2013:

(1) In the first sentence of the first full paragraph on page 2, which begins, "In his Statement of Additional Grounds (SAG)" and carries over to page 3, we

* delete the word "a" from the third line of the paragraph;
* change the word "slide" to "slides" in the fourth line of that same paragraph;
* add the phrase "showing exhibits that had been altered, including" after the word "slides";
* delete the word "containing" after that addition;
* add the phrase "(4) the trial court erred in denying a motion to dismiss for discovery violations;" after the citation to CP at 978; and

* change the reference to "(4)" before the word "cumulative."

With these changes, this sentence now reads,

> In his Statement of Additional Grounds (SAG), Maddaus asserts that (1) the trial court erred in denying his request for new appointed counsel; (2) the trial judge was unfairly biased against him; (3) the State committed prosecutorial misconduct by displaying Microsoft Power Point slides showing exhibits that had been altered, including a photograph of Maddaus wearing a wig, with a circle and a slash superimposed over it and the word "GUILTY" written beneath it, CP at 978; (4) the trial court erred in denying a motion to dismiss for discovery violations; and (5) cumulative error violated his right to a fair trial.

(2) In the last paragraph on page 5, which begins, "Meanwhile, Maddaus had acquired,"

we

* delete the phrase "and a photo of himself wearing a blond wig" from the first sentence;

* after the record citation following the above change, add this new second sentence, "The police found a blonde wig in Maddaus's vehicle when they arrested him.";

* in the sentence after this addition, which begins, "When asked why he had," insert the words "a blonde" after the word "had" and before the word "wig"; and

* delete the last sentence in this paragraph, which read, "The police found this wig in Maddaus's vehicle when they arrested him."

With these changes, this paragraph now reads,

> Meanwhile, Maddaus had acquired a wig and a false passport bearing the name "Chad Walker Vogt." 17 VRP at 2003. The police found a blonde wig in Maddaus's vehicle when they arrested him. When asked why he had a blonde wig, he stated, "Because I knew there was a warrant out for my arrest. The police wanted to talk to me. I didn't want to talk to them." 15 VRP at 1868.

(3) Before the period at the end of the first sentence of the first full paragraph on page 13, which begins, "The State also presented," we substitute the phrase and punctuation ", including several slides depicting photographic exhibits with text superimposed"; this changed sentence now reads,

> The State also presented Microsoft PowerPoint slides during its closing argument, including several slides depicting photographic exhibits with text superimposed.

(4) In the last sentence of the first full paragraph on page 13, which begins, "Maddaus did not object," we delete the words "this slide" and replace them with the words "these slides."; this changed sentence now reads,

> Maddaus did not object to these slides.

(5) In the first sentence of the last paragraph on page 13, which begins, "It appears," we delete the word "this" after the word "displayed" and substitute the word "the"; we also insert the phrase "that included the superimposed word 'GUILTY'" after the word "slide." This changed sentence now reads,

> It appears that the State displayed the slide that included the superimposed word "Guilty" as the prosecutor made the following closing remarks: . . . .

(6) Before the first full sentence at the top of page 15, which begins, "In the alternative, he argues," we insert the following sentence:

> In his SAG, Maddaus also asserts that the search warrant was invalid because the supporting affidavit contained "false" facts and allegations that the record did not support.

The changed ending of this paragraph now reads,

> In his SAG, Maddaus also asserts that the search warrant was invalid because the supporting affidavit contained "false" facts and allegations that the record did not support. In the alternative, he argues for the first time on appeal that the search was unconstitutionally overbroad. These arguments fail.

(7) Before the last sentence in the last paragraph on page 15, which sentence begins, "Because he does not," we insert this sentence: "Nor did he challenge the facts in the supporting affidavit." The changed ending of this paragraph now reads,

> Nor did he challenge the facts in the supporting affidavit. Because he does not meet his burden . . . .

(8) In the last partial sentence on page 15, which begins, "Because he does not meet his burden," we delete the words "challenge falls" and substitute the words "challenges fall"; this changed sentence now reads,

> Because he does not meet his burden to show that his new challenges fall within the RAP 2.5(a)(3) exception to the preservation requirement, we address only his preserved challenge to the firearm.

(9) At the end of the first sentence in the first full paragraph on page 20, which begins, "We hold that," we insert this new footnote 18:

> Although Maddaus contends that the restraints interfered with his ability to assist counsel and with his ability to testify, these bare allegations are not sufficient to establish prejudice based on the record before us. To the extent Maddaus has evidence outside the record supporting his claims of prejudice, he must raise any such claims in a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

This changed sentence and new footnote now read,

> We hold that, because the jury did not see Maddaus's restraints, there was no prejudice to him, and any error in ordering Maddaus to wear them was harmless.[18] *Jennings*, 111 Wn. App. at 61.
>
> [18] Although Maddaus contends that the restraints interfered with his ability to assist counsel and with his ability to testify, these bare allegations are not sufficient to establish prejudice based on the record before us. To the extent Maddaus has evidence outside the record supporting his claims of prejudice, he must raise any such claims in a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

(10) In the first full sentence on page 23, which begins, "He also asserts in his SAG," we

* insert "(1)" after the phrase "asserts in his SAG that";

* add the phrase and punctuation ", and (2) the trial court erred in denying the motion to continue." after the word "misconduct."

This changed sentence now reads,

> He also asserts in his SAG that (1) he received ineffective assistance of counsel based on the trial court's denial of Maddaus's motion to continue to investigate potential governmental misconduct, and (2) the trial court erred in denying the motion to continue.

(11) At the end of the first line at the top of page 25, after the text's reference to footnote 23 (which will become footnote 24 on entry of this order) and before the sentence, "Thus, this claim also fails," we insert the following sentence:

> With respect to the trial court's denial of Maddaus's motion to continue, we will reverse a trial court's denial of a continuance only upon "a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted"; Maddaus fails to make such a showing here. *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146, *review denied*, 97 Wn.2d 1037 (1982).

These changes now read,

> . . . why his counsel's performance was deficient or how counsel's performance prejudiced him.[24] With respect to the trial court's denial of Maddaus's motion to continue, we will reverse a trial court's denial of a continuance only upon "a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted"; Maddaus fails to make such a showing here. *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146, *review denied*, 97 Wn.2d 1037 (1982). Thus, this claim also fails.

(12) On page 41, we pluralize the word "Slide" in subheading D so that that the new subheading reads, "D. Power Point Slides". Also on page 41, in the first paragraph under subheading "D":

* After the first sentence phrase "other similar words surrounding it," we add ", along with several other slides depicting exhibits with additional superimposed text;" we also add a new footnote 37 between the word "text" and the semicolon, which footnote states, "*See* CP at 867, 868, 881, 885, 886, 889-92, 902-05, 907, 911-13, 940, 944, 978."

* Between the first and second sentences, we insert this new sentence, "He also contends that one of the State's slides misstated the record."

* And after the last sentence, we insert another new footnote, 38, which states,

> In addition, Maddaus appears to contend that the State engaged in misconduct by destroying or spoiling portions of the PowerPoint presentation. We decline to reach this issue because whether there were additional PowerPoint slides is a matter outside the record on appeal. If Maddaus has additional evidence related to this issue, he must present it in a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

This changed paragraph with new subheading and added footnotes now reads,

> D. Power Point Slides
>
> Maddaus also argues for the first time on appeal that (1) the State engaged in prosecutorial misconduct when it displayed a Microsoft PowerPoint slide containing a photograph of Maddaus wearing a wig police had found in his vehicle, the word "GUILTY" written beneath it, and other similar words surrounding it, along with several other slides depicting exhibits with additional superimposed text[37]; and (2) his counsel was ineffective in failing to object. He also contends that one of the State's slides misstated the record. These arguments also fail.[38]
>
> [37] *See* CP at 867, 868, 881, 885, 886, 889-92, 902-05, 907, 911-13, 940, 944, 978.
>
> [38] In addition, Maddaus appears to contend that the State engaged in misconduct by destroying or spoiling portions of the PowerPoint presentation. We decline to reach this issue because whether there were additional PowerPoint slides is a matter outside the record on appeal. If Maddaus has additional evidence related to this issue, he must present it in a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

(13) In the last partial paragraph on page 42, which begins, "Moreover, the center of":

* In the first sentence, we delete the word "this" after the phrase "the center of" and substitute the word "the"; and

* in the second sentence, after the word "slide" and before the phrase "to trigger," we insert the phrase "or any of the other altered slides."

In the first line of the continuation of this paragraph at the top of page 43, after the phrase "mug shot,"

* we delete the word "displaying" and its preceding comma and substitute the word "of";

* we delete the word "as" after the word "him" and before the word "unkempt"; and

* after the ending citation to *Glasmann*, we insert the following sentence and add new footnote 39, which together read, "Instead, these slides contained descriptions of testimony or statements presented at the trial or statements that represented the State's argument based on reasonable inferences from the record. [FN 39: Maddaus suggests that the static PowerPoint slides in the record do not adequately represent the entire presentation, which was arguably more dynamic in real time. Again, the extent to which these slides may not accurately depict the State's presentation is outside the record before us; therefore, we cannot consider this assertion. *See McFarland*, 127 Wn.2d at 335.]"

This changed paragraph now reads:

> Moreover, the center of the single slide included a photograph of Maddaus (not a mug shot, as in *Glasmann*) wearing a wig—to remind the jury that Maddaus had intentionally obtained a false passport and had been using a disguise on the days leading to his arrest. In contrast, nothing in the record here suggests that the State used this slide or any of the other altered slides to trigger "an emotional reaction" from the jury, as was the case in *Glasmann*, where multiple PowerPoint slides repeatedly displayed Glasmann's mug shot of him unkempt and bloody. *Glasmann*, 175 Wn.2d at 706; 710 n.4. Instead, these slides contained descriptions of testimony or statements presented at the trial or statements that represented the State's argument based on reasonable inferences from the record.[39]
>
> [39] Maddaus suggests that the static PowerPoint slides in the record do not adequately represent the entire presentation, which was arguably more dynamic in real time. Again, the extent to which these slides may not accurately depict the State's presentation is outside the record before us; therefore, we cannot consider this assertion. *See McFarland*, 127 Wn.2d at 335.

(14) In the first full paragraph on page 43, which begins, "Applying the heightened,"

* in the first sentence, after the word "unpreserved", we delete the word "errors" and substitute the phrase "prosecutorial misconduct claims";

* in the first sentence, after the phrase "State's use of," we delete the clause "this single slide showing him in a wig that he had used to evade arrest" and substitute the phrase, "these slides";

* in the second sentence, we delete the phrase "this slide to avoid emphasizing it" and substitute the phrase "these slides to avoid emphasizing them"; and

* immediately after the second sentence, ending "on this basis," we add new footnote 40, which states: "Division One of our court recently filed *State v. Hecht*, No. 71059-1-I, 2014 WL 627852 (Wash. Ct. App. Feb. 18, 2014), addressing a similar prosecutorial misconduct claim in another Pierce County case. We distinguish Maddaus's case because, unlike the slides the prosecutor used in *Hecht*, the slides here did not contain statements amounting to the prosecutor's personal opinions of the defendant's guilt."

This changed paragraph now reads,

> Applying the heightened standard of scrutiny for unpreserved prosecutorial misconduct claims, we hold that Maddaus has failed to show that a curative instruction would not have overcome any prejudicial effect from the State's use of these slides. Moreover, as with the previous claim, defense counsel could have strategically elected not to object to these slides to avoid emphasizing them further; this point, coupled with Maddaus's failure to show prejudice, defeats his ineffective assistance claim on this basis.[40]
>
> [40] Division One of our court recently filed *State v. Hecht*, No. 71059-1-I, 2014 WL 627852 (Wash. Ct. App. Feb. 18, 2014), addressing a similar prosecutorial misconduct claim in another Pierce County case. We distinguish Maddaus's case because, unlike the slides the prosecutor used in *Hecht*, the slides here did not contain statements amounting to the prosecutor's personal opinions about the defendant's guilt.

(15) After the first full paragraph on page 43 (and before the next heading, "VI. WITNESS TAMPERING"), we insert the following new paragraph:

> Maddaus also argues that another slide misstated the record: This slide was captioned, "DEFENDANT FALSE ALIBI ATTEMPT" and described several excerpts from Maddaus's jail telephone calls. CP at 915. For the first time on appeal, Maddaus specifically objects to the portion of the slide stating, "Dan Leville & Falyn Grimes 'you guys. . .protect me.'" CP at 915 (alteration in original). But this statement was a reasonable inference from the record. Nevertheless, to the extent this statement was arguably not a reasonable inference, any potential prejudice from this single statement was not significant given the other evidence of Maddaus's guilt; and Maddaus has not shown that a curative instruction would not have overcome any potential prejudice. Accordingly, Maddaus does not show prosecutorial misconduct or ineffective assistance of counsel on this ground.

(16) On page 56, between the first full sentence, which begins, "The trial court responded," and the second full sentence, which begins, "Maddaus did not provide," we insert the following new sentence:

> The trial court again address Maddaus's request for new counsel, based on the same grounds, the following day.

This changed latter part of this paragraph now reads,

> The trial court responded, "I am not going to allow it at this late date. . . . I have already ruled on the letter." 3 VRP at 264. The trial court again address Maddaus's request for new counsel, based on the same grounds, the following day. Maddaus did not provide any new substantial reason to support his request for new counsel, especially in light of the lateness of his request three days into the trial. Thus, we hold that the trial court did not abuse its discretion in denying this request.

(17) On page 56, after the end of subsection VIII. B. and before the beginning of subsection VIII. C., we change the original subheading "C. Cumulative Error" to "D. Cumulative Error" and insert the following new subsection "C" before new subsection "D" as follows:

C. Motion To Dismiss

> Maddaus next challenges the trial court's denial of his motion to dismiss or motion for mistrial based on alleged discovery violations, which he characterizes as prosecutorial mismanagement or misconduct. Maddaus argued to the trial court that the State had withheld material information related to Tremblay's testimony and to another witness's (Kyle Collins[54]) request for a "deal" from the State in exchange for his testifying against Maddaus. CP at 387. We disagree with Maddaus that the trial court erred in denying his motion.
>
> Trial courts have wide latitude in imposing sanctions for discovery violations. *State v. Dunivin*, 65 Wn. App. 728, 731, 829 P.2d 799, *review denied*, 120 Wn.2d 1016 (1992). We will not disturb the trial court's denial of a motion to dismiss for discovery violations unless the denial constitutes a manifest abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001).

Dismissal is an extraordinary remedy, available only when the discovery violation has materially affected the defendant's right to a fair trial. *Woods*, 143 Wn.2d at 582. Thus, before a trial court exercises its discretion to dismiss,

> a defendant must prove that it is more probably true than not that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process, which essentially compelled the defendant to choose between two distinct rights.

Woods, 143 Wn.2d at 583.

The record here shows the State was not aware that Tremblay's trial testimony would differ from his previous statements until Tremblay testified at trial. Thus, the State clearly did not fail to act with due diligence, and the trial court did not err in denying Maddaus's motion to dismiss to the extent it was based on in respect to Tremblay's testimony.[55]

As soon as the trial court became aware of the State's failure to communicate to Maddaus Collins' previous offer to testify against him in exchange for a plea deal, the trial court required the State to turn over this information to defense counsel and gave defense counsel the opportunity to question Collins about it.[56] Maddaus does not show that this trial court action was an unreasonable response to the State's failure to disclose information earlier. Thus, Maddaus fails to establish that the trial court abused its discretion in denying his request to impose the extreme sanction of dismissal for this arguable discovery violation.

Furthermore, Maddaus does not show that the new information about Collins materially affected his (Maddaus's) right to a fair trial. Collins had first offered to be a State witness against Maddaus in exchange for a beneficial plea deal; but when the State refused his offer, Collins had testified instead for the defense. This information, thus reflected on Collins' credibility; and the jury had already heard other information about Collins' credibility, namely that he had previously pleaded guilty to "[p]ossession with intent, delivery, bail jumping, forgery, eluding theft of a motor vehicle, obstruction of justice and dominion over a house for drug purposes." 13 RP (Jan. 26, 2011) at 1648. Accordingly, we hold that the trial court did not err in denying Maddaus's motion to dismiss or for a mistrial.

"D. Cumulative Error"

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[54] Defense witness Collins testified at trial that (1) Tremblay had told him (Collins) that he (Tremblay) had accidentally shot Peterson; (2) Jesse Rivera had told him (Collins) that Peterson had been brought to Dan and Falyn's house so Maddaus could talk to him; (3) Peterson was handcuffed before being allowed into the house; (4) Rivera was in the house with Maddaus and others when the shots were fired outside the house; and (5) Tremblay and Peterson were outside when the shots were fired.

[55] Maddaus's asserted information that the State knew Tremblay would change his testimony is outside the record before us on appeal; therefore, we cannot consider it. *McFarland*, 127 Wn.2d at 335.

[56] The record does not show that defense counsel asked for additional time to review this new information or to question other witnesses.

(18) The above changes in the text and addition of new footnotes will require corresponding changes in text pagination and footnote numbering.

We otherwise deny Maddaus's motion for reconsideration.

IT IS SO ORDERED.

DATED this 27TH day of FEBRUARY, 2014.

Hunt, J.

I concur:

Johanson, A.C.J.

Johanson, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT JOHN MADDAUS, Appellant.	No. 41795-2-II ORDER AMENDING CONCURRENCE

Appellant Robert John Maddaus has filed a motion for reconsideration of our unpublished opinion filed on September 20, 2013. I make the following changes to my concurrence filed September 20, 2013.

The concurrence introduction after the name of the judge and the first sentence of the concurrence is changed to read as follows:

> (concurring in the result only) — I concur with the result reached by the majority opinion but write separately to stress that Robert Maddaus had the right for a jury to find whether he is a persistent offender subject to incarceration for life without the possibility of parole under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570.

IT IS SO ORDERED.

DATED this 27TH day of FEBRUARY, 2014.

Quinn-Brintnall, J.P.T.

QUINN-BRINTNALL, J.P.T.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT JOHN MADDAUS, Appellant.	No. 41795-2-II UNPUBLISHED OPINION

HUNT, J. — Robert John Maddaus appeals his jury trial convictions for first degree felony murder, first degree attempted kidnapping, second degree assault, and four counts of witness tampering; he also appeals his Persistent Offender Accountability Act[1] (POAA) life sentence and the firearm sentencing enhancements for his murder, attempted kidnapping, and assault convictions. He argues that (1) the warrant-based search of his residence was illegal; (2) the trial court violated his due process rights by allowing him to be restrained during trial; (3) the trial court committed several evidentiary errors[2]; (4) his counsel rendered ineffective assistance for

[1] RCW 9.94A.570.

[2] More specifically Maddaus challenges the trial court's restricting his cross-examination of a State witness (which he further asserts violated his right to confrontation), failure to hold an evidentiary hearing to address alleged governmental misconduct had occurred, and admission of recorded jail phone conversations.

several reasons[3]; (5) some of the trial court's jury instructions were erroneous[4]; (6) the State committed misconduct during closing argument[5]; (7) his two witness tampering convictions constituted double jeopardy, with insufficient evidence to support one of them; and (8) several sentencing errors warrant resentencing.[6]

In his Statement of Additional Grounds (SAG), Maddaus asserts that (1) the trial court erred in denying his request for new appointed counsel; (2) the trial judge was unfairly biased against him; (3) the State committed prosecutorial misconduct by displaying a Microsoft Power Point slide containing a photograph of Maddaus wearing a wig, with a circle and a slash superimposed over it and the word "GUILTY" written beneath it, CP at 978 ; and (4) cumulative

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[3] More specifically, Maddaus contends that his trial counsel rendered ineffective assistance in failing to object to (1) the trial court's requiring that he wear restraints in court; (2) admission of recorded jail phone conversations; (3) prosecutorial misconduct during closing arguments; (4) jury instructions on "substantial step" and "deadly weapon"; and (5) a detective's statement bolstering Abear's testimony.

[4] More specifically, Maddaus challenges the trial court's refusal to instruct the jury on the lesser degree offense of third-degree assault, failure to instruct the jury that it must be unanimous about the alternative method used in committing the charged second degree assault and the first degree attempted kidnapping, and giving instructions on second degree assault and first degree attempted kidnapping that relieved the State of its burden to prove the essential elements of each crime.

[5] More specifically, Maddaus alleges that the prosecutor disparaged defense counsel; called the defense testimony "poppycock," "unreasonable under the law," and "crazy"; suggested that Maddaus had "duped" the defense investigator; and presented prejudicial power point slides. Br. of Appellant at 50-52.

[6] More specifically, Maddaus contends that his firearm sentencing enhancements violated his due process rights because the information charged him with only deadly weapon enhancements; the State failed to establish that he had two prior "strike" convictions for POAA purposes; and his POAA life sentence violated his equal protection and due process rights to a jury determination beyond a reasonable doubt that he had two prior qualifying convictions.

error violated his right to a fair trial.

We remand to the trial court to vacate and to dismiss either Count VI or Count VII (both witness tampering) with prejudice. We affirm Maddaus's other convictions and sentencing enhancements.

FACTS

I. CRIMES

A. First Degree Murder; Second Degree Assault

In the evening of November 13, 2009, Jessica Abear was sleeping in Maddaus's residence when a group of three to four persons kicked down the door and entered. One of the intruders ordered Abear to "[f]reeze" and held a gun to her head. 7 Verbatim Report of Proceedings (VRP) at 647. The intruders stole roughly $140,000 in drugs and cash.

When he returned home and learned about the robbery, Maddaus appeared "in a rage" and suspected that Abear had been involved. 7 VRP at 653. Attempting to elicit a confession, he hit her on the head with the butt of a firearm, sprayed her three times with mace, ripped off her clothes, and shot her ten times with a paintball gun. Maddaus then pointed the firearm at Abear's foot and threatened to shoot; but when he pulled the trigger, the firearm did not discharge. Abear told Maddaus that she thought his drug supplier might be a suspect in the robbery. Maddaus called his supplier, relayed what Abear had said, and mentioned that he (Maddaus) needed to "find someplace for [Abear] to go so that they [(Maddaus and his supplier)] could get the information out of [her]" and that he (Maddaus) "was going to torture it out of [her]." 7 VRP at 656. Abear managed to run out and take shelter in a neighbor's house until she was able to leave safely.

The next day, Maddaus discovered a tape recording that contained a recorded phone conversation of the persons involved in the robbery. Although most of the voices were unrecognizable, Maddaus believed that one was Shaun Peterson. Late the next evening, November 15, Maddaus met with Peterson and several friends (Matthew Tremblay, Jesse Rivera, Daniel Leville, and Falyn Grimes) to question Peterson about his involvement in the robbery. Peterson was handcuffed, and Maddaus was armed with a firearm and a knife. Nobody else was armed. While questioning Peterson, Maddaus played the recorded phone conversation. Peterson eventually walked out the front door; Maddaus followed him outside, after which Maddaus's friends reported hearing five rapid gunshots. Immediately following the shots, Matthew Tremblay saw Maddaus standing outside, pointing a firearm at Peterson, who ran a short distance before collapsing on the ground.

Early the following morning, November 16, Olympia police responded to a report of gunshots. They found Peterson on his back, having bled to death from multiple gunshot wounds. Police found four empty bullet casings and a cell phone near Peterson's body. The cell phone began to ring; the caller identified herself as Randi Henn, Peterson's girlfriend. Henn told the police that Peterson was involved in selling methamphetamine, that his drug source was Maddaus, and that Maddaus had recently been robbed and had asked to meet Peterson that night.

Several days later, police arrested Tremblay, who was believed to have been involved or to have knowledge about Peterson's murder. Tremblay told the police that (1) as he was placing items into Maddaus's vehicle, he had seen Peterson speaking with Maddaus outside the house and they had begun to argue; (2) Maddaus fired roughly five rounds from a firearm; (3) as the firing stopped, Tremblay looked up and saw Maddaus pointing a smoking firearm at Peterson;

(4) Tremblay and Maddaus fled to Josephine Lundy's residence, where they unloaded items into a large metal shipping container; and (5) Tremblay did not know what happened to the firearm that Maddaus had used to kill Peterson.

Tremblay later took the police to Lundy's property, where Lundy consented to a search of her residence and property; nothing of evidentiary value was found. Lundy also confirmed many of the details that Tremblay had provided, including that Maddaus had contacted Lundy in the early morning on the 16th of November.

Emerald Akau, who had been recently dating Maddaus, also spoke with police. She confirmed Maddaus's home address and stated that she had spent the night with him at his residence on the evening of November 16, the night after the murder.

The police obtained a search warrant for Maddaus's residence based on the information obtained during their investigation. This warrant authorized the police to search for: "[A]ny firearms, to include handguns, packaging for handguns, spent casings, new bullets, packaging for bullets," any "paintball guns, paintballs, marbles or items associated with paintball guns," and "handcuffs." Clerks Papers (CP) at 9. Executing the warrant, police found a paintball gun, a handgun and ammunition, and a set of handcuffs. They also detected the faint odor of pepper spray.

Meanwhile, Maddaus had acquired a wig and a false passport bearing the name "Chad Walker Vogt" and a photo of himself wearing a blond wig. 17 VRP at 2003. When asked why he had the wig, he stated, "Because I knew there was a warrant out for my arrest. The police wanted to talk to me. I didn't want to talk to them." 15 VRP at 1868. The police found this wig in Maddaus's vehicle when they arrested him.

B. Witness Tampering

Theodore Farmer had worked with Maddaus selling methamphetamine. After Farmer was caught carrying methamphetamine in November 2009, he provided Maddaus's name to the Thurston County Drug Task Force, became an informant, and agreed to perform three controlled buys from Maddaus. On November 14 or 15, Farmer called Maddaus to purchase methamphetamine, but Maddaus did not answer. Maddaus called Farmer back later and stated, "I can't talk. I'll either be—I'll talk to you in person, or either that, or I'll be in jail." 10 VRP at 1240-41.

While awaiting trial in jail, Maddaus repeatedly telephoned his niece Chelsea Williams, Grimes, Leville, and Farmer, whom he called three times, to establish a false alibi. The jail actively monitored these calls.[7] During a three-way phone call with Williams and Farmer, Maddaus stated, "Here's the deal, right? These F***ing phones are recorded all the way." 11 VRP at 1476. Although Farmer initially agreed with Maddaus to provide false testimony, Farmer later changed his mind and contacted the police.[8]

[7] Before an inmate initiates a phone call, the phone system explains that the conversation will be monitored. A similar announcement is given to any party being dialed; that other party can either accept the phone call or press a button to decline.

[8] Farmer later testified that he decided to contact police "[b]ecause [he] had received a call after [Maddaus] had gotten arrested from the Thurston County Jail, and I knew that the phones were recorded." 10 VRP at 1247.

II. PROCEDURE

The State charged Maddaus with first degree murder (alleging both premeditation and felony murder),[9] first degree attempted kidnapping, second degree assault of Abear (assault with a deadly weapon), and four counts of witness tampering (two based on his contacts with Farmer from the jail).[10] The first degree murder, attempted kidnapping, and assault charges each carried a sentencing enhancement allegation that "[Maddaus] was armed with a deadly weapon, a firearm." CP at 21-22.

A. Pretrial Motions

1. Search warrant; motion to suppress

Maddaus moved to suppress the search warrant of his residence, arguing lack of probable cause to authorize a search for firearms.[11] The trial court denied the motion, ruling that there was a sufficient nexus between the firearm sought and Maddaus's residence.

2. Maddaus's letter

Several weeks before trial, the State received a letter through the mail with no return address. The prosecutor's receptionist opened the letter, reviewed it, and determined that it appeared to be correspondence from Maddaus to his defense attorney. The prosecutor's office

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[9] The first degree murder charge was based on premeditation or, in the alternative, felony murder (during the attempted second degree kidnapping of Peterson).

[10] The State also charged Maddaus with two counts of first degree unlawful possession of a firearm. These separate firearm possession counts are not at issue in this appeal.

[11] More specifically, Maddaus stated, "[W]hat I'm concerned about is only the gun, nothing else that was taken out of the trailer." VRP (Aug. 12, 2010) at 58.

provided a copy of this letter to Maddaus's counsel. Maddaus alleged governmental misconduct, namely that someone at the jail had copied and mailed the letter to the prosecutor's office.[12]

Maddaus moved to continue the trial, to conduct a formal hearing to investigate how the letter came into the State's possession, and to dismiss. The prosecutor's sworn declaration in opposition stated:

> I directed . . . the receptionist . . . to not discuss with anyone whatever contents (of the letter) he may have seen, and to make a copy and dispatch it to defense counsel. I further directed that the original be kept, sealed, in the office until further order. I have not read what may or may not be a letter, or copy of a letter, written to [Maddaus's attorney].

CP at 283. At the hearing on Maddaus's motion, the prosecutor further explained,

> I told [the mail handler] I don't want to see it. I don't want to hear about it. Don't talk to anyone about it, and let's just freeze-frame this thing, seal it up, copy it, send a copy to [defense counsel] so he knows what's been going on, and seal it up because it might be . . . evidence of wrongdoing. . . .
>
> Now, Your Honor, consider the context of what's going on here. Mr. Maddaus, no stranger to the criminal justice system, fair to say con-wise, and familiar with the ways of manipulation, familiar with tampering with witnesses, we allege, who has violated court orders, who has been sitting in the jail for a year and comes up with a gimmick. And the gimmick is all I've got to do is send a copy of a letter or have somebody do it for me, and I can raise a ruckus and perhaps derail this prosecution.

VRP (Dec. 21, 2010) at 70. The trial court denied the motions to continue and to dismiss. VRP (Dec. 21, 2010) at 75.

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[12] Maddaus based this allegation on the envelope's label and the address's having been written with a felt tip marker. According to Maddaus's counsel, the letter was a copy of correspondence that Maddaus had sent him months earlier, and it contained information that only Maddaus knew. At the subsequent hearing, Maddaus's attorney stated, "[I]t's my understanding that the inmates do not have access to the white labels. They do have access to those types of envelopes . . . but not access to a felt tip pen." VRP (Dec. 21, 2010) at 55.

3. Potential impeachment

Maddaus moved in limine to be able to cross-examine Leville about his uncharged crimes to show bias. The trial court ruled that Maddaus could cross-examine Leville about his uncharged crimes, with or without a formal plea agreement. The trial court reserved ruling on the scope of cross-examination.

B. Trial

1. Restraints

Over defense counsel's objection and without articulating its reasons, the trial court ordered Maddaus to wear a shock device and a leg restraint during trial. Before the jury entered, Maddaus's counsel told the trial court he was concerned that the jury would notice the leg restraint if Maddaus were asked to walk to the witness stand in the jury's presence. In response, the trial court allowed Maddaus to take the stand before the jury entered.

The next day, Maddaus's counsel again notified the court that Maddaus was wearing a shock device and that he was concerned that the jury might notice it. In response, the court arranged several tables to block the jurors' views of the shock device. Maddaus's counsel agreed with this arrangement and acknowledged that the jurors would not see his shock device.

The next week, Maddaus's counsel again notified the court that he believed the jurors could see the device on Maddaus's leg because he was "wearing more constrictive pants." 7 VRP at 628. The trial court placed several pieces of cardboard around Maddaus's table, which "look[ed] like exhibits," to block the jurors' views. 7 VRP at 629. Maddaus's counsel again agreed with this arrangement and acknowledged that the jurors would not see Maddaus's restraints.

2. Detective Johnstone's testimony

The State called Detective Chris Johnstone as a witness and asked whether he had interviewed Abear during his investigations. Johnstone replied that he had. When the State asked, "And the facts that she testified about, is that what you [previously] interviewed her about[?]," Maddaus objected on hearsay grounds, and the trial court sustained the objection. The State then rephrased the question, asking, "[T]he subject matter of your interview [with Abear], was it similar to her testimony here at trial?" Johnstone replied, "Yes, it was." 8 VRP at 825-26. Maddaus did not object to this rephrasing.

3. Leville's Cross-examination

Maddaus questioned Leville about several of his (Leville's) uncharged crimes, including heroin, methamphetamine, marijuana possession, and identity theft. Leville denied any knowledge of or involvement with these crimes. The State objected, arguing that these inquiries involved specific instances of alleged misconduct, contrary to ER 608. The trial court ruled:

> Evidence of character or conduct of a witness [f]or the purpose of attacking or supporting a witness's [credibility]—*other than convictions* of crime, which you have done, may not be proved by extenuating evidence. They may, however, in the discretion of the court, be probative as to truthfulness or untruthfulness. I have let you go on. . . . I will not let you go into further specific incidents of conduct at this point.

10 VRP at 1129-30 (emphasis added).

4. Jury instructions

Maddaus requested a lesser degree offense jury instruction for either third or fourth degree assault. The trial court declined because "there [was] no evidence of criminal negligence

or assault in the fourth degree, that it's simply assault in the second degree or not guilty." 16 VRP at 1952.

For count I, first degree murder, the trial court instructed the jury on both premeditation and felony murder. For felony murder, Instruction 10 provided, "[O]n or about November 16, 2009 . . . the defendant was committing or attempting to commit the crime of kidnapping in the second degree." CP at 426. Instruction 10 further provided:

> If you find from the evidence that each of the elements in Alternative A [, premeditated murder,] or each of the elements in Alternative B [, felony murder,] has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. All of the elements of only one alternative need be proved. You must unanimously agree as to which one or more of the alternatives, A or B, has been proved beyond a reasonable doubt.

CP at 426.

For count IV, second degree assault, Instruction 17 provided, "An assault is an intentional touching or striking[, or] shooting of another person," or "an act . . . done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability," or "an act . . . done with intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury." CP at 433. The "to convict" instruction provided, "[O]n or about November 13, 2009, the defendant assaulted Jessica R. Abear with a deadly weapon." CP at 434 (Instruction 18). Instruction 30 stated, "A firearm, whether loaded or unloaded, is a deadly weapon." CP at 446. Finally, the "to convict" instruction for count III, Maddaus's first degree attempted kidnapping of Abear, provided, "[O]n or about November 13, 2009, the

defendant did an act that was a substantial step toward the commission of kidnapping in the first degree." CP at 437 (Instruction 21).

For counts I, III, and IV, the State sought special verdicts that "the defendant was armed with a deadly weapon at the time of the commission of the crime[s]." CP at 447 (Instruction 31). The special verdict instruction provided, "A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." CP at 447 (Instruction 31). Other than requesting a lesser included offense instruction, Maddaus did not object to the trial court's instructions.

5. Closing arguments

During closing, the State argued:

> [Y]ou can consider the reasonableness of the witness's statements in the context of the other evidence. Consider, for example, Mr. Maddaus's testimony that he—what did he say? He asked to put the handcuffs on Mr. Peterson? And Peterson did? I mean, *that's poppycock.* That's *unreasonable under the law. That's crazy.* Nobody voluntarily puts handcuffs on themselves, and besides, we have evidence, of course, that Mr. Peterson was literally under the gun at the time the cuffs were put on him.
> [. . .]
> [C]ounsel for the accused argued that they—they worked hard, [Defense Counsel] worked real hard at finding witnesses. The evidence, however, ladies and gentlemen, the evidence about the defense witnesses suggests otherwise. . . . I'm not suggesting Mr. Wilson of wrongdoing; I'm just suggesting that [Defense Counsel], like Chelsea Williams, *was duped into being this defendant's agent.* 'I've got somebody that's got this information.' 'Oh, we'll go talk to that person.'"
> [. . .]
> Counsel for the accused's argument was a reminder of the distractions that sometimes people create when they're passengers in a vehicle. You're driving down the highway, and you're [focused] on paying attention to what's going on in front of you and keeping your eye on the rear-view mirror, and someone says, "Look over there. Look over there." That's what the argument was about. It was all about everything but the proof of Mr. Maddaus's guilt.
> [. . .]
> What you heard in the defense case, those witnesses from the defense in the defense argument, was the last gasp of this defendant, the last gasp, *the last effort*

> *to develop lies to try to convince you of what he's not, that he's innocent, and he's not.* The last gasp.

17 VRP at 1984, 2074-75, 2077 (emphasis added). Maddaus did not object to any of these statements.

The State also presented Microsoft PowerPoint slides during its closing argument. One slide depicted Maddaus wearing the wig that detectives had recovered from his vehicle. Surrounding the photo were capitalized captions describing various evidence used by the State, including: "JAIL PHONE CALLS," "FALSE ALIBI ATTEMPT," DISGUISE AND COVER-UP," "FUGITIVE," THREATS TO KILL," "MOTIVE," "TELEPHONE RECORDS," and "EYEWITNESS TO EVENTS." CP at 978. Each caption included an arrow pointing towards Maddaus's photo at the center, with the word "GUILTY" superimposed over his face. CP at 978. Maddaus did not object to this slide.

It appears that the State displayed this slide as the prosecutor made the following closing remarks:

> [Maddaus] adopted a disguise. He worked on a cover-up, and he worked like heck on this false alibi. I was in Tumwater. I was [getting] a tattoo. And the jail phone calls where he's pumping at Grimes and Leville. He's working on Theodore Farmer. He's working on Chelsea Williams because he's guilty and he's got to get out from underneath all that evidence. This defendant, ladies and gentlemen, this defendant, is the only one with motive, the only one with the means and the only one who is guilty of murder in the first degree. He is guilty of all the crimes alleged in the Information. He is guilty as charged, ladies and gentlemen, and guilty as proven.

17 VRP at 2015. Maddaus did not object to these statements.

C. Conviction and Sentence

The jury found Maddaus guilty of (1) first degree felony murder, (2) two counts of unlawful possession of a firearm, (3) first degree attempted kidnapping, (4) second degree assault, and (5) four counts of witness tampering. The jury returned special verdicts for firearm enhancements on the first degree murder, attempted kidnapping, and second degree assault charges.

At sentencing, the State provided certified copies of Maddaus's criminal history.[13] When the court asked if there was any dispute as to his criminal history, Maddaus's attorney replied, "No, Your Honor, there's not." VRP (Feb. 8, 2011) at 124. Because of his prior "strike" offenses, the trial court sentenced Maddaus under the POAA, RCW 9.94A.570, to life without the possibility of early release. Maddaus appeals his convictions, POAA life sentence, and firearm sentencing enhancements.

ANALYSIS

I. SEARCH WARRANT

Appellate counsel argues in his brief and Maddaus asserts in his SAG that the State's search of Maddaus's residence was improper under the Fourth Amendment[14] and the Washington constitution because the affidavit in support of the search warrant lacked probable

[13] Among other crimes, Maddaus had previously been convicted of two prior "strike" offenses: possession of a controlled substance with intent to deliver while armed with a deadly weapon and second degree assault while armed with a deadly weapon.

[14] U.S. CONST. amend. IV.

cause. In the alternative, he argues for the first time on appeal that the search was unconstitutionally overbroad. These arguments fail.

A. Standard and Scope of Review

We review the issuance of a search warrant for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). But we give great deference to the issuing judge or magistrate's determination of probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). We find no abuse of discretion here.

A defendant waives the right to challenge the admission of evidence gained in an illegal search or seizure by failing to move to suppress the evidence at trial. *See State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). We will not address such unpreserved alleged errors unless he can show that this issue meets the manifest constitutional exception of RAP 2.5(a)(3).[15] At trial, Maddaus moved to suppress only the firearm, alleging lack of probable cause. He did not seek to suppress any other items of evidence, the admissibility of which he now attempts to challenge for the first time on appeal.[16] Because he does not meet his burden to show that his new challenge falls within the

[15] A defendant may raise an argument for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). An error is manifest if it has practical and identifiable consequences or causes actual prejudice to the defendant. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

[16] Maddaus did not move below to suppress any other items now argued on appeal, such as clothing; notes and records to establish dominion and control; notes and records that relate to the distribution or sales of controlled substances; computers; media storage devices; cell phones; surveillance equipment; packaging for handcuffs and documentation or receipts for handcuffs; and drugs and paraphernalia.

RAP 2.5(a)(3) exception to the preservation requirement, we address only his preserved challenge to the firearm.

A valid search warrant requires probable cause. U.S. CONST. amend. IV; WASH. CONST. art. I, sec. 7. In order to establish probable cause, the supporting affidavit must provide sufficient facts to persuade a reasonable person that the defendant is probably engaged in criminal activity and that evidence of criminal activity probably can be found at the place to be searched. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). Similarly, the affidavit must identify with particularity the place to be searched and the items to be seized. *Lyons*, 174 Wn.2d at 359. A court evaluates a search warrant affidavit "in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant." *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

B. Affidavit of Probable Cause

The search warrant affidavit described Tremblay's account to police—that he had been present at the time of the shooting, that he had seen Maddaus pointing a firearm at Peterson immediately following the shots, and that he and Maddaus had gone to Lundy's residence. The affidavit also explained that a police search of Lundy's residence and property did not uncover any firearms and that Akau had told police that Maddaus had spent the following night after the shooting at his own residence.

The affidavit then summarized the evidence police expected to find at Maddaus's residence as follows:

> The residence that Maddaus[] went to immediately following the murder . . . is roughly one mile away from [his] residence. . . . We did not locate anything of evidentiary value to this investigation at [Lundy's residence]. It is believed that

> the evidence of the crime to include the handgun used may be located at Maddaus'[s] address . . . as the result of the close location and the fact the evidence was removed from [Lundy's residence]. Therefore it is believed to have been removed and may be concealed in the home, mobile home[,] or outbuildings located at [Maddaus's address].

CP at 8.

Relying on *State v. Thein*, Maddaus argues that generalizations about the habits of criminals cannot provide sufficient probable cause to authorize a search. Br. of Appellant at 20 (citing *State v. Thein*, 138 Wn.2d 133, 148-49, 977 P.2d 582 (1999)). Maddaus is correct that (1) the search warrant in *Thein* "involve[d] nothing more than generalizations regarding the common habits of drug dealers and lack[ed] any specific facts linking such illegal activity to the residence searched"; and (2) it is not reasonable to infer that evidence is likely to be found in a certain location simply because police do not know where else to look for it. *Thein*, 138 Wn.2d at 148, 150. But the facts here are distinguishable from those in *Thein*, which, thus, does not apply.

Here, the affidavit contained two specific facts that provided probable cause to believe that the firearm used in the murder could be found at Maddaus's residence: (1) There was close physical proximity between Maddaus's residence and Lundy's residence, where Maddaus had visited immediately after the shooting; and (2) Maddaus had spent the night following the shooting at his residence, providing close proximity of time between the crime and the location to be searched. Here, the affidavit's provision for a firearm's search was not based on a *lack* of facts, as in *Thein*; nor was it based solely on an inference that the firearm's absence from one location (Lundy's nearby residence) necessarily permitted a search of another location (Maddaus's residence). *Thein*, 138 Wn.2d at 150. On the contrary, the affidavit recited a series of facts about Maddaus's location immediately following the shooting; it was reasonable to

assume that evidence of the crime could be recovered from his residence if not found in Lundy's, where he had gone before going home.

C. Overbreadth Challenge not Properly before Us

Maddaus argues for the first time on appeal that the search warrant was overbroad in its use of the term "firearms" because the supporting affidavit did not suggest that "rifles, shotguns, or other long-barreled guns were involved in the crime." Reply Br. of Appellant at 9. We do not address the merits of this challenge because Maddaus failed both to preserve it for appeal and to establish an exception to RAP 2.5(a)(3)'s preservation requirements.

At the CrR 3.6 hearing below, Maddaus argued only that the search warrant authorizing the search for firearms was invalid for lack of probable cause; he did not argue that it was overbroad, as he now argues here. A defendant's motion to suppress must state a specific ground of objection. ER 103(a)(1). Even if the defendant objected at trial, he may assign error in the appellate court only on the specific ground of that evidentiary objection. *Dehaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976)). Thus, we do not address Maddaus's newly raised overbreadth argument unless he meets the preservation requirements of RAP 2.5(a)(3). Maddaus does not, however, argue that his new overbroad challenge is a manifest error affecting a constitutional right, justifying departure from the

preservation requirement of RAP 2.5(a)(3). Accordingly, we do not address his unpreserved alternative overbreadth challenge to the search warrant.[17]

II. RESTRAINTS IN COURTROOM

Maddaus next argues that the trial court violated his due process rights by allowing him to be restrained at trial with a leg brace and shock device absent a showing of "impelling necessity" and that his counsel was ineffective in failing to object to these restraints. Br. of Appellant at 27. These arguments fail.

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). Shackling or handcuffing infringes on a defendant's right to a fair trial for several reasons, including that it violates a defendant's presumption of innocence. *Finch*, 137 Wn.2d at 844. In order to protect the defendant's rights, the trial court must exercise discretion in determining the extent to which restraints are necessary to maintain order and to prevent injury, supported by a factual basis set forth in the record. *Finch*, 137 Wn.2d at 846 (citing *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981)). Nevertheless, a claim of unconstitutional shackling is subject to a harmless error analysis. *State v. Jennings*, 111 Wn. App. 54, 61, 44 P.3d 1 (2002) (citing *State v. Damon*, 144 Wn.2d 686, 692, 25 P.3d 418, 33 P.3d 735 (2001)).

Although the record does not reflect the trial court's reasons for restraining Maddaus, we hold that any error in doing so was harmless in light of the trial court's repeated efforts to

[17] We note that (1) no long-barreled guns were seized under the warrant, (2) he identifies no other evidence seized under the challenged portion of the warrant that was used to convict him, and (3) Maddaus does not point to any prejudice that flowed from the challenged language.

prevent any prejudice that might have flowed to Maddaus if the jury had seen these restraints. On multiple occasions before the jury returned to the courtroom, defense counsel notified the court about his concern that Maddaus's shock device or leg brace might be visible to the jury. Each time, the trial court accommodated Maddaus's requests by having him take the stand before the jury entered and by arranging the defense table in such a way as to block the jurors' view of Maddaus's restraints. Consequently, the record contains no evidence that any member of the jury ever saw these restraints and, thus, no possibility of prejudice to Maddaus.

We hold that, because the jury did not see Maddaus's restraints, there was no prejudice to him, and any error in ordering Maddaus to wear them was harmless. *Jennings*, 111 Wn. App. at 61. And because Maddaus fails to show prejudice, he also fails to show ineffective assistance where defense counsel initially objected to the restraints, persuaded the trial court to recognize a potential problem, and then worked with the court to block the jury's view of the restraints.[18]

III. Other Evidentiary Issues

Maddaus raises several evidentiary challenges, some for the first time on appeal. In general, we review a preserved trial court's evidentiary rulings for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses its discretion when it

[18] We review ineffective assistance of counsel claims de novo. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 490, 251 P.3d 884 (2010). In reviewing claims of ineffective assistance, we begin with a strong presumption that counsel was effective, including that counsel may have had legitimate strategic reasons for failing to object. *See, e.g., State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). A person claiming ineffective assistance of counsel has the burden to establish that counsel's performance both (1) was so deficient that it deprived the defendant of his constitutional right to counsel and (2) prejudiced the defendant's case. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

bases its decision on untenable grounds or reasons. *State v. Thompson*, 173 Wn.2d 865, 870, 217 P.3d 204 (2012). If the defendant failed to preserve an evidentiary challenge with a specific objection below, we may address its merits for the first time on appeal if he establishes that the error is manifest and of constitutional magnitude for purposes of the RAP 2.5(a)(3) exception. We address each evidentiary challenge in turn; ultimately, all fail to provide grounds for reversal.

A. Leville's Cross-examination

Maddaus argues that the trial court violated his right to confrontation by restricting his cross-examination of Leville about the prosecutor's failure to charge Leville with various crimes. The cross-examination of a witness to elicit facts that tend to show bias, prejudice, or interest is generally a matter of right; but the scope or extent of such cross-examination is within the trial court's discretion. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (citing *State v. Robbins*, 35 Wn.2d 389, 213 P.2d 310 (1950)); *see also* ER 607, 611(b). A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice, where the evidence is vague, or where the evidence is argumentative or speculative. *Roberts*, 25 Wn. App. at 834 (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)).

The record does not support Maddaus's contention that the trial court unconstitutionally restricted his cross-examination. On the contrary, the record shows that, in both its ruling in limine and at trial, the court allowed Maddaus to cross-examine Leville about a number of his uncharged crimes, including drug possession, flight risk, and identity theft.[19] Only after

[19] The following is an example of such cross-examination:

> [Maddaus's counsel]: July you were picked up on a material witness warrant, but you were also picked up because Pretrial Services said you were attempting to take off, correct? You were going to go wherever the wind blew you?

permitting extensive questioning did the trial court sustain the State's objection and curtail Maddaus's continuing into other specific instances of misconduct for the reason that this evidence was not relevant under ER 608. Because this reason was not untenable, we hold that the trial court did not abuse its discretion in its limiting the scope of Leville's cross-examination during trial.

B. Evidentiary Hearing about State's Handling of Maddaus's Letter

In both his counsel's brief and his SAG, Maddaus contends that the trial court erred in denying his request for an evidentiary hearing to determine whether the State had engaged in

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[Leville]: They said I was a flight risk, and that's what I did say to them. I said something to that effect.
[Maddaus's counsel]: And you were arrested at your place, correct?
[Leville]: At my home, yes.
[Maddaus's counsel]: And when you were arrested, you were found with some heroin; isn't that true?
[Leville]: No.
[Maddaus's counsel]: You were found with some methamphetamines; isn't that true?
[Leville]: No.
[Maddaus's counsel]: How about some marijuana?
[Leville]: No.
[Maddaus's counsel]: And identity theft.
[Leville]: No.
[Maddaus's counsel]: Nothing.
[Leville]: I wasn't—I wasn't arrested. I was at my home. I didn't have anything on me. I wasn't—when they pulled up on me, I had just—my friend had just driven away, and they pulled up. I didn't have anything on me, no.
[Maddaus's counsel]: It was in your vehicle though, wasn't it? A Volkswagen truck.
[Leville]: I believe they found something in my vehicle, yes.
[Maddaus's counsel]: Heroin, correct?"

10 VRP at 1126-27.

governmental misconduct after it received a copy of a letter that Maddaus had sent to his attorney. He also asserts in his SAG that he received ineffective assistance of counsel based on the trial court's denial of Maddaus's motion to continue to investigate potential governmental misconduct. We disagree.

We review for abuse of discretion a trial court's denial of an evidentiary hearing to investigate possible governmental misconduct. *See* CrR 8.3(a), (b). A trial court may abuse its discretion by failing to hold an evidentiary hearing when presented with an issue of fact requiring a determination of witness credibility. *Harvey v. Obermeit*, 163 Wn. App. 311, 327, 261 P.3d 671 (2011) (citing *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994)).

A defendant's right to counsel is protected by the federal and our state constitutions. U.S. CONST. amend. V, VI; WASH. CONST. art. I sec. 22. The constitutional right may be violated when the government wrongfully intercepts protected attorney-client communications. *State v. Cory*, 62 Wn.2d 371, 377, 382 P.2d 1019 (1963). After notice and hearing, the trial court may dismiss any criminal prosecution because of arbitrary action or governmental misconduct that has prejudiced a defendant's right to a fair trial if the defendant has shown governmental misconduct that resulted in prejudice affecting his right to a fair trial.[20] CrR 8.3(b); *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (2000) (citing *State v. Michielli*, 132 Wn.2d 229,

[20] In certain egregious cases, prejudice may be presumed. *See, e.g., Cory*, 62 Wn.2d at 372 (jail secretly recorded conversations between the defendant and his attorney); *State v. Perrow*, 156 Wn. App. 322, 326, 231 P.3d 853 (2010) (state detective wrongfully seized attorney-client writings during search of residence and delivered writings to the State's prosecution team); *State v. Granacki*, 90 Wn. App. 598, 600, 959 P.2d 667 (1998) (state detective read from defense counsel's legal pad during a court recess).

239-40, 937 P.2d 587 (1997)). Here, there was no showing of governmental wrongdoing or interference with Maddaus's attorney-client communications.

Unlike the facts in *Garza*,[21] Maddaus made no offer of proof to the trial court identifying any wrongdoing by the State in the prosecutor's receptionist's handling of his letter after receiving it in the mail. Rather, he asserts only that it was unlikely that he could have been responsible for his letter's reaching the prosecutor's office.[22] And although the trial court did not hold a full evidentiary hearing into the matter, it did conduct a hearing on Maddaus's motions, which revealed that, after the prosecutor's office discovered the letter was apparently from Maddaus to his attorney, the prosecutor sealed the original, without reading it, and turned over a copy to Maddaus's counsel.

We find no abuse of discretion in the trial court's handling of this issue. With respect to Maddaus's ineffective assistance of counsel claim, he fails to provide any facts or reasons about

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[21] In *Garza*, jail officials seized and examined several defendants' legal documents after the defendants had attempted escape. One inmate witnessed one of the officers reading these legal materials. The trial court denied the defendants' motion to dismiss. *Garza*, 99 Wn. App. at 293-95. Division Three of our court held that the trial court had abused its discretion by denying the motion to dismiss without first holding an evidentiary hearing to determine whether the security concerns justified such an extensive intrusion into the defendants' attorney-client communications. *Garza*, 99 Wn. App. at 301. Division Three remanded for the trial court to conduct an evidentiary hearing, with instructions that if the defendants were able to establish that the jail officers' actions violated their right to counsel, the trial court "should fashion an appropriate remedy, recognizing that dismissal is an extraordinary remedy, appropriate only when other, less severe sanctions will be ineffective." *Garza*, 99 Wn. App. at 301-02.

[22] *See, e.g.*, Reply Br. of Appellant at 21:

> The attendant circumstances—including [Maddaus's] lack of access to a copy machine, the type of pen used, or the kind of envelope used, combined with the sheriff department's access to the letter—*suggest that the action was not taken by* [*Maddaus*].

(Emphasis added).

why his counsel's performance was deficient or how counsel's performance prejudiced him.[23] Thus, this claim also fails.

C. Recorded Phone Conversations

For the first time on appeal Maddaus argues that the trial court erred in admitting recorded phone conversations between him and several individuals he had contacted through the jail's telephone system, allegedly in violation of the Washington "Privacy Act", chapter 9.73 RCW. Maddaus also argues that his trial counsel provided ineffective assistance in failing to object to the admission of these recorded phone conversations.

1. Failure to preserve issue for direct appeal

The Washington Privacy Act provides a statutory, not a constitutional, right. Because Maddaus failed to object to admission of these phone conversations at trial, he does not meet the manifest constitutional error exception to the preservation requirement of RAP 2.5(a)(3). Therefore, we do not further consider this issue directly. *See State v. Sengxay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

2. Ineffective assistance of counsel

Maddaus also collaterally challenges this evidence by alleging that his counsel's performance was deficient in failing to object to the admission of these recorded phone conversations, which, he claims violated Washington's Privacy Act. *See Strickland*, 466 U.S. at 687-88; *Hendrickson*, 129 Wn.2d at 77-78. In assessing whether counsel's performance was deficient, Maddaus must show that (1) counsel's failure to object fell below an objectives

[23] *Strickland*, 466 U.S. at 687-88; *Hendrickson*, 129 Wn.2d at 77-78.

standard of reasonableness, (2) the proposed objection would have been sustained, and (3) the result of the trial would have differed. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Under Washington's Privacy Act, it is unlawful for any "individual, partnership, corporation, association, or the state of Washington . . . to intercept or record any [p]rivate communication transmitted by telephone . . . between two or more individuals . . . without first obtaining the consent of all the participants in the communication. RCW 9.73.030(1), (2). Our Supreme Court has recently held that recording an inmate's telephone conversations does not violate Washington's Privacy Act, which, by its own terms, applies only to "'[p]rivate communications." *State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008) (quoting RCW 9.73.030(1)(a)). A "communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." *Modica*, 164 Wn.2d at 88. Our Supreme Court concluded that, even if Modica had intended that his jail-recorded conversations be private, such expectation was not reasonable:

> First, we have already held that inmates have a reduced expectation of privacy. Second, both Modica and his grandmother knew they were being recorded and that someone might listen to those recordings. . . . He and his grandmother had to listen to an automated system's warning that the call will be "recorded and [is] subject to monitor at any time."
> [. . .]
> [B]ecause Modica was in jail, because of the need for jail security, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy.

Modica, 164 Wn.2d at 88-89 (internal citations omitted).

The jail phone system plays a recorded announcement to both the party dialing and the party receiving a phone call that all conversations are monitored. Maddaus was aware of this

fact: During a three-way phone call with Williams and Farmer, Maddaus stated, "Here's the deal, right? These F***ing phones are recorded all the way." 12 VRP at 1476. In a separate phone call, Maddaus spoke with Williams, who in turn handed the phone to Grimes, who then handed it to Leville. Maddaus argues that because the phone system did not replay the recorded message to Farmer, Leville, and Grimes, they did not consent to the State's recording these conversations.

This argument is not a persuasive reason for excluding these conversations under the Act. Regardless of who heard or did not hear the warnings, Maddaus, as well as the other parties he joined[24] into the conversation, had no reasonable expectation of privacy. *Modica*, 164 Wn.2d at 89. All parties knew that Maddaus was phoning them from jail. Because the reasonableness test is an objective one, we hold that any general expectation that jail-initiated phone calls would be private was not reasonable. *See Modica*, 164 Wn.2d at 89. In particular, before engaging Farmer in this phone call from jail, Maddaus expressly put him on notice that their phone conversation was being recorded. Williams, Leville and Grimes each knew that Maddaus was calling from jail; but even if they did not hear Maddaus's admonition to Farmer that the

[24] Maddaus cites *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980), to support his arguments that (1) "[a]n accused person has standing to object to the admission of any illegally recorded conversation, even if his or her privacy rights were not personally violated"; and (2) because certain parties to the recorded conversation did not hear the recorded "monitoring" message, Maddaus had standing to object to admission of these conversations on their behalf. Br. of Appellant at 45-47. We reject Maddaus's contention that he has standing to assert a violation of the Privacy Act on behalf of Williams, Leville, Grimes, or Farmer; moreover, the facts here show clearly that Maddaus invited these people into the conversation, knowing that the phone calls were being recorded. Thus, we do not further address whether their rights were violated.

conversation was being recorded, the participation of multiple parties diminished the privacy of this second call. *See State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004).[25]

Because none of the phone conversation participants had reasonable expectations of privacy, the conversations did not violate Washington's Privacy Act and Maddaus's counsel's performance was not deficient when he failed to object to the conversations' admission into evidence on these grounds. We hold, therefore, that Maddaus fails to establish that his counsel rendered ineffective assistance. *Strickland*, 466 U.S. at 687-88.

D. Detective Johnstone's Testimony

Maddaus next argues that he received ineffective assistance from his counsel when he failed to object to Detective Johnstone's testimony, which Maddaus claims was inadmissible hearsay that bolstered Abear's testimony. This argument fails.

First, Maddaus fails to show the deficient performance prong of the ineffective assistance counsel test because the challenged testimony was not hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Generally, hearsay is not admissible. ER 802. Here, the State asked Johnstone, "[T]he facts that [Abear] testified about, is that what you [previously] interviewed her about[?]" 8 VRP at 825-26. When Maddaus objected on hearsay grounds, and the trial court sustained the objection, the State rephrased the

[25] When determining whether an expectation of privacy is reasonable, we consider several factors, including but not limited to: (1) the duration and subject matter of the communication, (2) the location of the parties, (3) the potential presence of third parties, (4) the role of the interloper, and (5) the interloper's relationship to the nonconsenting party. *Christensen*, 153 Wn.2d at 193 (citing *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996)). Here, there was no reasonable expectation of privacy for several of these reasons, including the actual known presence and participation of third parties.

question to ask, "[T]he subject matter of your interview [with Abear], was it similar to her testimony here at trial?" Johnstone replied, "Yes, it was." 8 VRP at 826.

Defense counsel did not again object that this rephrased question and response involved hearsay because they neither elicited nor presented an out-of-court statement offered to prove the truth of Abear's testimony. Instead, the rephrased question and answer focused on whether there was overlap between the subject of Johnstone's interview of Abear and her trial testimony. Nor did this rephrased question and answer invite Johnstone to corroborate Abear's testimony. Because there was no hearsay involved, defense counsel's performance was not deficient for failing to object on this ground.

IV. JURY INSTRUCTIONS

Maddaus next asserts reversible error on several instructional grounds, none of which we find persuasive. Some issues he has preserved for appeal; some he has not. We address each in turn.

A. General Standard of Review

In general, jury instructions are proper if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Hayward*, 152 Wn. App. 632, 641, 217 P.3d 354 (2009). It is generally reversible error for the trial court to refuse a proposed instruction that states the proper law and that the evidence supports. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995); *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). We review de novo alleged errors of law in jury instructions. *State v. Porter*, 150 Wn.2d 732, 735, 82 P.3d 234 (2004); *Boeing Co. v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). We analyze a challenged jury instruction by considering the instructions

together as a whole and reading the challenged portions in context. *Hayward*, 152 Wn. App. at 642.[26] Failure to object below, however, usually waives an issue on appeal, including instructional error issues. RAP 2.5(a); *State v. Williams*, 159 Wn. App. 298, 312-13, 244 P.3d 1018, *review denied*, 171 Wn.2d 1025 (2011).

B. Lesser Degree Assault Instruction

Maddaus unsuccessfully argues that the trial court erred in refusing to instruct the jury on the lesser degree offense of third degree assault.[27] An instruction on an inferior degree offense is proper when

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). The State concedes, and we agree, that third degree assault is an inferior degree of second degree assault.

Our focus then is whether the evidence raised an inference that Maddaus committed *only* the lesser degree offense. *Fernandez-Medina*, 141 Wn.2d at 455. "[T]he evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina*, 141 Wn.2d at 456 (citing *State v.*

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[26] *See also State v. Teal*, 117 Wn. App. 831, 837, 73 P.3d 402 (2003) (citing *State v. Haack*, 88 Wn. App. 423, 427, 958 P.2d 1001 (1997), *review denied*, 134 Wn.2d 1016 (1998)), *aff'd*, 152 Wn.2d 333, 96 P.3d 974 (2004).

[27] Maddaus does not challenge the trial court's denial of Maddaus's request for an instruction on fourth degree assault.

Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). RCW 9A.36.031[28] provides, in relevant part, that a person commits third degree assault when he, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm, or causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. RCW 9A.36.031(1)(d), (f).

At trial, Maddaus testified that he grabbed the mace from Abear's hands and that it inadvertently went off, spraying them both. In his appellate brief, Maddaus denies that he assaulted Abear with a handgun or a paintball gun; he then argues that his trial testimony did not mention the use of any firearm or paintball gun against Abear. In short, Maddaus's theory of the case is that *there was no assault*, not that he committed only the inferior degree offense. Moreover, his argument relies entirely on the jury's disbelieving certain parts of Abear's testimony that pointed to second degree assault but accepting other parts of her testimony that would point to third degree assault. The Supreme Court previously rejected this analysis in *Fernandez-Medina*, 141 Wn.2d at 456 (The evidence must affirmatively establish the defendant's theory of the case; it is not enough that the jury might disbelieve the evidence pointing to guilt). Thus, we hold that the trial court did not err in denying Maddaus's request for an inferior degree instruction.

[28] The legislature has since amended RCW 9A.36.031 in ways that are not relevant to this case. Accordingly, we cite the current version of the statute, LAWS OF 2011, ch. 238, § 1; LAWS OF 2013, ch. 256, § 1.

C. Unanimity on Elements

Maddaus also argues that the trial court unconstitutionally relieved the State of its burden to prove the essential elements of each crime when it failed to instruct the jury that it must be unanimous about (1) the weapon used in the second degree assault sentencing enhancement, and (2) the victim in the first degree attempted kidnapping charge.[29] These arguments also fail.

Maddaus first argues that he was entitled to an instruction that the jury had to be unanimous about the weapon used in the second degree assault for the sentencing enhancement special weapon verdict because some jurors could have voted for the enhancement based on his assaulting Abear with mace and others could have focused on either the paintball gun or the handgun. This argument contravenes the clear jury instructions, which stated that Maddaus assaulted Abear with a "deadly weapon," defined as a "firearm, whether loaded or unloaded." CP at 434 (Instruction 18), 446 (Instruction 30). Because we presume the jury followed the trial court's instructions,[30] they could not have considered the non-firearm mace or paintball gun as deadly weapons.

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[29] Generally, when the State offers evidence of multiple acts, and any of those acts could support one count, either "the State must designate the acts upon which it relies to prove its case" or "the court may instruct the jury to agree unanimously as to which acts support a specific count." *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009) (citing *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984), *modified on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988)).

But a unanimity instruction is not required when the State offers evidence of multiple acts in a "continuing course of conduct." *State v. Crane*, 116 Wn.2d 315, 326, 804 P.2d 10 (1991). "A continuing course of conduct requires an ongoing enterprise with a single objective." *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). This determination requires a commonsense evaluation of the facts. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

[30] *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011).

Second, Maddaus argues that because the first degree attempted kidnapping charge did not name Abear as the victim, the jury could have convicted Maddaus of second degree assault based on his attempted kidnapping of Peterson instead of Abear. The record, however, does not support this possibility: During closing, the State argued,

> The judge also tells you what the completed crime of kidnapping in the first degree is. Keep in mind, ladies and gentlemen, the charge is attempted kidnapping. Jessica Abear was not kidnapped, but the evidence shows that that's what the defendant had in mind, and he took a substantial step towards the commission of that crime. . . . The issue is what did the defendant have in mind when he confronted, and I submit, tortured Jessica Abear.

17 VRP at 1992. We hold, therefore, that that Maddaus fails to show reversible error in the trial court's burden of proof instructions.

D. State's Burden To Prove Each Element

Maddaus next argues for the first time on appeal that (1) the trial court failed to define "deadly weapon" for his second degree assault charge, (2) the trial court gave an erroneous instruction on "substantial step" on his first degree attempted kidnapping charge, and (3) these errors unconstitutionally relieved the State of its burden of proof at trial. Br. of Appellant at 75, 77. He also argues that his counsel's failure to object below constituted ineffective assistance. These arguments also fail, both in meeting the RAP 2.5(a)(3) preservation exception and on the merits (which latter issue overlaps with the "manifest" component of the preservation exception test and the prejudice prong of the ineffective assistance of counsel test).

Due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. CONST. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jury instructions that relieve the State of its burden to prove every element of an

offense violate due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, such errors affect a constitutional right and may be raised for the first time on appeal if the defendant also shows the errors were "manifest" under RAP 2.5(a)(3).

> The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of *actual prejudice* that makes the error "manifest."

McFarland, 127 Wn.2d at 333 (emphasis added). Maddaus fails to meet this "manifest" prong of the RAP 2.5(a)(3) test.

1. "Deadly weapon"

As we have already discussed, the trial court adequately instructed that in order to convict on Count IV, the jury was required to find that "on or about November 13, 2009, [Maddaus] assaulted Jessica R. Abear *with a deadly weapon*." CP at 434 (Instruction 18) (emphasis added). The trial court also narrowed the jury's consideration of deadly weapon in Instruction 30 to a "firearm, whether loaded or unloaded." CP at 446 (Instruction 30). Again, we presume the jury followed these instructions.[31] Therefore, we hold that, in narrowing the jury's consideration to the firearm, the jury instructions did not relieve the State of its burden to prove Maddaus

[31] *Perez-Valdez*, 172 Wn.2d at 818-19.

assaulted Abear with a deadly weapon[32]; thus, Maddaus shows neither error nor prejudice.

2. "Substantial step"

Similarly, Maddaus fails to show that the trial court's instructions about the "substantial step" element of first degree attempted kidnapping relieved the State of its burden to prove each element of this crime. Br. of Appellant at 77. In addition, an instruction on the definition of "substantial step," Instruction 22 provided, "A substantial step is conduct that strongly *indicates* a criminal purpose and that is more than mere preparation." CP at 438 (emphasis added). Maddaus argues that this definition is a lower standard than that in *State v. Workman*, which stated, "[I]n order for conduct to be a substantial step it must be *strongly corroborative* of the actor's criminal purpose." *State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978) (emphasis added). Maddaus argues that "corroborative" is a stronger word than "indicates" and that "the" criminal purpose is a more narrow consideration than "a" criminal purpose. Br. of Appellant at 77-78.

Washington courts have used the terms "corroborative of" and "indicates" interchangeably without criticism; and Maddaus cites no cases to the contrary. *See, e.g., State v. Dent*, 67 Wn. App. 656, 660, 840 P.2d 202 (1992), *aff'd*, 123 Wn.2d 467, 869 P.2d 392 (1994)

[32] For the first time in his reply brief, Maddaus also argues that "[n]othing in this case established that the weapon allegedly used to assault Abear was a real gun, as opposed to a toy gun." Reply Br. of Appellant at 42. We do not consider an issue raised and argued for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Moreover, Maddaus provides no further argument or authority to support this claimed error. RAP 10.3(a)(6); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (courts need not consider issues unsupported by adequate argument and authority). Thus, we do not consider its merits.

(using "indicates a criminal purpose"); *State v. Aumick*, 126 Wn.2d 422, 427-28, 894 P.2d 1325 (1995) (using "corroborative of the actor's criminal purpose").

Furthermore, Maddaus incorrectly reads Instruction 22 in isolation, contrary to the well-settled rule that we must read jury instructions together as a whole. *Hayward*, 152 Wn. App. at 642; *State v. Teal*, 117 Wn. App. 831, 837, 73 P.3d 402 (2003). Instruction 20 provides, "A person commits the crime of attempted kidnapping in the first degree when, *with intent to commit that crime*, he or she does any act that is a substantial step *toward the commission of that crime*." CP at 436 (Instruction 20) (emphasis added). Read together, these two instructions clearly required the jury to find evidence demonstrating that Maddaus took a substantial step toward committing first degree attempted kidnapping in order to convict him of that charge. Thus, Maddaus cannot show deficient performance by defense counsel in failing to object to the trial court's proper instructions. We hold that the trial court's instructions did not relieve the State of its burden of proof and that defense counsel did not provide ineffective assistance in failing to object to these instructions.

V. PROSECUTORIAL MISCONDUCT

Maddaus next argues that the State committed various acts of prosecutorial misconduct during closing argument. He did not, however, preserve any of these arguments with timely objections below. Some he now casts in the context of ineffective assistance of counsel arguments. We address each of Maddaus's claims in each turn; none provide grounds for reversal.

A. Standards of Review[33]

A defendant has a fundamental right to a fair trial, secured by the right to counsel, guaranteed by the Sixth and Fourteenth Amendments and article I, section 22 of the Washington State Constitution.[34] *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Generally, a prosecutor has wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Nevertheless, prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The term "fair trial" implies a trial in which the prosecuting attorney does not throw the prestige of his public office or the expression of his own belief of guilt into the scales against the accused. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (citing *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011)). For example, the prosecutor should not use arguments calculated to inflame the passions or prejudice of the jury. *Glasmann*, 175 Wn.2d at 704.

A defendant must satisfy two requirements to prevail on a claim of prosecutorial misconduct: He must establish that (1) the prosecutors conduct was improper, and (2) the conduct was prejudicial in the context of the entire record and the circumstances at trial. *Thorgerson*, 172 Wn.2d at 438. To establish prejudice, the defendant must show a substantial

[33] We have previously stated the applicable standard of review for ineffective assistance of counsel claims. *See* n.18.

[34] U.S. CONST. amend. VI and XIV; WASH. CONST. art. I, § 22.

likelihood that the misconduct affected the jury verdict. *Glasmann*, 175 Wn.2d at 704 (citing *Thorgerson*, 172 Wn.2d at 438).

A party's failure to object to improper prosecutorial statements at trial constitutes a waiver on appeal unless that party shows the statement was "'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Even if the trial court could have cured the prejudice with a jury instruction, if the defense did not request such an instruction, reversal is not automatically required. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Rather, the burden on the defendant heightens to show that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 438.

This heightened standard of review requires the defendant to show that (1) no curative instruction would have cured any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that "'had a substantial likelihood of affecting the jury verdict.'" *State v. Lindsay*, 171 Wn. App. 808, ___, 288 P.3d 641, 650 (2012) (quoting *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012)). We assess the claimed misconduct by the effect *likely* to have flowed from it, focusing more on whether an instruction *could have cured* the misconduct. *Emery*, 174 Wn.2d at 762. In so doing, we inquire whether the misconduct engendered "'a feeling of prejudice'" that would have prevented a fair trial absent a curative instruction. *Emery*, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

B. Disparaging Defense Counsel

Maddaus argues, also for the first time on appeal, that the prosecutor infringed on his constitutional right to counsel by disparaging the role of defense counsel and impugning counsel's integrity when the prosecutor (1) claimed that defense counsel's investigator had been "duped," (2) compared defense counsel's argument to "the distractions that sometimes people create when they're passengers in a vehicle," and (3) stated that what the jury heard from the defense's witnesses were "the last effort to develop lies." Br. of Appellant at 50, 51. Maddaus further argues that he received ineffective assistance based on his counsel's failure to object to this alleged prosecutorial misconduct. Maddaus correctly notes that it is improper for the prosecutor to comment disparagingly on defense counsel's role or to impugn the defense lawyer's integrity. *Thorgerson*, 172 Wn.2d at 451.[35] But this did not happen here.

Here, the State neither disparaged counsel nor accused him of wrongdoing when it suggested that defense counsel's investigator had been "duped" into being Maddaus's agent. There was no insinuation of misconduct or lack of integrity on the part of defense counsel; nor did this statement impugn defense counsel. Rather, the statement focused on the defense investigator; and even then, it did not actually disparage him by suggesting that he had been "duped" by some external event or person. The same holds true for the prosecutor's second challenged statement—that defense's witnesses had engaged in a "last effort to develop lies." 17 VRP at 2077. This statement similarly did not call defense counsel's integrity into question.

[35] *Thorgerson* held it was improper for the prosecutor to describe defense counsel's tactics as "sleight of hand" because it "implies wrongful deception or even dishonesty in the context of a court proceeding." *Thorgerson*, 172 Wn.2d at 451-52.

Rather, the State was articulating reasons why the jury should find that the defense *witnesses* were not telling the truth.

The record does not support Maddaus's argument that the prosecutor committed misconduct in this way. In short, he shows no prejudice; thus, Maddaus also fails to establish both reversible error and ineffective assistance of counsel for failing to object to these comments.

C. "Poppycock," "Unreasonable," "Crazy," "Duped"

Maddaus next argues that the State committed prosecutorial misconduct during closing arguments by calling defense testimony "'poppycock,'" "'unreasonable under the law,'" and "'crazy,'" and suggesting that Maddaus had "'duped'" the defense investigator. Br. of Appellant at 49 (quoting 17 VRP at 1984, 2074). We find *State v. Copeland* instructive: There, the prosecutor told the jury, "[Y]ou'll find as a jury that [Copeland] lied when he took the stand," and he suggested that Copeland was "lying" when he made several other statements (based on contradictory testimony from other witnesses). *State v. Copeland*, 130 Wn.2d 244, 291-92, 922 P.2d 1304 (1996). Our Supreme Court held the prosecutor's argument was not improper because he was arguing inferences from the evidence; it also held that "a curative instruction would have neutralized any prejudice." *Copeland*, 130 Wn.2d at 291-92.

The statements at issue here were more flagrant and ill-intentioned than those in *Copeland*, but Maddaus fails to show that they rose to the level of being "so flagrant and ill-intentioned" that they, too, could not have been neutralized by a curative instruction. *Dhaliwal*, 150 Wn.2d at 578. Thus, we do not further consider the merits of his challenge for the first time on appeal.

To the extent that Maddaus also argues that his trial counsel was ineffective for failing to object to these comments, we note that defense counsel may have had strategic reasons for not objecting to these comments, such as preferring not to draw the jury's attention to them. *See Grier*, 171 Wn.2d at 32-33; *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) ("The decision of when or whether to object is a classic example of trial tactics.").

D. PowerPoint Slide

Maddaus also argues for the first time on appeal that (1) the State engaged in prosecutorial misconduct when it displayed a Microsoft PowerPoint slide containing a photograph of Maddaus wearing a wig police had found in his vehicle, the word "GUILTY" written beneath it, and other similar words surrounding it; and (2) his counsel was ineffective in failing to object. These arguments also fail.

Our Supreme Court recently reversed a guilty verdict and remanded for a new trial after the prosecuting attorney made a sequential electronic slide presentation to the jury graphically displaying his personal opinion that the defendant was "guilty, guilty, guilty" of the charged crimes. *Glasmann*, 175 Wn.2d at 699. The Supreme Court described these slides as follows:

> In one slide, the booking photo appeared above the caption, "DO YOU BELIEVE HIM?" In another booking photo slide the caption read, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Near the end of the presentation, the booking photo appeared three more times: first with the word "GUILTY" superimposed diagonally in red letters across [the defendant]'s battered face. In the second slide the word "GUILTY" was superimposed in red letters again in the opposite direction, forming an "X" shape across [the defendant]'s face. In the third slide, the word "GUILTY," again in red letters, was superimposed horizontally over the previously superimposed words.

Glasmann, 175 Wn.2d at 701-02 (internal citations omitted). Glasmann failed to object, just as Maddaus failed to object to here. *Glasmann*, 175 Wn.2d at 700, 702.

Nonetheless, on appeal, the Supreme Court held that the prosecutor's "including alterations of [the defendant]'s booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct." *Glasmann*, 175 Wn.2d at 714. The Court further noted, "[S]howing Glasmann's battered face and superimposing red capital letters" added to the prejudice. *Glasmann*, 175 Wn.2d at 708 (citing *State v. Gregory*, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006)). The Court believed there was a substantial likelihood that the misconduct affected the jury because "[t]he mental state required for the charged offenses, specifically intent, was critically important" and the nuanced distinctions posed a "serious danger that the nature and scope of the misconduct here may have affected the jury." *Glasmann*, 175 Wn.2d at 708, 710.

The circumstances in *Glasmann*, however, differed significantly from those here. Glasmann was charged with first degree assault, attempted first degree robbery, first degree kidnapping, and obstruction. *Glasmann*, 175 Wn.2d at 700. Glasmann did not deny culpability; rather, he disputed the degree of the crimes charged. *Glasmann*, 175 Wn.2d at 700. Maddaus was charged with first degree murder; but, in contrast with Glasmann, Maddaus adamantly denied culpability. Maddaus's theory of the case was that he did not commit the murder, not, like Glasmann, that he committed only a lesser degree of the charged crime.

Moreover, the center of this single slide included a photograph of Maddaus (not a mug shot, as in *Glasmann*) wearing a wig—to remind the jury that Maddaus had intentionally obtained a false passport and had been using a disguise on the days leading to his arrest. In contrast, nothing in the record here suggests that the State used this slide to trigger "an emotional reaction" from the jury, as was the case in *Glasmann*, where mulitiple PowerPoint slides

repeatedly displayed Glasmann's mug shot, displaying him as unkempt and bloody. *Glasmann*, 175 Wn.2d at 706; 710 n.4.

Applying the heightened standard of scrutiny for unpreserved errors, we hold that Maddaus has failed to show that a curative instruction would not have overcome any prejudicial effect from the State's use of this single slide showing him in a wig that he had used to evade arrest. Moreover, as with the previous claim, defense counsel could have strategically elected not to object to this slide to avoid emphasizing it further; this point, coupled with Maddaus's failure to show prejudice, defeats his ineffective assistance claim on this basis.

VI. WITNESS TAMPERING

Maddaus next argues that (1) his two witness tampering convictions, Counts VI and VII, based on his multiple contacts with Farmer to persuade him to provide a false alibi, constituted, "(at most) one unit of witness tampering" and, consequently, double jeopardy under the Fifth and Fourteenth amendments[36] and the Washington constitution, art. I, sec. 9; and (2) there was insufficient evidence to support his witness tampering convictions on Counts VI and VII because the State failed to prove that Farmer was a witness, was about to be called as a witness, or was in possession of information relevant to a criminal investigation at the time of the alleged tampering. Br. of Appellant at 54. The State concedes, and we agree, that these two counts constituted one unit of prosecution. We further hold that the evidence is sufficient to show that Farmer was a potential witness; therefore, Maddaus's challenge on this ground fails.

[36] U.S. CONST. amend. V; XIV.

A. Double Jeopardy; Single Unit of Prosecution

An appellant may raise a double jeopardy claim for the first time on appeal; and we review it de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006) (citing RAP 2.5(a)); *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (citing *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010)). A defendant may face multiple charges arising from the same conduct, but double jeopardy prohibits multiple convictions for the same offense.[37] *State v. Hall*, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010).

Washington's witness tampering statute provides in relevant part:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding . . . to:
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony.

RCW 9A.72.120(1), (a). Addressing this statute in *Hall*, our Supreme Court held that (1) "[a] unit of prosecution can be either an act or a course of conduct"; and (2) the evil the legislature has criminalized is the attempt "to induce a witness" not to testify or to testify falsely, rather than the number of attempts, "whether it takes 30 seconds, 30 minutes, or days." *Hall*, 168 Wn.2d at 731. We have similarly held that a defendant's numerous telephone calls to a potential witness to recant her testimony was a continuing course of conduct aimed at the same witness in a single proceeding, amounting to only one unit of witness tampering. *State v. Thomas*, 158 Wn. App. 797, 802, 243 P.3d 941 (2010). The State concedes, and we agree, that Maddaus's repeated phone calls to persuade Farmer to testify falsely constituted one unit of prosecution and should

[37] The Fifth Amendment of the United States Constitution and Washington Constitution article I, section 9 guarantee that "[n]o person shall be . . . twice put in jeopardy" for the same offense.

result in only one conviction for witness tampering based on his contacts with Farmer in order to prevent double jeopardy.[38]

B. Sufficient Evidence To Support Single Count

In determining the sufficiency of the evidence to support Maddaus's challenged witness tampering convictions, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Applying these standards here, we hold that the evidence is sufficient to show that Farmer was a potential witness.

Farmer had previously agreed to act as an informant for Thurston County and to perform three controlled buys; he had provided the drug unit with Maddaus's name, and he had called Maddaus on November 15, 2009, to purchase methamphetamine in a controlled buy. Police obtained phone records of all calls placed and received from Maddaus's cell phone, which included a record of his phone call to Farmer. We agree with the State that, in this context, Farmer was a potential witness by virtue of his prior arrangements with the police to set up a controlled buy with Maddaus and Farmer's subsequent phone calls to Maddaus's cell phone for

[38] We note that the legislature has since amended the tampering statute, adding subsection (3), which states, "For purposes of this section, each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120. LAWS OF 2011, ch. 165, § 3. Because the statute was amended after Maddaus attempted to persuade Farmer to testify falsely, it does not apply here.

this purpose on the days immediately preceding or following the murder. Taking this evidence in the light most favorable to the State, as we must, we hold that the evidence and the double jeopardy prohibition support a single conviction for witness tampering based on Maddaus's attempt to persuade Farmer to provide false testimony, namely *either* Count VI *or* Count VII, but not both.[39]

VII. SENTENCING

A. Firearm Enhancements

Maddaus next argues, for the first time on appeal, that his firearm sentencing enhancements on Counts I, III, and IV violated his due process rights because the fifth amended information charged him with only deadly weapon enhancements. We disagree.

When a defendant challenges the charging document for the first time on appeal, we liberally construe[40] the document in favor of validity. *State v. Witherspoon*, 171 Wn. App. 271, 294, 286 P.3d 996 (2012) (citing *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005)). We will find the charging document sufficient if the necessary elements appear in any form or, if by fair construction, we may find them on the face of the document. *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010). We review the information as a whole, according to common

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[39] Maddaus does not challenge his other two witness tampering counts on these grounds; nor do we address them. Thus, our holding here does not affect any witness tampering counts other than Counts VI and VII.

[40] As our Supreme Court recently explained, "Liberal interpretation 'balances the defendant's right to notice against the risk of . . . 'sandbagging'—that is, that a defendant might keep quiet about defects in the information only to challenge them after the State has rested and can no longer amend it.'" *State v. Zillyette*, 2013 WL 39460664 (2013) (quoting *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010)).

sense and including implied facts, to determine (1) whether the information reasonably apprised the defendant of the elements of the crime charged; and (2) whether the defendant can show that the inartful or vague language in the charging document actually prejudiced him if the information does not include all necessary elements.[41] *State v. Kjorsvick*, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991); *see also State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

We analyze a sentencing enhancement as if it were an element of an offense because the enhancement increases the sentence beyond the maximum otherwise authorized for the underlying offense. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). Thus, the State must include sentencing enhancements, such as deadly weapon and firearm allegations, in the information. *State v. Crawford*, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (State must set forth in information its intent to seek enhanced penalties); *In re Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981).

Here, the information alleged that (1) at the time Maddaus committed first degree murder and attempted kidnapping (Counts I and III), he "was armed with a deadly weapon, a firearm"; and (2) while committing second degree assault (Count IV), Maddaus "was armed with a deadly weapon, a firearm, to wit: a semi-automatic pistol." CP at 21-22. The information also cited

[41] Under the first analytical prong, if we can neither find nor fairly imply an essential element of the crime in the charging document, we presume prejudice and reverse without considering whether the omission prejudiced the defendant. *State v. Goodman*, 150 Wn.2d 774, 788, 83 P.3d 410 (2004). In such cases, we reverse the conviction even if the defendant had actual knowledge of all the essential elements of the alleged crime. *State v. Kjorsvick*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). But if the necessary facts appear, or are implied, in some form in the charging document, we then consider the second analytical prong, prejudice. *Goodman*, 150 Wn.2d at 788. Maddaus fails to meet this test here.

RCW 9.94A.533(3)[42] for Counts I and IV (murder and assault), giving Maddaus express notice that the State was seeking a firearm sentencing enhancement for those two counts. CP at 21-22. Although Count III of the information did not similarly cite this firearm sentencing enhancement statute,[43] the information expressly alleged that Maddaus had been armed with a firearm while he was attempting the kidnapping. Looking at the information "according to common sense, and includ[ing] facts which are necessarily implied," as we must on a first-time post-conviction

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[42] RCW 9.94A.533(3) provides in part:

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:
>
> (a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;
>
> (b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;
>
> (c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection.

[43] But it did cite the deadly weapon enhancement statute, RCW 9.94A.602, recently recodified as 9.94A.825. LAWS OF 2009, ch. 28, § 41.

challenge to the information, we hold that the information's allegation that Maddaus was armed with a deadly weapon, "a firearm," on Count III "reasonably appris[ed]" him that the State was seeking a firearm sentencing enhancement for this attempted kidnapping charge. CP at 22. *See Kjorsvick*, 117 Wn.2d at 109.

Furthermore, in contrast with *Recuenco*,[44] the jury instructions here defined "firearm" as "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." CP at 448 (Instruction 32). Each of the challenged special verdict forms also asked the jury to determine whether Maddaus was "armed with a *firearm* at the time of the commission of the crime." CP at 452, 455, 457 (emphasis added).

Contrary to Maddaus's focus on the "operative language of the [i]nformation,"[45] rather than on citation to a particular statutory authority, we conclude that the charging document reasonably apprised Maddaus that the State was seeking firearm sentencing enhancements and

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[44] In *Recuenco*, the information charged second degree assault committed with a deadly weapon, "'to—wit: a handgun'"; but the special verdict form asked the jury to find only whether Recuenco had been "'armed with a deadly weapon.'" The jury returned a special verdict finding that Recuenco had been armed with a deadly weapon while committing the assault; but the trial court imposed a firearm sentencing enhancement rather than a deadly weapon enhancement. *Recuenco*, 163 Wn.2d at 431-32. The Supreme Court vacated Recuenco's firearm sentencing enhancement, holding that (1) the trial court had erred in imposing a sentence enhancement that had not been charged and the jury had not found; and (2) the trial court had exceeded its authority in enhancing the sentence based on a fact not found by the jury. *Recuenco*, 163 Wn.2d at 442. The Court based its holding in part on (1) the trial court's failure to define "firearm" in the jury instructions, and (2) the lack of any jury finding that the defendant had been armed with a firearm during commission of the underlying offense. *Recuenco*, 163 Wn.2d at 431-32; *see also In re Pers. Restraint of Delgado*, 149 Wn. App. 223, 236-37, 204 P.3d 936 (2009) (applying *Recuenco* where information failed to allege firearm sentencing enhancements and jury instructions failed to define "firearm").

[45] Reply Br. of Appellant at 48.

that the charging document matched the special verdict forms, which clearly asked the jury to decide whether Maddaus had been "armed with a firearm," during the commission of Counts I, III, and IV.[46] CP at 452, 455, 457. Maddaus fails to show that the language in his fifth amended information actually prejudiced him. Accordingly, his claim fails. *See Kjorsvik*, 117 Wn.2d at 101-02.

B. Prior "Strike" Convictions

Maddaus next argues, for the first time on appeal, that the prosecution failed to prove his two prior "strike" convictions. Br. of Appellant at 97. This argument lacks merit.

To calculate a defendant's offender score and sentence properly, the Sentencing Reform Act of 1981, chapter 9.94A RCW, requires sentencing courts to determine a defendant's criminal history based on his prior convictions and the level of seriousness of the current offense. RCW 9.94A.505; *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The State must prove a defendant's criminal history by a preponderance of the evidence. *State v. Hunley*, 161 Wn. App. 919, 927, 253 P.3d 448, *aff'd*, 175 Wn.2d 901, 287 P.3d 584 (2012). The best evidence of a prior conviction is a certified copy of the judgment. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (quoting *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002)). It is the State's obligation to ensure that the record before the sentencing court supports the criminal history determination. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

[46] We also reject Maddaus's argument that a firearm enhancement cannot be imposed unless the State proved he had been armed with a working firearm. We have previously held that this language from *Recuenco* is non-binding dicta. *See State v. Raleigh*, 157 Wn. App. 728, 735, 238 P.3d 1211 (2010).

A defendant waives the right to object to inclusion of a prior conviction when he affirmatively acknowledges that the conviction was properly included in his offender score. *Ross*, 152 Wn.2d at 229-32. But a defendant's silence on the issue is not sufficient to constitute such a waiver. *Hunley*, 161 Wn. App. at 928-29.

Here, the State provided certified copies of Maddaus's prior judgment and sentences: A 1993 jury verdict of guilty for two counts of second degree assault while armed with a deadly weapon; and a 1995 guilty plea conviction for unlawful possession with intent to deliver while armed with a deadly weapon. Both offenses are "most serious offenses" under the POAA. RCW 9.94A.030(32)(b), (t). A "[m]ost serious offense" includes "[a]ny other felony with a deadly weapon verdict under RCW 9.94A.825." RCW 9.94A.030(32)(t).

Maddaus argues that his 1995 drug possession conviction was not a "'most serious offense'" under the POAA because he "pled guilty to the offense and the enhancement; thus, there was no 'verdict'," as required by RCW 9.94A.030(32)(t). Br. of Appellant at 100. In the alternative, he argues that his 1995 deadly weapon enhancement for this crime was entered "under [former] RCW 9.94A.125"[47], rather than RCW 9.94A.825, thus disqualifying it for consideration under the POAA. Br. of Appellant at 101. Maddaus's first argument lacks merit because a plea of guilty is equivalent to conviction and has the same effect as a jury verdict of guilty. *In re Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988). Maddaus's alternative argument also fails because the language from former RCW 9.94A.125 is identical to that in RCW 9.94A.825; and RCW 9.94A.030(32)(t) references former RCW 9.94A.125. These

[47] The statute was recodified as RCW 9.94A.825 in 2008. LAWS OF 2009, ch. 28, § 41.

portions of the SRA have changed only in their numbering, not in their substance. Thus, Maddaus's argument on this point also lacks merit.

C. POAA Sentence

Finally, Maddaus challenges his life sentence, arguing that (1) the classification of prior convictions as "elements" in some circumstances and "sentencing factors" in others violates his state and federal equal protection rights; (2) the trial court's imposition of a life sentence violated his Sixth and Fourteenth Amendment rights to a jury determination beyond a reasonable doubt that he had two prior qualifying convictions; and (3) his life sentence without the possibility of parole violates his state constitutional due process rights. Br. of Appellant at 107. These arguments also fail.

1. Equal protection

Maddaus argues that the POAA violates his state and federal equal protection rights because his prior convictions allegedly elevated the offense from one category to another. He argues that when proof of a prior conviction elevates a crime, (1) the State must prove the conviction beyond a reasonable doubt, but (2) the POAA violates equal protection because it permits the State to prove his prior crimes by a mere preponderance of the evidence. We disagree.

Equal protection guarantees that persons similarly situated with respect to the legitimate purposes of the law must receive equal treatment. *State v. Williams*, 156 Wn. App. 482, 496, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010); U.S. CONST. amend. XIV; WASH. CONST. art. 1, § 12. We recently analyzed the same issue in *Witherspoon*, holding that the defendant's equal protection challenge to his POAA sentence failed because there is a rational basis to distinguish

between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense. *Witherspoon*, 171 Wn. App. at 304-05; *see also State v. Langstead*, 155 Wn. App. 448, 454-57, 228 P.3d 799, *review denied*, 170 Wn.2d 1009 (2010); *Williams*, 156 Wn. App. at 496-99. Adhering to our rationale in *Witherspoon*, we reject Maddaus's equal protection challenge here.

2. Prior convictions

Maddaus next argues that the trial court violated his Sixth and Fourteenth Amendment rights when it failed to prove his prior qualifying convictions by a jury determination beyond a reasonable doubt. Again, we recently rejected this same argument in *Witherspoon*. We recognized that current Washington Supreme Court case law interpreting the POAA has "consistently continued to hold that a judge can determine a prior conviction for POAA sentencing purposes and that a jury determination is not required." *Witherspoon*, 171 Wn. App. at 317 (citing *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256–57, 111 P.3d 837 (2005); *State v. Mutch*, 171 Wn.2d 646, 659, 254 P.3d 803 (2011)). We further noted that all three divisions of the Washington Court of Appeals have also rejected this argument. *Witherspoon*, 171 Wn. App. at 317 (citing *State v. Rivers*, 130 Wn. App. 689, 692, 128 P.3d 608 (2005) (Division One), *review denied*, 158 Wn.2d 1008 (2006), *cert. denied*, 549 U.S. 1308 (2007); *State v. McKague*, 159 Wn. App. 489, 515–17, 246 P.3d 558 (Division Two), *aff'd*, 172 Wn.2d 802, 262 P.3d 1225 (2011); *State v. O'Connell*, 137 Wn. App. 81, 90–91, 152 P.3d 349 (Division Three), *review denied*, 162 Wn.2d 1007 (2007)). Again adhering to existing case law, we hold that Maddaus's argument also fails here.

3. Due process balancing test

Finally, Maddaus argues that the imposition of a life sentence without parole violates due process under article 1, section 3 of the Washington constitution when analyzed under the civil liberties deprivation test outlined by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).[48] We disagree.

In *State v. Heddrick*, our Supreme Court explicitly rejected the *Mathews* test for criminal matters. *State v. Heddrick*, 166 Wn.2d 898, 904 n.3, 215 P.3d 201 (2009). Instead, it applied the due process analysis found in *Medina v. California*, 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). *Heddrick*, 166 Wn.2d at 904 n.3 ("[T]he *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules.") (citing *Medina*, 424 U.S. at 334-35). Nevertheless, our Supreme Court did use *Mathews* to resolve a due process challenge in the context of assessing a witness's competency to testify, but only because the issue (witness competency) might "arise in a civil or criminal proceeding." *State v. Brousseau*, 172 Wn.2d 331, 346 n.8, 259 P.3d 209 (2011).

Maddaus's due process question focuses on the procedure for determining a criminal defendant's prior history under the POAA—an issue "that is unique to the criminal context." *Brousseau*, 172 Wn.2d at 346 n.8. Therefore, in light of our Supreme Court's limited application of the *Mathews* test in *Brousseau*, we decline Maddaus's invitation to apply the *Mathews* test

[48] In *Mathews*, the United States Supreme Court held that, in determining what process is due in a given situation, courts should weigh (1) the private interest at stake; (2) the risk of an erroneous deprivation of such interest through current procedures, and the probable value of additional or substitute procedural safeguards; and (3) the government interest, including the additional burden of added procedural safeguards. *Mathews*, 424 U.S. at 321.

here. Because he presents no other argument in support of his due process claim, we hold that he has failed to show that existing procedural safeguards under the POAA are insufficient.

VIII. Remaining Additional Grounds (SAG)

A. Request for New Appointed Counsel

Maddaus asserts that the trial court erred in denying his request to fire his attorney and for appointment of new counsel. We disagree.

A defendant has the right to retain his counsel of choice; denial of a request to retain new counsel may unlawfully deprive the defendant of that right. *State v. Chase*, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). But the right to retain the counsel of one's choice is not unlimited; instead, the request must be made within a reasonable time before trial. *Chase*, 59 Wn. App. at 506. Absent substantial reasons for delay, a late request will generally be denied, especially if a continuance may delay trial. *Chase*, 59 Wn. App. at 506. We review a trial court's denial of a motion to substitute counsel for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To determine whether the trial court abused its discretion in denying a defendant's request for substitute counsel, we consider the (1) extent of the alleged conflict, (2) adequacy of the trial court's inquiry, and (3) timeliness of the request. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

On the third day of trial, Maddaus asked for new counsel, stating,

> Yeah, at this time I'd like to fire my counsel. I need new counsel. I can't afford to hire [retained counsel] and continue to pay him like this. I've asked him to do several things. A letter, I don't know, somehow from me to Mr. Woodrow made it to the prosecutor's office. Now, it might be possible that Mr. Woodrow could have been the one to send that letter himself. I didn't do it.

3 VRP at 263-64. The trial court responded, "I am not going to allow it at this late date. . . . I have already ruled on the letter." 3 VRP at 264. Maddaus did not provide any new substantial reason to support his request for new counsel, especially in light of the lateness of his request three days into the trial. Thus, we hold that the trial court did not abuse its discretion in denying this request.

B. Judicial Bias

Maddaus also asserts that the trial court was biased against him and failed to act impartially because the trial court denied several of his counsel's requests to be heard outside the presence of the jury and "ma[de] a bunch of rulings all in favor of the state." SAG at 46. The record does not support these assertions.

We presume that a judge acts without bias or prejudice. *State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996). The law requires both actual impartiality and the appearance of impartiality of a judge. *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992). Having reviewed the record, we find no basis to support Maddaus's claim that the trial judge was either actually or apparently biased against Maddaus. *Dominguez*, 81 Wn. App. at 330.

C. Cumulative Error

Finally, Maddaus asserts that we must reverse his convictions under the cumulative error doctrine. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless, when the errors combined denied the defendant a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant, however, bears the burden of proving an accumulation of

error of such magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). Maddaus has failed to satisfy his burden of demonstrating an accumulation of errors sufficient to require a retrial on all counts; furthermore, most of his alleged errors considered individually have failed. Thus, the cumulative error doctrine does not apply.

We remand to the trial court to vacate either Count VI or Count VII because these two witness tampering convictions were based on a single unit of prosecution and should result in a single conviction at resentencing. We affirm Maddaus's other convictions and his firearm sentencing enhancements.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Johanson, A.C.J.

Johanson, A.C.J.

QUINN-BRINTNALL, J. (concurring) — I agree with the entirety of the majority opinion with the exception of its analysis that Robert Maddaus does not have the right for a jury to find whether he is a persistent offender subject to incarceration for life without the possibility of parole under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570. For the reasons stated in my opinions in *State v. Witherspoon*, 171 Wn. App. 271, 306, 286 P.3d 996 (2012) (plurality opinion), *review granted*, 177 Wn.2d 1007 (2013), *State v. McKague*, 159 Wn. App. 489, 525, 246 P.3d 558 (Quinn-Brintnall, J., concurring in part and dissenting in part), *aff'd*, 172 Wn.2d 802, 262 P.3d 1225 (2011), and *State v. Rudolph*, 141 Wn. App. 59, 72, 168 P.3d 430 (2007) (Quinn-Brintnall, J., dissenting), *review denied*, 163 Wn.2d 1045 (2008), I continue to question a trial court's constitutional authority to impose a sentence beyond that supported by a jury verdict based on a trial court's factual finding that a defendant is a persistent offender. But because of a key factual distinction between the present case and those considered in my dissenting analyses on this issue in the opinions referenced above, I conclude that any violation of Maddaus's jury trial rights in this instance is harmless and concur with the majority's result on the POAA issue.

In both *Witherspoon* and *McKague*, I discussed how the trial court's imposed sentence exceeded the maximum statutory penalty for the offense of conviction established by the legislature. In both cases, the defendant's "third strike" for purposes of the POAA involved a class B felony with a statutory maximum penalty of 10 years confinement. *Witherspoon*, 171 Wn. App. at 314 (defendant's third strike involved second degree robbery, a class B felony that normally carries a maximum penalty of 10 years confinement); *McKague*, 159 Wn. App. at 527 n.22 (Quinn-Brintnall, J., concurring in part and dissenting in part) (defendant's second degree

assault conviction, a class B felony, had a statutory maximum penalty of 10 years confinement). And in both cases the trial court sentenced the defendant to a sentence longer than the statutory maximum of 10 years confinement—life without the possibility of parole—without a jury finding that the defendant was a persistent offender beyond a reasonable doubt. *Witherspoon*, 171 Wn. App. at 314; *McKague*, 159 Wn. App. at 527 (Quinn-Brintnall, J., concurring in part and dissenting in part). In my view, this procedure does not comport with longstanding practice in Washington nor the Sixth Amendment's protections of a defendant's jury trial rights. *See, e.g.*, *Witherspoon*, 171 Wn. App. at 305-08. By imposing a sentence that exceeds the one supported by the jury verdict, as in *McKague* and *Witherspoon*, a defendant's Sixth Amendment right to have his sentence supported by a jury's verdict remains unfulfilled.

But here, a jury entered a guilty verdict finding Maddaus guilty of first degree felony murder. First degree felony murder is a class A felony. RCW 9A.32.030(2). The statutory maximum sentence for class A felonies is confinement for life. RCW 9A.20.021(1)(a). The trial court sentenced Maddaus to life without the possibility of parole under the POAA. Our Supreme Court has previously determined that in the context of the POAA, there is no significant difference between a life sentence with the possibility of parole and a sentence of life without the possibility of parole. *State v. Thomas*, 150 Wn.2d 821, 847-48, 83 P.3d 970 (2004); *State v. Rivers*, 129 Wn.2d 697, 714, 921 P.2d 495 (1996). Accordingly, in contrast with *McKague* and *Witherspoon*, the trial court here imposed a sentence within the permitted statutory maximum of

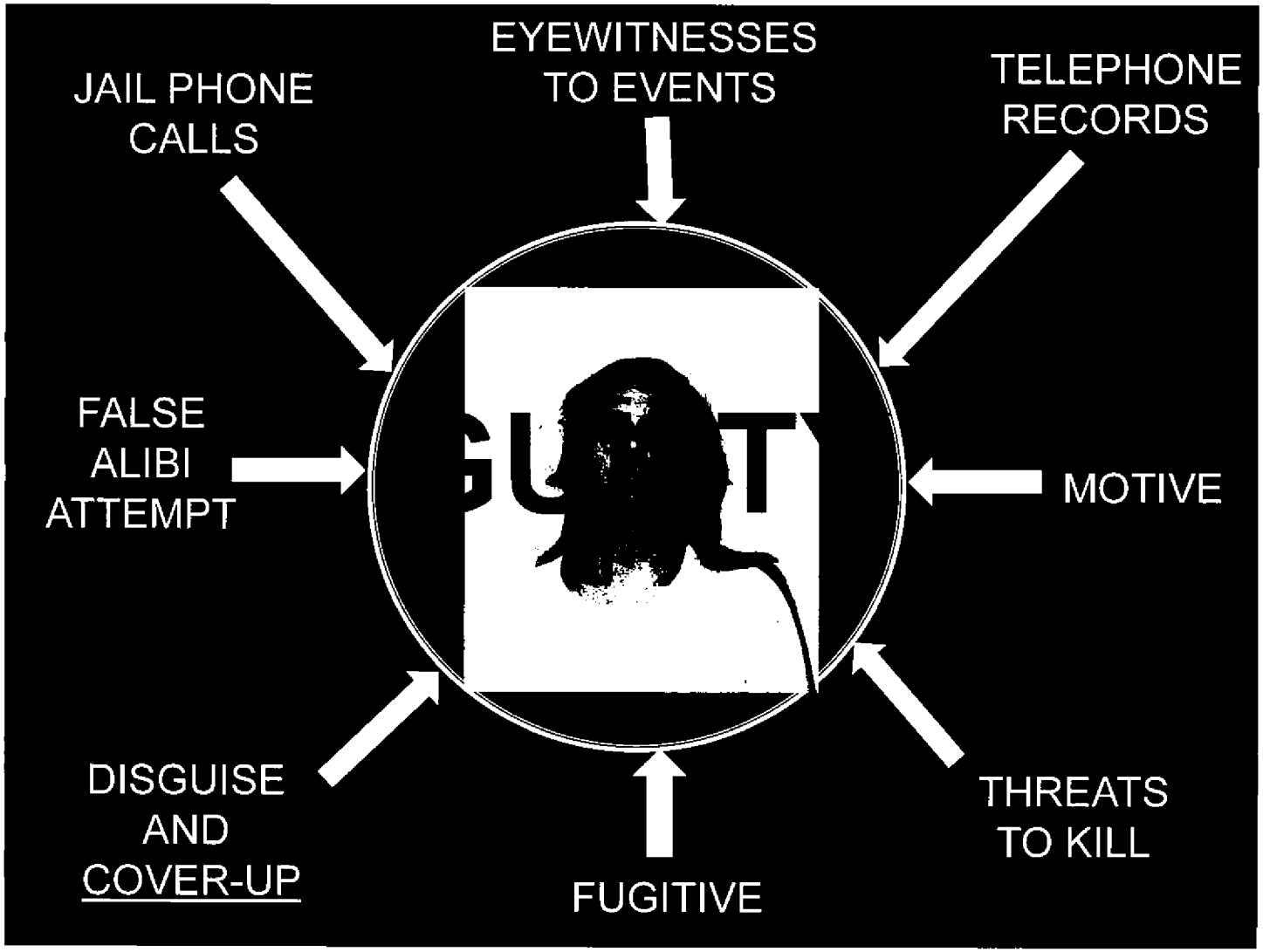
the offense of conviction. Therefore, Maddaus's sentence is supported by the jury's verdict and any violation of Maddaus's jury trial rights in this instance is harmless.

QUINN-BRINTNALL, J.

APPENDIX B

STATE'S CLOSING POWERPOINT SLIDES

CP 881 AND 978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EYEWITNESSES TO EVENTS
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FALSE ALIBI ATTEMPT
GUILT
MOTIVE
DISGUISE AND COVER-UP
FUGITIVE
THREATS TO KILL

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