NO. 43762-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LA'JUANTA LE'VEAR CONNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00435-8

BRIEF OF RESPONDENT

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SERVICE		
	Catherine E. Glinski Po Box 761 Manchester, Wa 98353 Email: cathyglinski@wavecable.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically*. . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 30, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITY

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether trial court acted within its discretion in allowing the State to exercise its final peremptory challenge after the jury had been sworn where the State initially relied on the trial court's representation that the juror had not been a witness in the attempted murder trial of the juror's son, and only later learned that the juror did testify and that the prosecutor in the prior case had essentially accused the juror of lying and witness tampering on cross-examination?

2. Whether Conner has met his burden of showing that Detective Davis's testimony regarding the use of a ruse, introduced during cross-examination, was improper opinion testimony that should be considered for the first time on appeal?

3. Whether counsel was ineffective for failing to object to the ruse testimony?

4. Whether the trial court properly gave a missing witness instruction as to Rachel Duckworth?

5. Whether the judge commented on the evidence by sustaining the State's objections to defense argument that was not based on the evidence or by striking the improper comments?

6. Whether the cause should be remanded with instructions to

correct the judgment and sentence? [Concession of Error]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

La'Juanta Conner was charged in Kitsap County Superior Court with twenty-six separate offenses based on a string of interrelated home-invasion robberies and burglaries in Bremerton and nearby unincorporated Kitsap County. The first six counts were based on offenses that occurred the day he was arrested, November 17, 2010:

1 Conspiracy to commit first-degree burglary

2 Second-degree unlawful possession of a firearm (a Hi-Point .40 revolver)

3 Possession of a stolen firearm (the Hi-Point)

4 Second-degree unlawful possession of a firearm (a Taurus .44 semiautomatic)

5 Possession of a stolen firearm (the Taurus)

6 Possession of marijuana

CP 208-12. The second four were based on a home invasion on Twelfth Street on September 9, 2010:

7 First-degree robbery of Robert Dato

8 First-degree robbery of Aaron Dato

9 First-degree burglary

10 Second-degree theft

CP 212-15. The third group involved a second home invasion of the same Twelfth Street residence on September 28, 2010:

11 First-degree robbery of Robert Dato

12 First-degree robbery of Aaron Dato

13 First-degree robbery of Jeffrey Turner

14 First-degree burglary

15 Second-degree theft

CP 216-20. The next three charges were related to a home invasion on Shore Drive, also on September 28:

16 First-degree robbery Brett Cummings

17 First-degree burglary

18 Third-degree theft from Cummings (GM)

CP 220-22. On the night of October 2-3, 2010, Conner participated in a burglary at the Weatherstone Apartments, resulting in the following charges:

19 First-degree burglary

20 Second-degree theft from Kimberly Birkett

CP 223-24. The final home invasion took place on the evening of November 3-4, 2010, at a home on Wedgwood Lane:

21 First-degree robbery of Aaron Tucheck

22 First-degree robbery of Keefe Jackson

23 First-degree burglary

24 Theft of a firearm

25 Second-degree theft of an access device, a debit card belonging to Ann Marie Tucheck

CP 224-28. Finally, a post-arrest search of the apartment of Conner's girlfriend, Rachel Duckworth, on November 19, 2010, resulted in Count 26, a charge of third-degree possession of stolen property. CP 228.

All burglary and robbery counts included a special allegation that

Conner or an accomplice were armed with a firearm under RCW 9.94A.602. All felony counts included special allegations of the multiple current offense aggravating circumstance under RCW 9.94A.535(2)(c). Counts 9, 14, 17 and 23 included special allegations of the aggravating circumstance that a victim was present during a burglary under RCW 9.94A.535(3)(u). CP 209-28.

After a trial, the jury acquitted Conner on Counts 6 and 26, and did not find that he was armed with a firearm as to Count 9. CP 302, 308, 312. On all other counts and special allegations, Conner was convicted as charged. CP 300-15, 325. The trial court imposed a standard-range sentence of 1148.5 months. CP 333.

B. FACTS[1]

1. September 15, 2010 – 704 Twelfth Street

Robert Dato lived in a rear ground floor apartment on Twelfth Street in Bremerton his stepbrother Thomas Harveson. 20RP 1020-1021.[2] His brother, Aaron Dato, was also intermittently staying there. 20RP 1022.

On September 15, 2010, Robert was sitting in a chair with his laptop and watching television. 20RP 1025. The outside door was open

[1] Because there are multiple witnesses with common last names, the State may refer to some of them by their first names for clarity. No disrespect is intended.

[2] The State will follow the numbering scheme for the transcripts set forth in Conner's brief.

to let in the air. 20RP 1025. Aaron was in the bedroom. 20RP 1027.

Robert heard a knock and saw a black guy with a mask and a black gun. 20RP 1026. He had a red bandana and braids. 20RP 1030. The man said, "Where is the shit." Robert thought he knew him, and told him to quit playing. 20RP 1026. The man just repeated, "Give me the shit." 20RP 1026. Robert realized that he did not know him, and realized he was being robbed. 20RP 1026. The robber pointed the gun at Robert and told him to get up. 20RP 1027

Robert put down the laptop and went with the robber into the bedroom. 20RP 1028. The robber went into the bedroom, and waved the gun around, and then pulled out the clip, looked at it, and put it back in. 20RP 1027. He again told him, "Give me the shit." 20RP 1028. Robert responded, "What are you talking about?" 20RP 1028. Robert sat on the bed and looked at his brother, and said they were being robbed. 20RP 1028.

The robbers took two 42-inch televisions, two Xboxes, a blackberry, his black Jansport backpack with his mechanic's tools in it, his wallet and $700 rent money. 20RP 1031-32. Robert was scared, and just wanted them to take the stuff and leave, so he would not get shot. 20RP 1029. While he was in the bedroom, he saw the second robber's hand, holding a silver gun. 20RP 1029. His arm looked like he was a light-

skinned black man. 20RP 1030. At some point, the first robber took off the bandana and tied it around his neck. 20RP 1030.

They stayed in the bedroom until they were sure that the robbers were gone. 20RP 1033. Then they went to his sister's house on Burwell. 20RP 1034. When they got there, they called 911. 20RP 1035. The police picked him up and took him back to his apartment. 20RP 1035.

Aaron, who was watching TV in the bedroom, heard the click-click sound of a gun, and got up and saw that Robert had a gun to his head. 21RP 1129-30. They threw Robert into the bedroom with him. 21RP 1130. He was not focused on what they looked like because he was "more focused on not trying to die." 21RP 1130. He was scared to death. 21RP 1134. They had bandanas on. 21RP 1131. He did not recognize any of them. 21RP 1132.

Bremerton Patrol Officer Aaron Elton responded around 10:55 p.m. 19RP 774-75. Elton met the Robert a few blocks away and drove him back to the apartment. 19RP 776. Dato described what had happened, and Elton started processing the scene. 19RP 777. The TV and some electronic game consoles were missing. 19RP 777. There was a wet boot print near the door, but Elton's camera malfunctioned and he was unable to photograph it before it dried. 19RP 778. It appeared to belong to an adult. 19RP 778.

2. September 28, 2010 – 704 Twelfth Street

On September 28, 2010, Robert was again sitting his chair, playing video games. 20RP 1036-37. Aaron and Harveson's brother Jeffrey were in the bedroom, also playing video games. 20RP 1037. The door was shut this time, and someone knocked. 20RP 1038. Robert looked out the peephole, but it was blurry, so he asked who it was. 20RP 1038. The visitor responded, "Chris." 20RP 1038. Robert did not know a Chris. 20RP 1038.

Chris said that Tom told him to come over. 20RP 1039. Robert cracked open the door to see who it was. 20RP 1039. They pushed the door open. 20RP 1039. There were three this time. 20RP 1040. He did not recognize the first one, but the second one was from the prior robbery. 20RP 1040. He did not see the third one. 20RP 1040. The first one had a purple bandana on, and the one who had the red bandana the last time now had a black bandana. 20RP 1040. He could tell it was the same robber because he had the same braids and again took his mask off. 20RP 1041. The second one was darker-skinned and had green shoes. 20RP 1041. The first was a lighter-skinned black man with a gap in his teeth. 20RP 1041. He was wearing a gray sweatshirt and jeans. 20RP 1042. They had the same guns as the last time. They again said "Give me the shit. Where is it at? You guys already know." 20RP 1042. So Robert went to the bedroom. 20RP 1043.

One had a smaller charcoal-colored gun that was not a revolver. 20RP 1043. The other had the black gun from the first robbery. 20RP 1043. They were waving the guns around. 20RP 1044. Robert was concerned he would be shot. 20RP 1043. The one with the gap tooth kept pacing and asking, "Where's the money." 20RP 1047. Robert heard one of them call another one Mook. 20RP 1016.

This time they took two 47-inch televisions, two Xboxes, an EVO phone and some money. 20RP 1044. They also took his laptop. 20RP 1045.

During the robbery, the building manager knocked on the door. 20RP 1048. The robbers grabbed Aaron and told him to tell the manager that Robert was not home. 20RP 1048. The manager left. 20RP 1049. After they left, Robert went to the manager's apartment and called 911. 20RP 1049.

Turner was was playing Xbox in the bedroom. 21RP 1109. Robert was in the living room. 21RP 1109. Aaron was in the kitchen washing dishes. 21RP 1111. He looked up and saw Aaron, with a black gun to his head. 21RP 1111-12. Turner was not familiar with guns; it looked like a "police gun" to him. 21RP 1112. Turner jumped up, dropping the game controller. 21RP 1112. He also kicked his phone and wallet under the bed. 21RP 1112. He could not describe the clothing the

robber wore. 21RP 1113. He was a black man with a mask on. 21RP 1113. All three were black, but one was lighter-skinned. 21RP 1113. The light-skinned one did not have a mask on. 21RP 1115. The lighter one could have been mixed-race. 21RP 1116. He did not know any of the robbers. 21RP 1117. The lighter one could have been Anthony Adams, but he was not sure. 21RP 1118. He heard one of them yelling "Mookie." 21RP 1124.

When the manager knocked on the door, and the robbers put a gun to Aaron's head and had him tell the manager to leave. 21RP 1137. They put a shirt over his face so he could not see anything. 21RP 1144. The gun was black. 21RP 1144. Aaron also heard someone say Mookie. 21RP 1142.

At 9:51 p.m., Bremerton Patrol Officer Larry Green was dispatched to the scene. 20RP 1007-08. Green approached across the parking lot from behind the building; Robert's apartment was on the rear ground floor. 20RP 1008-09. As he walked across the parking lot, there was a trail of debris including Xbox 360 controllers, wires, some CD cases and CD's leading up to the residence. 20RP 1008-09.

Green could not find any usable fingerprints. 20RP 1011. He was unable to locate any neighbors who had witnessed the event. 20RP 1012. They did not have any suspects. 20RP 1012. The victims could only

come up with the street name "Mook." 20RP 1012. Green did not know who Mook was at that time. 20RP 1012.

The victims reported that one of the robbers was a light-skinned black man with a gap in his front teeth. 20RP 1013. Another had three stars on his left hand or wrist. 20RP 1013. Two were armed with guns. 20RP 1013. Aaron Dato said the guns were smaller than ".45 1911-style pistols," and were automatics. 20RP 1015. He was told the robbers wore gloves. 20RP 1015.

3. September 28, 2010 – 211 Shore Drive

Brett Cummings lived in a studio apartment at 211 Shore Drive in Bremerton. 21RP 1171. The apartment was on the ground floor. 21RP 1172. Cummings, a musician, was returning from a day at the studio. 21RP 1173. He was carrying two saxophones when he walked into his apartment. He turned around and there were two guns pointed in his face. 21RP 1173. They had followed him into the apartment. 21RP 1173.

There were two men. 21RP 1174. One had a red cap with a black bill on and they had bandanas over their faces. 21RP 1174. A third man stayed by the door as a lookout. 21RP 1174. He was wearing darker clothing and a ball cap. 21RP 1174. They kept saying, "Where's the bud at." 21RP 1176. He told them he did not know what they were talking about. 21RP 1175. He took "bud" to mean marijuana. 21RP 1177. Then

one of them told the other to shut the door, which spooked Cummings. 21RP 1175. He was terrified. 21RP 1180. He said, "No way," and started walking toward the door. 21RP 1175.

The closest robber grazed Cummings's face with the gun and tried to stop him. 21RP 1175. Cummings pushed past him and got to the door. 21RP 1176. One of them jumped on him and hit him repeatedly in the head with the butt of the gun. 21RP 1176. He was bleeding, and screamed, "Armed robbery!" 21RP 1176, 1181. The robbers fled, grabbing Cummings's laptop on the way out. 21RP 1176.

The guns were like a Glock or 9mm that he had seen on television; he did not know much about guns. 21RP 1176. One of them was black; the other may have been two-toned. 21RP 1177. The two-tone gun may have been black and silver, but he was not sure. 21RP 1190.

They resembled the gun admitted into evidence. 21RP 1177.

The inside robbers were of average height and thinner build. 21RP 1178. They seemed to be in their early to mid twenties. 21RP 1178. One had a black hoodie on. 21RP 1179. One of the bandanas was red, the other black. 21RP 1179. He would not be able to identify them. 21RP 1180. The bandanas had the same pattern as the ones in evidence. 21RP 1192.

Bremerton Patrol Officer Jeff Inklebarger contacted the victim outside his apartment. 21RP 1166. He was upset and sweating and said he had been robbed. 21RP 1166. He said they took his Toshiba laptop and ran out. 21RP 1166. Inklebarger then checked the area for the suspects and their vehicle but was unable to locate them. 21RP 1167. The getaway vehicle was described as a small white SUV, possibly a Toyota. 21RP 1169.

4. October 3, 2010 – Weatherstone Apartments, 7654 Merastone

Around 7:30 p.m. on October 2, 2010, Kimberly Birkett and her son went over to house of a friend, Kesha Van Burien, to socialize. 22RP 1214-16. While she was there, Van Burien's friend Megan Duckworth, who Birkett did not know, came over and stayed for about 45 minutes. 22RP 1215, 1233.

When she was at Van Burien's house, Birkett left her purse on the coffee table or the floor. 22RP 1241. She did not take it with her when she went outside to smoke. 22RP 1241. There were no signs of forced entry at the apartment. 22RP 1241.

At some point, Van Burien left, because Megan had called from a 7-Eleven, saying she was having a fight with her boyfriend. 22RP 1216. Van Burien returned after about half an hour. 22RP 1216. Eventually Van Burien drove Birkett and her son home. 22RP 1216. They arrived

back home around midnight. 22RP 1216.

Van Burien went into the apartment first, and said, "Oh my God, Kim. What happened to your house." 22RP 1217. The house was in disarray. 22RP 1220. A bunch of food had been taken from the freezer and the refrigerator. 22RP 1223. She never told anyone she had money in the house, except for her close friend Van Burien. 22RP 1226. She may have told Van Burien she would hide money in the freezer, just in case the house caught fire. 22RP 1226.

Two wide-screen televisions were missing. 22RP 1220, 1228-29. There was $1300 cash from her income tax return missing from her bedroom nightstand. 22RP 1225-26. Also missing was $400 her son had saved from his allowance and gifts. 22RP 1229. They also took about 100 DVD's, his Xbox, 20 or so Xbox games and the controllers, and his sword collection, and a novelty pair of brass knuckles. 22RP 1229-30, 1232.

5. October 27, 2010 – 3121 Preble Street

On the evening of October 27, 2010, there was a home-invasion robbery at 3121 Preble Street in West Bremerton. 16RP 425. The uniformed officer at the scene, Sergeant Endicott reported that the victim, Lloyd Freeman, was sleeping. 16RP 425. He was not feeling well. 16RP 425. He was awakened when he was struck in the head with a pistol.

16RP 425. The suspects tied Freeman to a baby gate with a bathrobe belt, covered his head and beat him. 16RP 426. Then they ransacked the house and took various items including electronics and two marijuana plants. 16RP 426.

6. November 3, 2010 – 4412 Wedgwood Lane

Aaron Tucheck lived with his wife, Ann Marie, and his best friend, Keefe Jackson, on 4412 Wedgwood Lane. 22RP 1252, 1301. On November 3, 2010, he was in his room playing video games. 22RP 1302. Ann Marie and Jackson were asleep. 22RP 1302. There was a knock on the door. 22RP 1302.

Tucheck looked through the peephole, and there was someone in a camo jacket, which was zipped up to his nose. 22RP 1302. He did not recognize the man, but thought it could be a friend who had the same jacket. 22RP 1304.

He opened the door and saw three guns. 22RP 1304. There was the guy in the camo, and another in a gray hoodie. 22RP 1304. The third had a blue hoodie on. 22RP 1306. The ones in hoodies had bandanas on, possibly blue. 22RP 1308. The bandanas looked like the ones in evidence. 22RP 1329. The one in camo had a purple bandana that he was holding his revolver with. 22RP 1308. They looked like the bandanas that were admitted into evidence.

Tucheck could only see their skin around their eyes. 22RP 1310. The two in hoodies were darker brown. 22RP 1310. The one in camo was lighter brown. 22RP 1310. They were all pretty skinny. 22RP 1310. They were taller than Tucheck, who was 5'5". They seemed to be in their early 20's. 22RP 1311.

The one in camo's gun was a big silver revolver. 22RP 1308. It looked like the one admitted into evidence. 22RP 1308. The other guns were black and pretty large, like .45s, although Tucheck was not very familiar with guns. 22RP 1309. They looked like the other gun that was admitted into evidence. 22RP 1309.

The intruders cocked their guns, and Tucheck slammed the door shut and threw the bolt. 22RP 1304. Tucheck went to call 911, but before he could, they kicked in the door. 22RP 1305. Tucheck put his hands up. 22RP 1305. The one in camo told him to "sit the fuck down." 22RP 1305. He sat on the couch. 22RP 1305.

The one in blue woke up Jackson and brought him into the living room. 22RP 1307. The one in camo told them they had "jacked" someone named Black Chris. 22RP 1307. Neither Tucheck nor Jackson had any idea who that was. 22RP 1307. They told them to take what they wanted and go. 22RP 1307.

The blue and gray hoodies went to search the apartment. 22RP

1308. The gray hoodie came out and asked whose bedroom was on the right. 22RP 1308. Tucheck said it was his, and the gray told him to get up and walked him into the bedroom with a gun in his back. 22RP 1308. In the bedroom, he told Tucheck to open the safe. 22RP 1308. Tucheck opened it. 22RP 1311.

Ann Marie was still sleeping. 22RP 1312. After Tucheck opened the safe, the robber went to wake her. 22RP 1312. Tucheck told him not to; he said he would do anything they wanted, just not to touch his wife. 22RP 1312. The robber told him to turn around and walk. 22RP 1312. Tucheck hesitated because he did not want to leave Anne Marie, and the robber hit him in the back of the head with the gun. 22RP 1312. Tucheck had a bump on his head for a week. 22RP 1312.

They took his grandmother's ring from the safe, his PlayStation, some games for it, Ann Marie's phone, and the rent money, $250 in cash. 22RP 1312.

They went back out to the living room and he was again told to "sit the fuck down." 22RP 1314. Tucheck was afraid they were going to be shot. 22RP 1314. While they were sitting in the living room, the ones in hoodies came back from Jackson's room with items wrapped in a blanket, including Jackson's safe. 22RP 1315. Jackson's safe looked like the one admitted into evidence. 22RP 1315. They also had a shotgun Ann

Marie's father had given her. 22RP 1316.

They then told Jackson and Tucheck to "lay the fuck on the floor." 22RP 1316. They patted them down, and took Tucheck's wallet and the battery from Jackson's phone. 22RP 1316. Tucheck had hidden his phone in his crotch when they ordered them to the floor and they missed it. 22RP 1316.

Tucheck had a medical marijuana authorization. 22RP 1317. He did not know if the robbery was related to that. 22RP 1317. They took some marijuana from his room. 22RP 1320. It was about seven grams. 22RP 1320.

After the robbers left, Tucheck and Jackson woke up Ann Marie and they left. 22RP 1318. They got in the car and drove to his mother's house in Silverdale. 22RP 1319. He called 911 en route. 22RP 1319.

Tucheck did not know any of the robbers, but he knew Shantel Ross; she was one of Ann Marie's bridesmaids. 22RP 1319-20.

Keefe Jackson was awakened by a darker African-American wearing a hoodie and a bandana across his mouth. 22RP 1350. He told Jackson he was being robbed. 22RP 1351. Jackson thought it was a joke until he saw the gun. 22RP 1351. He was not familiar with handguns, but would guess it was a black 9mm. 22RP 1351. He was taken into the

living room. 22RP 1352.

There were three robbers. 22RP 1352. Jackson did not know them. 22RP 1352. One had a purple bandana and a camo jacket. 22RP 1353. He was lighter skinned, probably mixed, and had a revolver. 22RP 1353. It looked like the revolver admitted into evidence. 22RP 1353. One of them had unusual braids. 22RP 1365. The other had very closely cropped hair. 22RP 1365. The one with the camo jacket was originally wearing a purple bandana, but later he took it off and was holding his gun with it. 22RP 1366.

They told them to lay on the floor. 22RP 1355. Jackson was afraid they were going to shoot him. 22RP 1355.

They took his lockbox, his iPod. 22RP 1356. The "lockbox" was the safe that was in evidence. 22RP 1356. His rosary he made in his confirmation class was in it. 22RP 1356. The rosary admitted into evidence was his. 22RP 1357. The cell phone battery they took was an LG. 22RP 1370.

Earlier that day, Tucheck's younger brother had texted that he would be coming over. 22RP 1359. There was a banging on the door. 22RP 1359. Jackson was texting with a friend so he ignored it for a minute. 22RP 1359. The banging continued, and he looked out the peephole. 22RP 1360. There were two African-Americans on the porch.

22RP 1360. They stopped banging and then started doing something to the lock. 22RP 1360. Jackson went into his bedroom and loaded his shotgun. 22RP 1360. He waited a few minutes and when he went back to the door, they were gone. 22RP 1361.

Tucheck's brother arrived a few minutes later. 22RP 1361. After Jackson told him what had happened, he said there were still two guys outside. 22RP 1361. Jackson went outside and walked past them and looked at them. 22RP 1361. He could not say if they were the same ones who robbed them later that evening. 22RP 1361.

Ann Marie Tucheck was not awakened until the robbery was over. 22RP 1331. Before leaving the apartment, she checked her purse and discovered that her wallet, and makeup bag were gone. 22RP 1333. Her phone, which had been on the charger in the bedroom, was also gone. 22RP 1333. The phone admitted into evidence was hers. 22RP 1333. The serial number matched. 22RP 1333. She called Bank of America to cancel her debit card, and learned that it had already been used. 22RP 1336, 1346.

Ann Marie worked at Chuck E. Cheese at the time. 22RP 1331. Shantel Ross was a coworker. 22RP 1338. They had been friends for four or five years. 22RP 1338. Ross was one of Ann Marie's bridesmaids. 22RP 1338. Mook was Ross's boyfriend. 22RP 1338. They were

introduced at a Halloween party shortly before the robbery. 22RP 1338, 1340. Mook then introduced Ann Marie to his cousin Juanee. 22RP 1338.

Mook had weird braids and was wearing a blue hoodie. 22RP 1341. Mook's picture was set as the wallpaper for her phone when the police recovered it. 22RP 1342.

Patrol Deputy Jason Bowman responded to the robbery, which was in unincorporated Kitsap County northeast of Bremerton. 22RP 1252. The victim had asked to meet at his parents home in Silverdale. 22RP 1253. They seemed to be solemn and in shock. 22RP 1254. After speaking with them Bowman returned with them to Wedgwood Lane. 22RP 1254.

There appeared to have been a forced entry. 22RP 1254. The doorjamb was broken, and there was a muddy footprint on the door. 22RP 1254. The apartment looked like it had been ransacked. 22RP 1254.

When Bowman left Wedgwood Lane, he went to the 7-Eleven on Wheaton Way. 22RP 1258. Ann-Marie's debit or credit card was taken in the robbery. 22RP 1259. He had a report that it had been used at that 7-Eleven to purchase gas at the pump. 22RP 1259. There was a surveillance camera, but it did not appear to be pointed at the pumps. 22RP 1259.

7. Jeff Robb robbery

Christopher Devenere met Joe Perez, who went by the street name of Vegas, through Devenere's cousin Ricky Miller. 19RP 850-52. When they met, Perez told Devenere he had robbed the Red Apple a few years earlier. 19RP 853. He told him about other robberies. One was in California, where they stole some "weed." 19RP 854. Another was on Preble Street where they had run into a house and thrown a blanket over the resident's head and hit him, and took some plants. 19RP 854. Finally he mentioned one where they came in through the back door with a pipe to steal some weed, but they "got run out of the house." 19RP 854.

At the time they were at Devenere's friend Luke's house. 19RP 854. Perez, Miller, Devenere's friend Brice, and a black male he did not know were there. 19RP 854-55. Devenere was never introduced to him. 19RP 855.

The thwarted robbery sounded like what had happened to his friend Jeff Robb a few weeks earlier. 19RP 855. Robb was Devenere's best friend. 19RP 855. Robb had a legal marijuana dispensary, and grew it in his house. 19RP 856.

Devenere did not disclose his friendship with Robb to Perez. 19RP 856. A few weeks later, Miller called Devenere and told him that they were planning on robbing Robb again, and would take guns this time and

do whatever it took to complete the robbery. 19RP 859-60.

Devenere called Robb and told him what he had learned. 19RP 860. Devenere did not want to call the police because he did not like snitching. 19RP 860. Robb agreed, and got a shotgun and a security alarm. 19RP 860.

Devenere told Miller that they should not try to rob Robb again, because he had gotten an alarm and a gun. 19RP 861. Miller said they did not care, because they had guns and would do whatever it took. 19RP 861. After that, Devenere talked to Robb again. 19RP 861. They decided they needed to go to the police. 19RP 861. Devenere eventually talked to Detective Mike Davis, who told him that they could not do anything right away because they had procedures to follow. 19RP 861.

8. November 17, 2010 – Conspiracy and Arrest of Conner, Smith and Perez

Devenere called Detective Mike Davis on November 17, around 2:00 p.m., Davis received a call from a suspect, Chris Devenere. 16RP 426, 428, 431. They treated him as a confidential informant because he was afraid of retaliation. 16RP 426. Davis arranged to meet with Devenere and Kitsap Sheriff's Detective Birkenfeld at the Bremerton police station. 16RP 428. Birkenfeld was present because of the home-invasion robberies that had occurred in the unincorporated part of the county. 16RP 429. Devenere identified one participant as Joe Perez and

the other as a black male he could not name. 16RP 427, 429.

Later that day, Devenere talked to Miller, who said they were surveilling Robb's house. They were watching Robb's movements and were planning to hit him that night. 19RP 862. Miller said Perez had a couple of friends with him. 19RP 862. Devenere told Miller to tell them he had a better location to rob, and that they should not go to Robb's because it was not safe. 19RP 862. Then Devenere called Davis again. 19RP 862. He told Davis he wanted to set them up. 19RP 863.

Miller called Perez and told him he knew someone who had just picked up two pounds of weed. 19RP 863. He told Perez that Devenere was supposed to pick up an ounce, so the door would be open. 19RP 863.

The story was a fiction. 19RP 863. Devenere told them the house was on John Carlson Road. 19RP 863. Miller was not aware that Devenere was making it up. 19RP 864. The plan was that Devenere would be in a separate car, and lead them to John Carlson Road and flash his brake lights to indicate the house. 19RP 864. They would then take their guns and do the robbery. 19RP 864.

Devenere also advised them that Perez and his associates were planning another home-invasion robbery for that evening. The meeting place was the Fred Meyer/Azteca parking lot on Hwy 303 just outside the Bremerton city limits. 16RP 433. Davis had asked Devenere to ask the

suspects to meet there to make it easier to set up the surveillance. 16RP 434.

Devenere met with Perez and the others in the Azteca parking lot. 19RP 866. Devenere and Miller arrived in his red SUV. 19RP 866. Perez showed up in a black pickup with two black men. 19RP 867. Perez got out, and they discussed the plan. 19RP 868. The front seat passenger stayed in the truck but sat with his feet out the open door. 19RP 868. The passenger participated in the conversation. 19RP 871. They indicated their guns were loaded and ready to go. 19RP 871. They asked Devenere if he wanted to see the guns, and he said he did not. 19RP 872. Devenere excused himself, saying he had to pee, and called Davis and told them they were ready to go and were armed. 19RP 872. Devenere returned to the group and they got into their respective vehicles and proceeded up Wheaton Way until the police pulled over Perez's truck. 19RP 872.

After the meeting in the restaurant parking lot, the suspects proceeded north for about a mile, crossing McWilliams Road to near Bentley Road. 16RP 433, 436, 439. Bremerton Officers Elton and Meador followed in a patrol car. 16RP 436. Davis and Birkenfeld followed behind them. 16RP 436. They pulled the Colorado pickup over after they passed McWilliams Road. 16RP 437-38. Elton ordered the three occupants out of the truck. 16RP 440.

The driver was the owner, Jerrell Smith. 16RP 441. Conner was in the passenger seat. 16RP 441, 20RP 930. Perez was in the back seat. 16RP 441. The three were placed in separate patrol cars and taken to the station for interviews. 16RP 442.

Davis obtained a warrant to search the truck. 16RP 442-43. There was a black American Tourister bag in the bed of the pickup. 16RP 447. There were two blue bandanas in the bag. 16RP 448. Conner was also wearing a dark hoodie and jeans when he was arrested. 17RP 539. There was paperwork in the American Tourister bag with the name Trong Yang on it. 18RP 673.

Below the bandanas was a chrome Taurus[3] .44 magnum revolver. 16RP 448. The revolver had five rounds in it. 16RP 455. Davis ran a records check based on the Taurus's serial number, and it had been reported stolen by Brandon Bird. 16RP 456-57; 24RP 1403-05.

Also in the bag was a Hi-Point .40 semiautomatic pistol with the serial number filed off. 16RP 451. The Hi-Point had a magazine in it with 11 rounds in it. 16RP 453. Based on the number recovered by the lab, Davis was able to contact the owner, Woods, who indicated that it had been stolen.[4] 16RP 461.

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[3] RP says "Torres".

[4] Woods had kept the gun in his closet in his bedroom in his apartment in Lakewood.

The Taurus, the Hi-Point and the bandanas were found in the main compartment of the bag; nothing else was in that compartment. 18RP 722. The papers belonging to Trong Yang were in the side pouch. 18RP 722. They were unable to locate Trong Yang. 18RP 723.

In the back of the truck's cab, Davis found a black knit hat and glove. 16RP 466. In the glove box was a cell phone belonging to Ann Marie Tucheck. 16RP 467-68. When they powered up the phone, they discovered a picture of Kevion "Mook" Alexander, who had been implicated in the Wedgwood robbery. 16RP 469. Alexander's military ID card was also in the glove box. 20RP 941. Conner's auto insurance card was in the truck. 18RP 682. A backpack from cab of truck had cell phones in it. 18RP 684. There were also envelopes with Smith's name on them, and various items taken in the robberies. 18RP 684.

After finishing the search of the truck, Davis went to the station to interview Perez and Conner. 16RP 470. Perez declined to talk to the police. 20RP 958. Birkenfeld interviewed Conner. 20RP 958. Conner waived his rights and agreed to have the interview videotaped. 16RP 474.

24RP 1389. He did not notice it was missing until he moved in September 2011. 24RP 1391. The last time Troy Brown visited, he brought Conner and a light-skinned brown man with a gap in his front teeth. 24RP 1393. He was introduced as Chicago. 24RP 1393. That was the only time Chicago was there; Conner was there twice. 24RP 1393. He never showed the gun to either of them, but he had shown it to Brown. 24RP 1393. Conner went to the bathroom once. 24RP 1394. The bathroom was across from the bedroom. 24RP 1397.

Conner said that Alexander was like a little brother to him. 16RP 477. It also appeared that he was close friends with Perez and Smith. 17RP 540.

Conner stated he was living at Village Fair Apartments near the fairgrounds. 16RP 472. They asked Conner where they were going that evening, and Conner said to his apartment. 16RP 474. He said he was coming from Silverdale, which was northwest of his apartment. 16RP 474. He did not explain why he was south of his apartment. 16RP 475.

Conner said he had also been staying at his girlfriend Rachel Duckworth's apartment, located at 3439 Spruce Place. 16RP 475. That was off Highway 303 near Sylvan Way, or due south of the Fred Meyer/Aztec parking lot. 16RP 475, 575. Conner said he and Perez had been there before they were stopped. 16RP 476. Then he and Perez had picked Smith up at the Olive Garden in Silverdale, where Smith worked. 16RP 476. He said they were going back to Rachel's apartment but that he changed his mind. 16RP 476.

Conner initially denied that he had been at the Azteca parking lot. 16RP 478. After some follow-up questioning, he admitted to having been there. 16RP 478. He again initially denied meeting anyone there, but ultimately admitted to meeting some "white dudes" there. 16RP 479. He said that there had been a conversation with Perez and the two individuals

in the Tahoe. 16RP 479. Conner denied participating in it. 16RP 479.

Conner denied any involvement in the robberies. 16RP 480. He said he spent his time with his kids and girls. 16RP 480. Conner said he was not robbing or kicking anyone's door in. The detectives had not mentioned any doors having been kicked in. 16RP 480. Conner did not offer any serious denials. 16RP 481. The detectives' manner was quite serious, and Conner even laughed in response to some very serious questions. 16RP 481. He was specifically asked if he knew the names of anyone who was involved in the home-invasion robbery, and Conner began to laugh. 16RP 481. He did not provide any names. 16RP 482. He said he heard that the robberies were occurring from "word on the street" or from some high school kids. 16RP 482.

Conner denied having ever seen Smith or Perez handle the guns. 16RP 482. While Davis and Birkenfeld were interviewing Conner, Detective Bogen and Officer Elton were interviewing Smith, and they had already interviewed Perez. 16RP 482, 17RP 553. During the interview Bogen stepped out and told them that Smith had confessed. 16RP 483. Conner responded to this information by saying that Smith would not admit to something like that. 16RP 483.

At the station, Elton assisted Bogen with the interview of Smith. 19RP 769. Smith waived his rights and agreed to have the interview

videotaped. 19RP 770-71. Smith was reluctant to be interviewed. 19RP 771. He appeared nervous and concerned. 19RP 771. Smith provided information about and the names of people involved in the home-invasion robberies. 19RP 771. After the interview Smith agreed to go with Elton and Meador to identify the locations of the robberies. 19RP 772.

9. Subsequent Investigation

Davis did not speak to Smith that night. 16RP 484. He ultimately spoke to Smith twice. 16RP 485. The interview lasted several hours, during which time Smith gave them details about several robberies. 17RP 554.

Based on the information, they were able to identify additional suspects. 17RP 555. They were already aware that Alexander was involved in the Wedgwood robbery and the 704 12th Street robbery that occurred on September 15, 2011. 17RP 555. Smith was able to provide them with suspects for the 211 West Shore Drive and Weatherstone robberies. 17RP 555. The robberies and a second robbery at 704 12th Street had all been reported before that, but they had no suspects in the latter two cases up to that point. 17RP 555. Smith also gave them information about robberies or burglaries that had not been reported. 17RP 556. The information Smith related was consistent with the information they had. 17RP 557.

Davis again met with the prosecutor, Smith, and his attorney on January 26, 2011. 17RP 553. The second interview was held because they believed Smith had more information, which he did. 17RP 558. Davis was also able to corroborate the new information. 17RP 558.

Davis had a warrant for Alexander's arrest, but had not been able to locate him. 17RP 564. He eventually learned from Conner that Alexander was staying at Rachel Duckworth's apartment. 17RP 564, 18RP 699. Maintenance workers and Rachel's neighbors also described Alexander. 17RP 565. They contacted Rachel in the parking lot on November 19. 17RP 566. She was returning from work and was very hostile toward the police. 17RP 567, 20RP 975. She was loud and bordering on hysterical. 17RP 573. Rachel then went in and returned shortly with a child and drove away, talking on the phone. 17RP 574.

Davis obtained a warrant to search the apartment. 17RP 565. Luggage from back bedroom had Conner's name on it. 18RP 739-40. In the bedroom closet they found a black and gray Sentry safe,[5] which matched the description of the one taken in the Wedgwood robbery. 17RP 586. When Davis saw the safe, he applied telephonically to expand the warrant. 17RP 586. The safe had damage and pry marks around the lock. 20RP 969.

[5] RP says "Century."

A printout of Conner's booking information was in the safe. 18RP 708. According to the footer, it was printed from the Kitsap County website on November 18, 2010, a time when Conner was incarcerated. 18RP 708. Various documents with Smith's name on them were in the safe. 18RP 709-11. Numerous items from both Smith and Conner were in the safe. 18RP 711, 17RP 587. Two of the CDs from the safe had "Juanee" written on them with a Sharpie pen. 18RP 723. Also in the safe were identification cards, social security cards and birth certificate of Conner, and photos of Smith. 17RP 590. There was also small black vinyl zippered pouch identified by Keefe Jackson. 17RP 592.

Davis was familiar with Gregory "Skeet" Carter from executing a search warrant for evidence of drug dealing. 17RP 594. Carter gave him information relevant to the robbery investigation. 17RP 595.

Davis interviewed Alexander the day he was arrested for 10 to 15 minutes, and had a second, longer interview later. 18RP 721. Alexander corroborated details that Davis had learned from Smith and from his investigation. 17RP 562. He also provided information that Davis had not been aware of. 17RP 562. Davis was able to confirm these latter details. 17RP 562. Alexander gave information both about robberies that had participated in, as well as robberies and burglaries that he denied having joined in. 17RP 562-63.

Alexander indicated where a shotgun taken from the Wedgwood burglary had been discarded. 17RP 563. Davis checked the area, but did not find the gun. 17RP 563.

10. Jerrell Smith

Smith moved to the Bremerton Gardens apartments in August 2010. 24RP 1224. He lived there with Conner and Alexander. 24RP 1426. He moved out in early November of that year, and moved in with Leneka Summers. 24RP 1425. Smith met Summers through Troy Brown; she did Brown's hair. 24RP 1425. Summers was the mother of three of Conner's children. 24RP 1425. Smith worked a the Olive Garden at the time. 24RP 1426.

Smith also met Conner through Brown, and used to buy weed from him. 24RP 1427. He met Alexander through Conner. 24RP 1427. Alexander and Conner were pretty close. 24RP 1427. Conner referred to Alexander as his little brother. 24RP 1427. Smith had known Perez since high school. 24RP 1446. Perez dropped out when they were juniors, and Smith had not seen him since Conner reacquainted them in November 2010. 24RP 1446.

On September 17, 2010, he was at Rachel Duckworth's apartment. 24RP 1428. She was Conner's girlfriend at the time. 24RP 1428. Rachel, Conner and Perez were there. 24RP 1428. Smith left for work at the

Olive Garden in Silverdale around 3:40 p.m. 24RP 1429. It took about 10 to 15 minutes to get there. 24RP 1429.

Before he left for work, Conner was talking about doing a robbery later that afternoon. 24RP 1430. It was supposed to happen while Smith was at work. 24RP 1430. Conner and Perez asked to borrow his truck, and he agreed. 24RP 1430. Perez dropped him off at work. 24RP 1430.

Smith worked until about 11:00. 24RP 1431. Conner and Perez came and picked him up. 24RP 1431. They first gave a co-worker a ride home in Silverdale. 24RP 1431. Then they drove to Bremerton. 24RP 1432. Either Perez or Conner told him to drive to the Fred Meyer. 24RP 1432. They were going there to meet with the person who knew about the robbery. 24RP 1433. They had texted while he was at work and told him what was happening. 24RP 1433. After picking him up from work, Conner never said anything about wanting to go to Summers's or Rachel's houses. 24RP 1447.

When they got the Fred Meyer they met up with a red SUV. Two white males got out, and Conner got out and had a brief conversation with them. 24RP 1434. Conner got back in and said "This is going to be easy." 24RP 1434. The plan was to follow the SUV to the location, where they would flash their brake lights. 24RP 1434. The were following the SUV when they got pulled over. 24RP 1435.

Smith was driving. 24RP 1436. Conner was in the passenger seat; Perez was in the back. 24RP 1436. When the police pulled them over Perez said he had some marijuana on him and that he had a gun. 24RP 1436. Conner did not act surprised when Perez said that. 24RP 1436. Smith was not surprised either. 24RP 1438. The guns were not in the truck when he went to work. 24RP 1438.

He had seen the in evidence gun in Perez's possession at Summers's apartment. 24RP 1439. Perez had also left it in Smith's truck in the past; Smith gave it back to him. 24RP 1439. Smith had also handled the black gun, as had Conner, Alexander, and Brown. 24RP 1440. Smith first saw the gun in early September, when Brown had it. 24RP 1441. He had seen Conner with that gun more often than he had seen Brown or Alexander with it. 24RP 1442. Conner had it the most often. 24RP 1442. He kept it in the mini-fridge. 24RP 1443. Conner said Brown gave it to him in exchange for Conner paying to get Brown's car out of impound. 24RP 1444.

They were instructed to get out of the truck and were arrested. 24RP 1437. Smith was put in a patrol car by himself and taken to the Bremerton police station. 24RP 1437. He was interviewed, but was not truthful because he did not want to get anyone else in trouble. 24RP 1447.

Smith originally told the police both guns belonged to Perez.

24RP 1446. He was trying not to incriminate Conner. 24RP 1447. He was closest to Conner of any of the people involved. 25RP 5. He called Conner Jay in the video in hopes that they would not associate it with Conner. 25RP 6. He also made up two names, Antonio and New York. 25RP 6. Nicole was an alias for Rachel Duckworth. 25RP 7.

Smith told the police that both guns were Perez's because he did not want to get Conner in trouble. 25RP 51. No one ever asked Smith to implicate Conner. 25RP 53. They never asked him to implicate anyone in particular. 25RP 53.

a. 12th Street

Alexander and Conner told Smith about the first Twelfth Street robbery when he got off work that night. 25RP 13. They showed him the Xbox, television and phones they got. 25RP 14. They did not say that anyone else was involved in it. 25RP 13. Once, while they were driving through that neighborhood, Conner commented that it was where the robbery had been. 25RP 13-14.

Conner also talked about the second robbery at Twelfth Street. 25RP 14. The second time they got a couple of TV's, another Xbox, and some phones. 25RP 15. One of the phones was an EVO. 25RP 52. Conner, Alexander and Anthony Adams committed the second robbery. 25RP 15. He did not know if Brown was involved in either of the Twelfth

Street robberies. 25RP 52.

b. Merastone

Smith, Conner, Alexander and Adams were involved in the Merastone Lane burglary. 25RP 20. Smith was sitting in his room and Conner asked him if he wanted to go along for a "lick." 25RP 20-21. Conner said that no one would be home. 25RP 21. Conner said that Megan Duckworth had told him that. 25RP 21. The apartment was unlocked when they arrived. 25RP 22. Conner said that Megan knew the woman that lived there, and that she never locked her doors. 25RP 22. They took two televisions, an Xbox, games and DVD's and some brass knuckles. 25RP 22. They took the TV from the living room to Smith's apartment, and then sold it. 25RP 23.

They were looking for cash because Conner had heard that the victim did not use banks and had $5000 in cash. 25RP 24. Alexander took some money from the son's dresser. 25RP 24.

Smith originally told Bogen and Elton that he had not gone into the apartment. 25RP 29. That was not true. 25RP 29. He also did not implicate Conner because he did not want to get him in trouble. 25RP 29. They sold the property that they took. 25RP 29.

Smith knew Skeet through Conner. 25RP 29.

c. Wedgwood

Alexander, Conner and Brown were involved in the Wedgwood robbery. 25RP 30. He was not sure if Perez was there. 25RP 30. Alexander and Conner initially discussed it. 25RP 30. They were at Summers's apartment. 25RP 31. Conner and Alexander left for a few hours and then returned. 25RP 31. They had gone to scope out the apartment. 25RP 32. Conner said they would not be able to kick in the door, so they needed to get a crowbar. 25RP 31. They got one and then left again. 25RP 31. Alexander and Conner came back to Summers's house after the robbery. 25RP 32. Conner did not say much about it. 25RP 32. Conner did show Smith the loot: a safe, the victims' ID's, some marijuana, an iPod, a rosary. 25RP 33-34. Conner said there were three or four victims: three male, one female. 25RP 38.

Smith had seen Perez with a .44 magnum revolver. 25RP 33-34. It was the one in evidence. 25RP 34. The safe in evidence was the one Conner showed Smith. 25RP 34, 36. He saw the gun in the safe at Summers's apartment in early November. 25RP 36-37. A week or two later, Smith saw the safe in Rachel's closet. 25RP 36. Smith's ID was put in the safe by Megan after he was arrested. 25RP 35. Rachel and Megan were sisters. 25RP 35.

Smith also saw Alexander and Brown after the robbery. Alexander

also came back to Summers's apartment. 25RP 37. Alexander had a stolen cell phone. 25RP 39. He might have taken a picture with it. 25RP 39. He put it in the safe, and later put it in a backpack. 25RP 39. The phone and the backpack were the ones in evidence. 25RP 42.

He saw Brown later in the evening. 25RP 37. He did not see Perez. 25RP 37. Brown, Alexander, Conner and Smith went to a 7-Eleven and used one of the victims' debit card to buy gas. 25RP 38.

Megan and Conner went to high school together. 25RP 38. Smith did not know if they dated, but believed they had been intimate. 25RP 39. They had a friendly relationship. 25RP 52. She would lend him her car if he needed it. 25RP 52. She came over and cleaned their apartment once. 25RP 53.

Smith heard Conner talking to Ross about the Wedgwood robbery on the ferry. 25RP 43. He did not remember what Conner said. Smith told Davis that the robbers were wearing what they always wore: sweatshirts and dark clothing. 25RP 50.

d. Shore Drive

Alexander, Adams and Conner were involved in the Shore Drive robbery. 25RP 44. They came back to Smith's apartment afterwards. 25RP 44. Conner and Alexander were living there as well at the time. 25RP 45. Conner said it did not go well; the victim, whom he described

as a balding heavy-set twenty-something, was home. 25RP 45. The victim started yelling for help. 25RP 48. Alexander punched the victim in the stomach, but it did not faze him. 25RP 49.

11. Kevion Alexander

Alexander lived with Summers for several months up until November 2010 at the Village Fair Apartments. 26RP 1530. Conner and Conner and Summers's children also lived there. 26RP 1530. Before that Alexander lived with Smith and Conner at Bremerton Gardens. 26RP 1531. His nickname was Mook. 26RP 1531. He had star tattoos on his left hand. 26RP 1531.

Alexander met Conner in late 2009 through Josh Adams. 26RP 1533. He referred to Conner as his big brother. 26RP 1533. Alexander mostly got involved in burglaries through Conner and Conner's cousin Anthony Adams, a.k.a. Chicago. 26RP 1534.

The victims were not random. 26RP 1536. Someone in the group knew them in each case. 26RP 1536. Alexander was closer to Conner than he was to any of the others. 26RP 1536.

a. Twelfth Street

Alexander participated in the robbery at Twelfth Street. 26RP 1537. The first robbery was a few weeks after he returned from Arizona on September 5. 26RP 1538. The first involved Adams, Conner, Brown

and Alexander. 26RP 1539. They drove to the robbery in Conner's blue Buick. 26RP 1540. Conner and Adams went inside. 26RP 1540. Alexander and Brown waited in the car. 26RP 1540. The door was open when they arrived. 26RP 1544. From the car, Alexander could see the kitchen and someone sitting in the living room, and then they went into the back. 26RP 1541, 1544.

Conner and Adams had on black hoodies, and Adams, who usually wore a purple bandana was wearing Alexander's red one. 26RP 1546. Conner had a black or dark blue bandana. 26RP 1546. They picked the location because Conner's friend Amber said they had drugs and cash in the house. 26RP 1547. They expected to find a couple pounds of marijuana. 26RP 1547. Conner had bought some pills from one of the residents. 26RP 1547. Most of the robberies started that way. 26RP 1547. They would buy some drugs, and then come back and rob the seller. 26RP 1547. Conner knew Tom who lived there. 26RP 1547. The plan at Twelfth Street was to quickly go in, steal some ecstasy, and leave. 26RP 1548. However, Tom was not there, another male was. 26RP 1548. He had claw tattoos on his hands. 26RP 1549.

The bandana colors were gang-related. Adams and Conner wore black for the Gangsters of Disciples, or GD. 26RP 1550. Adams also had a purple bandana that he wrapped around his gun, a Glock 9. 26RP 1550.

The bandanas in evidence were the ones they wore. 26RP 1551. They were not the ones they wore for the first Twelfth Street robbery, however. 26RP 1551. They were similar. 26RP 1552. Both Adams and Conner were armed during the first robbery. 26RP 1552. Alexander had a gun in the car as well. 26RP 1552. Conner had his .40, Adams had his Glock, and Alexander had his revolver. 26RP 1553. The Glock was a dark charcoal gray; the top was a metal gray, so it was two-toned. 26RP 1553-54. Conner's gun was a black Hi-Point .40. 26RP 1553. Alexander had a silver revolver. 26RP 1554. The .40 in evidence was Conner's. 26RP 1554. The Glock was smaller than the Hi-Point. 26RP 1555.

They were in the apartment for five to ten minutes. 26RP 1555. There were two occupants. 26RP 1586. They took some TV's and an Xbox. 26RP 1555. Conner carried the stuff out while Adams stayed in the apartment. 26RP 1556. The TV's were approximately 44-inch flat-screens. 26RP 1557. Conner pulled his bandana off when he was taking the stuff out. 26RP 1557. They sold the property to Skeet. 26RP 1561.

b. Shore Drive

They went to the Shore Drive robbery in Adams's Tahoe. Michelle was driving, and Adams was in the front. 26RP 1564. She was a friend of Adams, and had told them that the victim, Chris, had weed. 26RP 1565, 1580. He was supposed to have a few pounds of it. 26RP

1565. Alexander and Conner were in the back. 26RP 1564. When they arrived, Chris's truck was not there, so they left. 26RP 1565. Michelle said he might be at band practice. 26RP 1565. They later returned a few hours later and he was just getting home; Michelle pointed him out. 26RP 1567, 1580-81. They followed Chris from his car into his apartment. 26RP 1563, 1567.

Alexander was wearing a hoodie and a red bandana. 26RP 1567-68. Alexander's hair was shorter and braided like backwards cornrows. 26RP 1575. Adams had a purple bandana, a NASCAR jacket, and a White Sox baseball cap on. 26RP 1567, 1584. Adams had a gap in his front teeth. 26RP 1582. Conner had on a black or blue hoodie and black or blue bandana. 26RP 1567. Adams had his Glock, Conner had his .40, and Alexander had a revolver. 26RP 1570.

When he went into the apartment, Chris left his door open, so Alexander and Adams followed him in. 26RP 1571. Adams cocked his gun and pointed it at the victim. 26RP 1577. Alexander asked him where the weed was. 26RP 1573. Adams said to shut the door. 26RP 1577. When he saw them, Chris tried to run out of the apartment, and Adams started hitting him with his gun. 26RP 1571. Chris grabbed the door frame, and Conner hit him. 26RP 1571. He was big, and when he charged, Alexander who was small, moved out of the way. 26RP 1572.

Chris was yelling for help, so Alexander and Conner ran. 26RP 1573. Adams followed, with a laptop. 26RP 1573.

c. Twelfth Street Part 2

After the Shore drive robbery, they returned to Twelfth Street again, that same night. 26RP 1583. Amber had told them that Tom had "reupped" and had a large quantity 26RP 1585. They left the Tahoe, and took Conner's Buick again. 26RP 1583. Alexander, Conner and Adams all went in this time. 26RP 1583. Adams had changed into a hoodie and a knit cap. 26RP 1584. The knit cap was like the one in evidence. 26RP 1585. Adams had his Glock, and Alexander had Conner's Hi-Point. 26RP 1591.

There were three occupants this time. 26RP 1586. They knocked on the door, Adams showed his face and someone opened it. 26RP 1586. They pushed the door open and went in. 26RP 1586, 1589. They moved the occupants into the bedroom. 26RP 1589. They took some pills, the TV's and Xboxes and an EVO phone. 26RP 1590, 1592. Alexander stood in the kitchen to keep watch, and Adams stayed in the room with the occupants while Conner took the stuff. 26RP 1592. While they were there, someone knocked on the door. 26RP 1593. Conner brought one of the occupants out and put a gun to his head, and told him to tell the caller to go away. 26RP 1593-94. After he left, they gathered the stuff and left

too. 26RP 1596. During the robbery, Adams said Alexander's nickname, Mook, several times. 26RP 1597. After the robbery, they went to Bremerton Gardens, where they saw Smith. 26RP 1598.

d. Merastone

No one was home during the Weatherstone burglary on Merastone Lane. 26RP 1601. They initially gathered at Summers's apartment. 26RP 1601. Their friend Megan Duckworth told them that the occupant was drunk at Kesha's. 26RP 1612. Megan took her keys and unlocked the door for them and then returned the keys. 26RP 1612. Connor and Megan were good friends, and occasionally had a sexual relationship. 26RP 1614. Megan was Rachel's older sister. 26RP 1614. Rachel was Conner's girlfriend. 26RP 1614. Megan had told Conner that there was supposed to be money in the freezer. 26RP 1615.

Conner had asked Alexander to sell some weed for him while they did the burglary. 26RP 1601. The sale was at a convenience store across the street. 26RP 1601. Alexander caught up with them while it was in progress. 26RP 1601. When He got there, Smith's truck was parked outside. 26RP 1602. Conner's car was there too. 26RP 1604. Conner and Smith were carrying a TV down the stairs. 26RP 1602. Adams was in the apartment. 26RP 1604. The apartment already looked trashed when Alexander got there. 26RP 1604. There was supposed to be money in the

freezer, but they did not find out. 26RP 1605. Alexander went out on the balcony through the sliding glass door to see if anything was out there. 26RP 1606.

Alexander found a small box with $100 in it in the child's room. 26RP 1609. They also took a PlayStation and two TV's. 26RP 1610-11. They sold the large TV from the living room. 27RP 1623.

e. Wedgwood

They believed that there was cash and marijuana at the apartment. 27RP 1626. They got the information from their friend Shantel Ross. 27RP 1627. Ross's coworker from Chuck E. Cheese lived there. 27RP 1627. The robbery was planned by Ross, Alexander, Conner, Adams, Brown and Perez. 27RP 1627. They originally just planned a burglary. 27RP 1628-29.

The first time Alexander, Conner, Ross and Adams went, there was no answer at the door. 27RP 1629. They decided to get a crowbar and come back. 27RP 1629. They went to Summers's house and got one. 27RP 1631. When they came back, someone came out of the house. 27RP 1629. Conner tried to jimmy the door, but some maintenance workers noticed them, so they left. 27RP 1630, 1633. He was wearing his hair in plaits that day. 27RP 1634.

After that they decided to come back after dark and rob them.

27RP 1635. They went back to Summers's and got ready. 27RP 1635. Brown drove his Black Suburban, and Alexander, Conner, Ross and Perez went along. 27RP 1638. Alexander had a gray hoodie and jeans on. Perez had a camo jacket and Conner had a black hoodie. 27RP 1638. Alexander and Connor wore bandanas but Perez did not. 27RP 1639. Perez had a bandana wrapped around his gun hand. 27RP 1675. All the bandanas were blue; they had just bought them and wore blue ones so the victims would associate them with the Crips. 27RP 1676. They were not actually associated them; it was a ruse to make them harder to identify. 27RP 1676. Alexander had Adams's Glock, Conner had his .40, and Perez had a .44 revolver. 27RP 1639-40. The revolver was black with a gray rubber grip. 27RP 1640. It was the revolver in evidence. 27RP 1640.

Ross went in first to buy some weed to make sure they had some. 27RP 1640. After she came out, she left with Brown and Adams, who were supposed to wait for them in a nearby park. 27RP 1641. Perez, Alexander and Conner went to the apartment. 27RP 1641.

They knocked on the door, and an occupant opened it. 27RP 1642. When he saw their guns, he shut the door. 27RP 1642. Perez kicked the door in, and they entered the apartment. 27RP 1642. There were three men in the apartment, and a woman who was sleeping. 27RP 1644.

Alexander took a s few hundred dollars from the kitchen drawer. 27RP 1645. He took the woman's cell phone. 27RP 1645. It was the phone in evidence. 27RP 1654. Alexander later took pictures of himself with the phone. 27RP 1654. They instructed the males to lay on the living room floor. 27RP 1646.

Alexander asked the victim to come and open the safe in the master bedroom. 27RP 1648. After he opened the safe, Alexander took a shogun from the closet, and a small bag of marijuana. 27RP 1648. The shotgun looked old-fashioned. 27RP 1653. They took the safe, some pipes and a rosary that were in the safe. 27RP 1653. The safe was the one in evidence. 27RP 1656. They took the victims' wallets. 27RP 1659. The also took a second shotgun. 27RP 1660. Both Alexander and Conner were much darker-skinned than Perez. 27RP 1662.

They ran out and Brown was not there. 27RP 1664. They went and hid in a ditch and Conner called Adams. 27RP 1664. They showed up a minute later and they went to Josh Adams's house in Erlands Point. 27RP 1664. Josh's brother's girlfriend was there. 27RP 1665. Alexander decided they would not be able to do anything with the longer shotgun, so he threw it into some bushes near the apartment. 27RP 1666-67. After he learned there was a warrant for his arrest, Alexander gave the other shotgun away. 27RP 1667.

After leaving Josh Adams's apartment, they went to Brown's house, and then he, Brown and Conner went to Summers's house. 27RP 1669. They met up with Smith there. 27RP 1670. They went to the 7-Eleven and used the victim's card to get gas. 27RP 1671.

Brown gave the gun to Conner to pay for some property he broke. 27RP 1683. The .44 revolver was originally Adams's, but Perez used it most of the time. 27RP 1684. He offered it to Alexander, but he thought it was too big. 27RP 1684.

12. Defense

Summers, Megan Duckworth, and Ross testified on Conner's behalf and generally denied any knowledge of Conner being involved with any guns or robberies. 30RP 1963-2006, 32RP 2271-92. Conner also testified to similar effect. 30RP 2018-2255.

III. ARGUMENT

A. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO EXERCISE ITS FINAL PEREMPTORY CHALLENGE AFTER THE JURY HAD BEEN SWORN WHERE THE STATE INITIALLY RELIED ON THE TRIAL COURT'S REPRESENTATION THAT THE JUROR HAD NOT BEEN A WITNESS IN THE ATTEMPTED MURDER TRIAL OF THE JUROR'S SON, AND ONLY LATER LEARNED THAT THE JUROR DID TESTIFY AND THAT THE PROSECUTOR IN THE PRIOR CASE HAD ESSENTIALLY ACCUSED THE JUROR OF LYING AND WITNESS TAMPERING ON CROSS-EXAMINATION.

Conner argues that the trial court abused its discretion in allowing the State to exercise its final peremptory challenge after the jury had been sworn. Conner fails to show a material departure from the statute and rule governing jury selection, where the State initially relied on the trial court's representation that the juror had not been a witness in the attempted murder trial of the juror's son, and only later learned that the juror did testify and that the prosecutor in the prior trial had essentially accused the juror of lying and witness tampering on cross-examination.

The standard of review is abuse of discretion. *State v. Williamson*, 100 Wn. App. 248, 253, 996 P.2d 1097 (2000). The Court considers whether the jury selected was fair and impartial. *Id.* A defendant must show prejudice to justify reversal if the jury selection process substantially

complies with the applicable statutes or rules. *Id.* The Court will presume prejudice only if there has been a material departure from those statutes or rules. *Id.* Further, although the Sixth Amendment and article 1, section 22 of the Washington Constitution guarantee a defendant the right to a fair trial by an impartial jury, a "defendant has no right to be tried by a particular juror or by a particular jury." *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995).

The present case is squarely on point with *Williamson*. In that case, After the State's first witness began to testify, a juror told the court that she knew the victim. *Williamson*, 100 Wn. App. at 252. The court refused to remove the juror for cause, but allowed the State to exercise an unused peremptory challenge over a defense objection.

The issue in *Williamson* presented a case of first impression in Washington. The Court concluded, after considering authority from other jurisdictions, as well as the language of CrR 6.4(e)(2) and RCW 4.44.210, that the trial court acted within its discretion.[6] *Williamson*, 100 Wn. App.

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[6] Although the statute has been amended since *Williamson* was decided, it would appear that the modification was to modernize the language of the statute, which dated from 1881, rather than to alter its meaning or to modify *Williamson*. The statute, as amended by Laws 2003, ch. 406, § 9, now reads:

> The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:
>
> The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be

at 254-55.

Here, the jury was accepted but not sworn, and the State had one peremptory left. 19RP 829. The juror submitted a note to the court the first day of trial, May 7, 2010, before the jury was sworn, indicating that she had realized that the judge had presided over son's trial. 19RP 829. The judge informed the parties that the juror had not been a witness at the trial:

> MS. LEWIS: Was she a witness?
>
> THE COURT: No. She was not a witness,

> exhausted. During this alternating process, if one of the parties declines to exercise a peremptory challenge, then that party may no longer peremptorily challenge any of the jurors in the group for which challenges are then being considered and may only peremptorily challenge any jurors later added to that group. A refusal to challenge by either party in the said order of alternation shall not prevent the adverse party from using the full number of challenges.

The 1881 version in effect when *Williamson* was decided read:

> The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:
>
> The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation, shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn, shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only.

The State can discern no change in meaning. *See State v. Schmidt*, 141 Wash. 660, 664, 252 P. 118 (1927) ("talesmen" are those not "in the jury box" at the time the peremptory is exercised).

Likewise, a 2000 amendment to CrR 6.4 only substituted gender-neutral language and the "state Department of Corrections" for "penitentiary.

and he did not testify in his own defense. …

16RP 387; *also* 19RP 829.[7]

The juror was brought in and questioned, and asserted that she could be fair. 16RP 387-91. 19RP 829. The judge opined that she saw no basis for a cause challenge:

> THE COURT: She is still on, as far as I know. She hasn't revealed any prejudices or basis.

16RP 391. 19RP 830. The jury was then sworn. 16RP 393; 19RP 830.

First thing on the morning of May 9, the prosecutor again raised the issue of the juror:

> MS. LEWIS: Your Honor, I just have one issue that I would like to bring up. We talked about Juror No. 4. I believe that her name is Pat Olsen, who is the mother of Edward Olsen, and I was able to speak with Mr. Salamas yesterday afternoon. He indicated that she was a witness in the trial, and that he --
>
> THE COURT: Boy. I couldn't remember.
>
> MS. LEWIS: Impliedly accused her of lying saying, "You will do anything for your son" and also implied that she had manipulated other people's testimony and argued both of those things in closing.
>
> Also, he said that during sentencing he could hear like gasping – when he was presenting he could hear gasping. He can't attribute that specifically to her, but it did come from her direction. I have obvious concerns about those facts.

18RP 649. The prosecutor further explained that it was the fact that the juror had been a witness for the defense, which the judge had stated she

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[7] The son was Mark Edward Olsen. *See State v. Olsen*, 175 Wn. App. 269, __ P.3d __ (2013).

had not been, that would have led her exercise a peremptory:

> My other concern is – and I understand what the Court is saying. I am certainly not suggesting that there was any potential misrepresentations, but I had asked whether or not she was a witness, and if I had found out at that point that she was a witness, I would have asked her to be excused.

18RP 651. The judge apologized for misleading the state, and deferred the issue until she could review the statutes. 18RP 652. Later that day, the judge indicated that she had read *Williamson*, and asked the parties to look at that case, along with *State v. Bird*, 136 Wn. App. 127, 148 P.3d 1058 (2006). 18RP 704.

The next day the judge raised the issue again at the midday break. 19RP 828. The prosecutor asked to exercise a peremptory to excuse the juror. *Id.* The following colloquy ensued:

> THE COURT: ... Ms. Lewis, can you refresh my memory about what you had learned from Mr. Salamas, who is the trial deputy?
>
> MS. LEWIS: Sure. He indicated to me that Ms. Olsen, Juror No. 4, had been called as a witness for the defense. Mr. Salamas cross-examined her, and during his cross-examination implied to the jury that she was not telling the truth, and that she had manipulated other people's testimony.
>
> He argued both of those in closing and during the sentencing. During his sentencing argument he could hear from her general area – he can't attribute it specifically to her – but heard gasps and expressions of surprise or being upset.
>
> THE COURT: All right. Now, Ms. Lewis, had you known this information on Monday morning when

Ms. Olsen was being questioned, would you have followed up on questions with her in this regard?

MS. LEWIS: Yes.

THE COURT: And based upon what you now know about this individual, why is it that you would have exercised, and still do want to exercise, a preemptory challenge?

MS. LEWIS: Well, essentially, Your Honor, because members of our office, our prosecutor's office, quite frankly, called her a liar, and I don't think, based on that – she can say she could be fair and impartial all she wants, but I have a real issue with keeping that person on a jury given the fact that one of my collogues [sic] did imply that.

THE COURT: Have you – do you believe, or do you know, whether or not that was information that you could have easily obtained within the Monday morning when we had gotten the note from the juror and found out that her son was Edward Mark Olsen?

Do you – would it have been within your thinking to go and talk to other prosecutors or ask for a recess or even ask for a preemptory at that time?

MS. LEWIS: Well, with all due respect to Your Honor, that is why I asked whether she was a witness in the trial. So had I known that she was a witness, I certainly would have gone to talk to Mr. Salamas or Ms. Pendras.

THE COURT: All right. Because that was what your concern was?

MS. LEWIS: Correct.

THE COURT: So my faulty recollection that she – I didn't think that she was a witness caused you not to have to be concerned about that –

MS. LEWIS: Correct.

THE COURT: -- at the time?

MS. LEWIS: Correct.

THE COURT: So can you tell me briefly

> how the conversation with Mr. Salamas occurred so that you learn this additional information?
>
> MS. LEWIS: Sure. I had forgot to mention – you know, as you indicated, it was a couple of days before I brought this to the Court's attention. I had intended to let Mr. Salamas know just, you know, what a coincidence it was that the mother of this person was on our jury panel, and I think that I may have mentioned, you know, she – but apparently she wasn't a witness, and he said, "Oh, she was a witness."
>
> I said, "Oh, okay. She was?"
>
> He clarified he was the one that cross-examined her, and he described what I have already described about his technique and tactics.

19RP 830-33.

The judge observed that while *Williamson* appeared to be good law. 19RP 834. She further observed that absent her own faulty recollection of the *Olsen* trial, the prosecutor would have more quickly investigated the juror. 19RP 835. She therefore concluded that under *Williamson*, allow the State to strike the juror was appropriate, so long as the defendant would not be prejudiced. 19RP 836.

The judge then examined the question of prejudice. She could find none. She noted that the jury had not begun deliberations, and further, that one alternate would remain available. 19RP 836. She then examined what she viewed to be the *Williamson* rationale:

> Under the *Williamson* reasoning is it just simply, is this information that is a surprise? And I would say that, yes, it is. It is information that, had the parties known during the time when they could have exercised a challenge, would

they? Yes, they would have.

19RP 837. The judge specifically rejected the defense contention that the situation was unforeseen:

> THE COURT: ... Your argument is that the State should have foreseen this and should have been able to exercise its preemptory prior to the jury being impanelled, and for the reasons I have stated, I'm not sure that was a reasonable probability.
>
> Two things were going on. One is that I had telegraphed that I didn't believe that a challenge for cause would be appropriate. I still believe that the juror had given the right answers to survive a challenge for cause, and it just didn't occur to me to even offer a preemptory. Had I done so, I believe that Ms. Lewis would have taken up the opportunity to exercise a preemptory at that time.
>
> Even then, we still would have been left with 13 jurors, prospective, in the case unless we were all willing to take more time to try to develop one or two more jurors as alternates. That would be from a different panel entirely.
>
> So for all of those reasons, I am going to allow the State to exercise its last preemptory challenge against Juror No. 4; that is, Ms. Olsen.

19RP 843-44.

Here the trial judge carefully considered the controlling case law, weighed the facts before it, and reached a reasonable decision. It cannot be said she abused her discretion.

Conner nevertheless argues that the trial court's decision was a material departure from the statutes or rules such that prejudice should be presumed and a new trial had. A review of the cases where a material

departure has been found, however, all have involved irregularities that resulted in *denial* of a peremptory, the sitting of biased jurors, or called into question another constitutional right. *See*, *e.g.*, *State v. Bird*, 136 Wn. App. 127, 148 P.3d 1058 (2006) (improper denial of peremptory reversible error where juror deliberated); *State v. Tingdale*, 117 Wn.2d 595, 817 P.2d 850 (1991) (reversible error where trial court allowed clerk to excuse jurors for cause, and then refused to allow defendant to voir dire the jurors); *Bothell v. Barnhart*, 172 Wn.2d 223, 257 P.3d 648 (2011) (seating jurors who did not reside in the county where the offense was committed was a violation of state constitution and a material departure requiring presumptive prejudice); State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) . It thus appears that before a defendant is entitled to reversal from irregularity in jury selection, there must have been a violation of *his* procedural or constitutional rights, or have resulted in the seating of an unqualified juror.

By way of contrast, both the United States and Washington Supreme Courts have declined to find reversible error where a juror should have been excused for cause, but was not, and the defendant used his last peremptory to excuse the juror. *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001). These cases comport with the Supreme

Court's explanation that to be consider material, deviation from the statutory scheme must be a "gross departure." *State v. Twyman*, 143 Wn.2d 115, 122, 17 P.3d 1184 (2001) (*quoting State v. Rice*, 120 Wn.2d 549, 562, 844 P.2d 416 (1993)).

The purpose of the jury selection statutes is to "'provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity.'" *Rice*, 120 Wn.2d at 562 (*quoting State v. Finlayson*, 69 Wn.2d 155, 157, 417 P.2d 624 (1966)). An isolated irregularity does not constitute a material departure from the statutory jury selection process. *Rice*, 120 Wn.2d at 562. Under the circumstances, Conner has not shown a gross departure from the jury selection statute or resulting prejudice. This claim should be rejected.

B. CONNER FAILS TO SHOW THAT DAVIS'S TESTIMONY REGARDING THE USE OF A RUSE, INTRODUCED DURING CROSS-EXAMINATION, WAS IMPROPER OPINION TESTIMONY THAT SHOULD BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

Conner next claims that Detective Davis improperly gave opinion testimony about Conner's veracity and guilt. This claim is not preserved and is without merit. On cross examination, Conner submitted to Davis that he had lied to Conner during his interview. Davis responded that he

had used a ruse. On redirect, the State explored what a ruse was and why the police would use one. At no point did Davis offer and explicit or near-explicit opinion on Conner's guilt or veracity.

Generally, this Court will not consider an evidentiary issue raised for the first time on appeal, and any error is deemed waived. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, ¶ 20, 155 P.3d 125 (2007). The reason for this rule is that timely objection gives a trial court the opportunity to prevent or cure error. *Kirkman*, 159 Wn.2d at ¶ 17. For example, a trial court may strike testimony or provide a curative instruction to the jury. *Id.*

A narrow exception exists, however, for "manifest error(s) affecting a constitutional right." RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at ¶ 20. However, the Court on appeal "will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction)," because "[f]ailure to object deprives the trial court of this opportunity to prevent or cure the error." *Kirkman*, 159 Wn.2d at ¶ 53. The decision not to object is often tactical. *Id.* If raised on appeal only after losing at trial, a retrial maybe required with substantial consequences. *Id.* The defendant therefore must show the error is "manifest," meaning, in the present context, that the testimony included an explicit or nearly explicit opinion of guilt that

resulted in actual prejudice. *Kirkman*, 159 Wn.2d at ¶¶ 21, 23. Although Connor cites to *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), the Supreme Court has specifically disapproved *Demery* the extent that it concluded that a comment on another witness's credibility was necessarily manifest constitutional error. *Kirkman*, 159 Wn.2d at ¶ 56-58.

In considering whether testimony that is alleged to comment on a witness's veracity is improper, "the court will consider the circumstances of the case, including the following factors: '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.'" *State v. Aguirre*, 168 Wn.2d 350, ¶ 14, 229 P.3d 669 (2010) (*quoting Kirkman*, 159 Wn.2d at 928). To be improper, the testimony must amount to "a direct comment on … the victim's veracity." *Aguirre*, 168 Wn.2d at 16.

In *Kirkman* the Supreme Court thus found that a physician's testimony was not an improper comment on the victim's veracity:

> The Court of Appeals erroneously deemed Dr. Stirling's testimony as "clearly" an improper opinion implying Kirkman's guilt. Dr. Stirling was not "clearly" commenting on A.D.'s credibility and actually testified that his findings neither corroborated nor undercut A.D.'s account. Dr. Stirling did not come close to testifying that Kirkman was guilty or that he believed A.D.'s account. Dr. Stirling's statement that A.D.'s account was "clear and consistent" does not constitute an opinion on her credibility. A witness or victim may "clearly and consistently" provide an

> account that is false. The jury properly was instructed to determine the facts. Thus, Dr. Stirling's testimony was not a manifest error of constitutional magnitude.

Kirkman, 159 Wn.2d at ¶ 34.

The issue of the use of a ruse was first brought up by the defense on cross-examination of Detective Davis:

> Q. Okay. Now, in the interview you tell Mr. Conner that Mr. Perez is [sic] and Mr. Smith are both in the other room pointing the finger at him related to the guns, correct?
>
> A. Yes.
>
> Q. But, in fact, at that point Mr. Smith had said that the guns belonged to Joe Perez, didn't he?
>
> A. That point may have been a ruse, yes.

17RP 605. Counsel then played a portion of the video of Conner's interview with the detectives. 17RP 607. He then accused Davis of "lying" to Conner:

> Q. Right there, were you lying at that point?
>
> A. At what point?
>
> Q. Right here when you said that you've got one of the two. You are saying that they put a gun in his hand, the Hi-Point?
>
> A. I believe that Detective Birkenfeld said that they put the gun in his hand.
>
> Q. But you went along with it, didn't you?
>
> A. I did.
>
> Q. And that wasn't true, was it?
>
> A. It was a ruse.
>
> Q. Okay. That is common?
>
> A. Sure.
>
> Q. That is something that you do in police work is

> that you make people think that you have something when you don't have something?
>
> A. That is correct.

17RP 607-08. The tenor of this examination was part of an overall strategy on counsel's part to suggest that Conner was targeted without cause. In fact, the State raised the issue with the trial court during Conner's cross-examination of Conner:

> He has made a couple of references now to the fact that the State simply wants to point the finger at Mr. Conner solely, and he indicates that Mr. Alexander goes by the wayside. Mr. Smith goes by the wayside. He also indicated that Mr. Perez went by the wayside.
>
> Mr. Perez pled guilty, and he was sentenced to ten years in prison for his involvement in these incidences.
>
> Mr. Brown was convicted after a trial for his involvement in these incidents, so for defense to try and suggest, especially in front of the jury, that we are targeting Mr. Conner is absolutely incorrect, and it's not with a good-faith basis.
>
> So I am going to ask the Court to instruct Mr. Longacre that he is not to make those accusations because they are just completely false.

17RP 623-24; 640.

On cross-examination, the State responded to these concerns by clarifying what a ruse was and why the police used it.

> Q. So that brings us, then, to the interview at the Bremerton Police Department, and specifically the interview with Mr. Conner. There was a discussion about a ruse. Do you recall that discussion in your cross-examination?
>
> A. I do.
>
> Q. Can you tell us what a ruse is?

A. A ruse is a statement made by police to elicit the truth of the matter.

Q. And when you do that, can you tell us – well, let's talk directly to this case. Was there a ruse involved in this case when you were interviewing Mr. Conner?

A. Yes.

Q. Let's back up a little bit. When you went in to interview Mr. Conner, did you have any information from what Mr. Smith was telling detectives?

A. I initially spoke with Detective Bogen, who was interviewing Jerrell Smith prior to me arriving back at the police department.

Q. Did Detective Bogen give you any information about what Mr. Smith had been telling them?

A. Yes. It was a very quick meeting. Detective Bogen indicated that Jerrell Smith --

MR. LONGACRE: Objection as to what Detective Bogen indicated.

THE COURT: Overruled.

Q. You can answer.

A. Detective Bogen indicated that Jerrell Smith was cooperating during his interview and that Jerrell Smith had been admitting to having knowledge of robberies and burglaries, and the fact that there were weapons in the truck at the time that they were stopped.

Q. Based on the information that Detective Bogen gave you, was there any indication that Mr. Conner knew that there were guns in the truck?

A. Yes.

Q. What was that?

A. Jerrell Smith stated that –

MR. LONGACRE: Objection to what Jerrell Smith stated. If I can't get into it, the State shouldn't be able to get into it.

MS. LEWIS: Your Honor, this goes to the issue of the ruse.

MR. LONGACRE: Very well might, but the State – if – as long as it opens the door for me, I don't have a problem.

THE COURT: Why don't you ask the question in another way.

MS. LEWIS: I can.

Q. Detective, did you have information that Mr. Conner specifically possessed the Hi-Point pistol?

MR. LONGACRE: Objection. Hearsay.

THE COURT: Overruled.

A. Yes. Can you ask me again, please?

Q. Did you have information that Mr. Conner specifically possessed the Hi-Point pistol?

A. Yes.

Q. That he specifically possessed that particular gun?

A. No, not that particular gun.

Q. So when Detective Birkenfeld said to Mr. Conner, "We have somebody that places that gun in your hands – the Hi-Point pistol in your hands, was that a ruse?

A. Yes.

Q. Did you have information that – well, did you have information that Mr. Conner had possessed one of the guns – at least one of the guns?

A. I took it as Mr. Conner had knowledge that there were guns in the vehicle based on what he said to Jerrell Smith.

Q. When you are employing a technique like a ruse, what is your intention?

A. To elicit the truth.

Q. Why do you do it that way?

A. I only do it when I have facts or believe that it says otherwise what the person is telling me. I don't just throw it out there if I have no knowledge of what we are talking about. I would have to have facts, or at least an

> opinion, on whether this person is not being truthful with me to use a ruse.
>
> Q. Let me ask you this: Do you use it in order to get a confession from someone?
>
> A. No. I get it – I use it to get the facts. That is what I am is a fact-finder.

18RP 727-30.

At no point did Davis explicitly or nearly explicitly offer an opinion on Conner's guilt or even his veracity. To the contrary, the focus of the examination was why *Davis* lied to Conner. It clear intent was to rebut the defense suggestion that the police were lying to Conner to trick him into giving a (presumably false) confession.

Furthermore, under analogous circumstances, the Washington Supreme Court has concluded that there was no prejudice where, despite allegedly improper opinion testimony on witness credibility, the trial court had properly instructed the jury that jurors "'are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each'" and that jurors "'are not bound'" by witness opinions. Kirkman, 159 Wn.2d at 937 (quoting Clerk's Papers). The trial court here gave virtually identical instructions, CP 236, 242, which the Court presumes the jury followed. Kirkman, 159 Wn.2d at 937; *see also State v. Montgomery*, 163 Wn.2d 577, ¶ 34, 183 P.3d 267 (2008).

Conner has failed to demonstrate manifest constitutional error with regard to this claim. As such, the Court should decline to consider it.

Moreover, even if the Court were to find reviewable error, it would be harmless. In the course of the six-week trial, Davis's discussion of the ruse was brief. Additionally, the jury both saw the video of Davis's multi-hour interview of Conner, and heard Conner's live testimony at trial. They had ample opportunity to judge his credibility for themselves.

Further, the State presented extensive testimony of two of Conner's coconspirators, whose testimony was amply corroborated by the testimony of the victims and by the numerous items of physical evidence that linked Conner to the crimes. There simply is no reasonable possibility that if the testimony had been omitted from trial the outcome would have been different. This claim should be rejected.

C. CONNER FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE RUSE TESTIMONY.

Conner next claims that he fails to meet the standard for considering his ruse claim for the first time on appeal, it should be considered as ineffectiveness of counsel. For the same reasons as the previous claim fails, so does this one.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also*

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Competency of counsel is determined based upon the entire record below. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Judicial scrutiny of a defense attorney's performance must be "highly deferential" in order to "eliminate the distorting effects of hindsight."

Strickland, 466 U.S. at 689. If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *Lord*, 117 Wn.2d at 883.

Counsel's decisions regarding whether and when to object "fall firmly within the category of strategic or tactical decisions." *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). The failure to object constitutes counsel incompetence justifying reversal only in egregious circumstances on testimony central to the State's case. *Johnston*, 143 Wn. App. at 19.

To establish that counsel's failure to object to evidence constituted ineffective assistance, Jones must show that (1) counsel's failure to object fell below prevailing professional norms, (2) the trial court would have sustained the objection if counsel actually had made it, and (3) the result of the trial would have differed if the trial court excluded the evidence. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008). "The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial[?]" *State v. Lei*, 59 Wn.2d 1, 6, 365 P.2d 609 (1961). Conner must show that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d

1260 (2011) (*quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). One conceivable legitimate tactic explaining counsel's performance could exist if counsel did not want to risk emphasizing the damaging testimony with an objection. *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993).

Further, even if counsel were deemed deficient, Conner cannot show prejudice for the reasons discussed in the previous section of this brief.

D. THE TRIAL COURT PROPERLY GAVE A MISSING WITNESS INSTRUCTION AS TO RACHEL DUCKWORTH.

Conner next claims that the trial court erred in giving a missing witness instruction with regard to Rachel Duckworth. This claim is without merit because the trial court carefully considered the criteria for giving such an instruction, and properly found that they were met.

Under the missing witness doctrine, the defendant's theory of the case is subject to the same scrutiny as the State's. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). The State may point out the absence of a "natural witness" when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable. *State v. Blair*, 117 Wn.2d 479, 485-86, 816

P.2d 718 (1991). The State may then argue, and the jury may infer, that the absent witness's testimony would have been unfavorable to the defendant. *Id.*

There are a number of limits on the application of the doctrine in a criminal case. *State v. Montgomery*, 163 Wn.2d 577, ¶ 40, 183 P.3d 267 (2008). First, the doctrine applies only if the potential testimony is material and not cumulative. *Id.* Second, the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. *Id.* Third, the doctrine applies only if the witness's absence is not satisfactorily explained. *Id.* Finally, the doctrine may not be applied if it would infringe on a criminal defendant's right to silence or shift the burden of proof. *Id.*

The trial court addressed each of these factors in its ruling. It found the evidence material and not cumulative because Rachel Duckworth was a party to numerous phone calls Conner made from the jail. Recordings of the calls were played for the jury. *See* CP 351-96. Conner testified that his conversations about "quitting" what he was doing pertained to partying rather than to criminal activity. 30RP 2064-65. The State's position and argument, 34RP 2528, was that Duckworth could have corroborated that claim. The trial court agreed:

> Also, statements were introduced that incriminate the defendant, his own jail phone calls. The prosecution

> argues consciousness of guilt, and the defendant argues that it's consciousness only that he wishes to change his ways with respect to selling and using marijuana.
>
> There is an inference that the jury can draw from the language that is used in those phone calls that the defendant meant the criminal activity, other than smoking and using marijuana, such as robberies or burglaries.
>
> Ms. Duckworth's testimony would have been material on that issue, since she was the other participant in the telephone calls, as well as the person who was in relationship with him during these events, so I find that the testimony would have been material.

33RP 2416. Contrary to the defense suggestion, Duckworth would not necessarily have had to impermissibly testify about Conner's state of mind. She could have explained her own statements on the jail calls, such as this one, which Conner was asked about:

> So I want to tell you that when you get out, if you don't leave the streets alone I am going to leave you. We are not doing this ever again. No more. No more nothing. I am just telling you because I know that when you get out you say that. I know that it's going to be tempting or whatever, but I am just telling you.

31RP 2202. Conner testified that this was again just a reference to partying. 31RP 2203.

Smith also placed Duckworth on the scene when Conner was discussing doing robberies. 24RP 1428-30. Conner denied that such conversations happened. Presumably she could have corroborated this if it were true.

The trial court also based its ruling in part on its belief that counsel

had said in opening that Duckworth would testify. Conner now faults the trial court for that mistaken belief. *See* 39RP. However, at the time it was considering whether to give the instruction, the trial court specifically asked defense counsel why he would say in opening Rachel was going to testify. Counsel did not deny having said it.

> I don't know if I said Rachel Duckworth, but if did, I did. I still wanted to leave it open in case she changed her mind. Sometimes people come in and testify. Sometimes I can get them here.

32RP 2364. Not having corrected the trial court's misperception of his own statements at trial, Conner cannot fault the court on appeal.

The court next addressed the witness being under Connor's control:

> Secondly, the missing witness must be particularly under the defendant's control, rather than equally available to both parties. Mr. Longacre argues that the State could have called Rachel Duckworth as a witness, subpoenaed her as equally or easily as he could.
>
> However, Ms. Duckworth had a Fifth Amendment privilege, and so she had an attorney appointed for her by the Court. That attorney was not Clayton Longacre. Because of the fact that she had the potential for making incriminating statements, it would not have been a simple matter for the prosecution to interview her in light of the fact that she would had to have advice of Counsel. She would had to have been Mirandized, et cetera, and those are limitations not ordinarily existing in civilian witnesses in cases.
>
> Mr. Longacre was the only person – the only lawyer with whom Ms. Duckworth apparently had any contact, even though she had been appointed an attorney to help protect her interest and her legal status as far as any

incriminating statements.

> Mr. Longacre, when he talked to her, told Ms. Duckworth that she was potentially facing a number of separate criminal charges, and he stated in open court that if he was her attorney he would probably advise her not to testify.
>
> Mr. Longacre did not consult with Ms. Duckworth's attorney to see if that was the advice that that person would have given in light of the police reports. He did not consult with the prosecution to see if there was any kind of a deal that could be worked out with Ms. Duckworth in order her to – enable her to testify, and in no way did Mr. Longacre make it any easier for Rachel Duckworth, in fact, to testify when he could have done so. And that makes Ms. Duckworth particularly under Mr. Longacre's control, especially when he asserts that the reason for her absence is because of the advice that he gave her.

33RP 2416-18. The trial court also pointed out that counsel had represented to the court and the State at the beginning of trial that Rachel would testify:

> THE COURT: I am just reviewing my notes here to see if I can refresh my recollection. Here we go. We went through the defense witnesses that were on your witness list. Megan Duckworth ID'd the gun from Mr. Smith. Rachel Duckworth was going to testify about the safe and Mook, and that was on the day that we went through all of your list of witnesses. So did you know on that day that Ms. Duckworth didn't want to testify?

32RP 2364.

In addition to the factors noted by the trial court, the evidence, some of it directly from Conner, also established that Duckworth and Conner had a romantic relationship, and indeed, in the jail calls they even discussed marriage. 30RP 2069, 31RP 2132, 2137. The evidence also

established that Duckworth was extremely hostile to the State and to law enforcement. 17RP 567, 573, 20RP 975.

Moreover, despite the trial court's concern, the case law is clear that self-incrimination is not necessarily an impediment to giving the instruction:

> In a similar vein, it is possible that a witness's testimony, if favorable to the party who failed to call the witness, would necessarily be self-incriminatory. Some courts therefore hold that the inference is not available if the witness's testimony would necessarily be self-incriminatory if favorable to the party who could have called the witness; however, the fact that the testimony might be self-incriminatory *if adverse to the party not calling the witness* does not preclude use of the missing witness inference. *United States v. Pitts*, 918 F.2d 197 (D.C. Cir. 1990). Here, there is no indication that any of the uncalled witness's testimony, if favorable to the defense, would be self-incriminatory.

Blair, 117 Wn.2d at 489-90. The same is true here. Conner denied any involvement in the robberies, and denied that his phone conversations referred to anything other than partying too much. There is no suggestion that Duckworth would have in any way incriminated herself by supporting that story. This is not a situation where the missing witness would be "taking the fall" for the defendant.

The trial court next addressed the third factor:

> The third criteria is that her absence is not adequately explained. That is self-evident from the record. The only explanation that we have is that Mr. Longacre represented that she told Mr. Longacre that she didn't want

> to testify, he presumed, because of the advice that he had given to her. But I find, as a matter of law, that that is not an adequate explanation, given that she has an attorney, that attorney could have consulted with her and explained her absence, and that was not done.

33RP 2418.

The trial court also, contrary to Conner's claim addressed the final factor:

> Fourth, the inference must not infringe upon a criminal defendant's right to silence, nor shift the burden of proof. Here, the first part of that is not present in this case because the defendant chose to remain – his right to be silent and testify, so there is no infringing upon the right to remain silent, and her absence does not shift the burden unnecessarily onto the defendant to prove his innocence. In fact, the burden is still on the State to prove her – to prove guilt beyond a reasonable doubt. So that is why I am going to give the missing witness instruction.

33RP 2418. It is quite clear that Conner testified.

It is also clear that no burden shifting occurred. It is not misconduct for a prosecutor to "argue that the evidence does not support the defense theory." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). Nor is it impermissible for a prosecutor to challenge a defendant's credibility in closing argument. *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996).

Finally, even if the instruction should not have been given, such error is not grounds for reversal unless there is a substantial likelihood that the error affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672,

904 P.2d 245 (1995). This is the standard where there has been an incorrect application of the missing-witness doctrine. *See, e.g., State v. Dixon*, 150 Wn. App. 46, 53, 207 P.3d 459 (2009); *Contreras*, 57 Wn. App. at 473-74.

The Court does not assess the effect of the alleged error in isolation. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Here, the jury was properly instructed on the State's burden of proof. The trial court explained that the defendant "has no burden of proving that a reasonable doubt exists." CP 239. Moreover, the prosecutor herself reminded the jury of the State's burden:

> The defense has absolutely no burden whatsoever. The State bears the entire burden of proving these charges.

34RP 1379. The prosecutor again acknowledged the State's burden in her rebuttal argument. 35RP 2700. Nor did the State dwell on the missing-witness instruction. It mentioned it twice and closing argument that took half a day. 34RP 2527, 35RP 2716. Further, Conner also argued, based on each of the factors listed in the instruction why it should not apply to Duckworth. 35RP 2687-88, 2690-91.

Viewed as a whole, as is required, Gregory, 158 Wn.2d at 810, 147 P.3d 1201, the State's closing argument did not urge the jury to relieve the State of its burden of proof. Thus, even if the instruction should not have been given Conner fails to show reversal is required.

E. THE JUDGE DID NOT COMMENT ON THE EVIDENCE BY SUSTAINING THE STATE'S OBJECTIONS TO DEFENSE ARGUMENT THAT WAS NOT BASED ON THE EVIDENCE OR BY STRIKING THE IMPROPER COMMENTS.

Conner next claims that granting the State's request to strike improper closing argument, the trial court commented on the evidence. This creative claim is without merit.

Trial courts may not comment on the evidence. Const. art. IV, § 16. "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.' *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). The trial court comments on the evidence if it expresses its attitude toward the merits of the case or its evaluation relative to a disputed issue. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). However, the comment violates the constitution only if those attitudes are "reasonably inferable from the nature or manner of the court's statements." *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). The determination of whether an instruction constitutes a comment on the evidence depends on the facts and circumstances of each case. *State v. Stearns*, 61 Wn. App. 224, 231, 810 P.2d 41 (1991).

One of the factors to be considered is whether the trial court specifically instructed the jury that it was not intending to comment on the evidence, and that any such inference should be disregarded. *State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988). It should be noted that the jury was specifically instructed to disregard any statement by the court that could be perceived as a comment on the evidence. CP 236.

Before addressing the Conner's contentions regarding the State's objections and the trial court's resolution of them, the State will address Conner's contention regarding his motion for mistrial, because it is sheds light of his misperception of this entire issue. Conner brings up an incident during the State's rebuttal, where he objected when the State began to discuss the portion of Instruction 1, CP 236, that addressed comments of counsel. Conner mentions that his request for a mistrial was rejected, but fails to discuss the basis for the objection or the court's resolution of it. The following is what occurred.

> MS. LEWIS: ... Ladies and gentlemen, there are a couple of things that I think that Mr. Longacre and I can agree on. No. 1 is that no matter what the attorneys say, or how many times the attorney says it, that is not evidence. That is absolutely true.
>
> What is evidence is what is heard from the witness stand and any exhibits that have been given to you. That is evidence. This applies also to any representations made in closing arguments. And you heard a number of objections regarding mischaracterization of the evidence, and I would submit to you that when you go –

MR. LONGACRE: Objection, Your Honor. I ask to be heard.

THE COURT: Members of the jury, head off into the jury room, please. Okay. Mr. Longacre.

MR. LONGACRE: Your Honor, I move for a mistrial based on what happened in front of the jury, based on the fact that so many objections that the Court has made, so many responses that has now become a comment on the evidence, and now we have a prosecutor talking about referring to those objections and then being sustained by the Court in her case in rebuttal.

I would move for a mistrial. It's improper comment on the evidence, and it's improper comment on the defendant and deprives him of a fair trial and Prosecutorial Misconduct 813.

THE COURT: Ms. Lewis?

MS. LEWIS: Your Honor, in Instruction No. 1 in the jury instructions it indicates that you may have heard objections made by the lawyers during trial, and each party has a right to object to questions asked by another lawyer and may have a duty to do so. These objections should not influence you. This is an instruction that the Court gave to the jury. My point in pointing this out is that I would like them to look at their notes and not take the representations by Mr. Longacre.

MR. LONGACRE: I have no problem with her pointing that out, Your Honor. My objection goes to "his mischaracterizations."

THE COURT: She – okay. The statement that was made by Counsel said – she said, "You heard a number of objections regarding mischaracterization of the evidence," which is true. She objected, "misstates the evidence." The jury heard that, right?

MR. LONGACRE: The jury might have heard that, Your Honor, but at the same time it goes right to my request for a mistrial because the way that the Court has handled it, sustaining these types of objections time and again, instead of simply saying what's normally said, "That this is argument by Counsel," that it has become a

comment on the evidence.

THE COURT: Okay.

MR. LONGACRE: By her reinforcing that, it reinforces that completely.

THE COURT: The motion for a mistrial is denied, and stick to the instructions language.

MS. LEWIS: I will.

35RP 2694-96.

This passage is instructive in terms of Conner's complaint. His counsel was apparently under the misapprehension that any argument is permissible, at least by the defense, and the only proper response by the court is to observe "argument of counsel." Neither trial nor appellate counsel offer any support for this contention.

To the contrary, the Washington Reports are replete with cases reminding counsel of their duty to confine their argument to the facts in evidence. "References to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (*citing State v. Belgarde*, 110 Wn.2d 504, 507–08, 755 P.2d 174 (1988)); *see also State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993) (closing arguments unsupported by the record are improper); *State v. Staten*, 60 Wn.App. 163, 173, 802 P.2d 1384, *review denied*, 117 Wn.2d 1011 (1991); *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

None of the foregoing cases involve improper argument of defense counsel. Given the limited circumstances under which the State may appeal, that is hardly surprising. Nonetheless, the State is aware of no authority that holds that defense counsel are exempt from the rule that it is improper to argue facts not in evidence. To the contrary, the Rules of Professional Conduct, which presumably apply to defense counsel prohibit such argument:

> A lawyer shall not:
>
> * * *
>
> (e) in trial … assert personal knowledge of facts in issue except when testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness … or the guilt or innocence of an accused.

RPC 3.4.

Turning to the first cited incident, Conner repeatedly argued, despite objections being sustained, that the police and the prosecutor's office coached Smith and Alexander into changing their stories:

> Now, what Mook Alexander said – this is interesting because Mook Alexander still tries to diminish what he did. If you will look at the taped interview of Mr. Smith, you will understand why because Mr. Smith had told at the beginning by the detectives, "Well, if you were not the ringleader, and you were just somebody on the outer edges, we can probably help you out here."
>
> Mr. Smith is no fool. Like any kid, he's just been told what direction to take with his lies. Mook Alexander went through the same thing, whether he got it from the prosecutor's office, when they interviewed him from the detectives, from his own lawyer –

MS. LEWIS: Objection, Your Honor. These are facts not in evidence.

THE COURT: Sustained. Move on, Mr. Longacre.

MR. LONGACRE: Mr. Alexander knew which way that he needed to go. At the time that he came forth in March, and they needed to cut his sentence way down, he knew, and in trial the only person that they had to get was Mr. Conner.

MS. LEWIS: Objection, Your Honor. Move to strike.

THE COURT: Members of the jury, you will disregard the last argument of Counsel.

MR. LONGACRE: Mr. Conner was the person left that they did not have the evidence that they needed, and Mook Alexander –

MS. LEWIS: Objection, Your Honor. Move to strike.

THE COURT: Sustained. Move on, Mr. Longacre.

MR. LONGACRE: Mr. Alexander knew which way that he needed to go in March. That is where he went.

34RP 2590-91. Shortly thereafter, when the court broke for the day, the prosecutor asked to be heard:

MS. LEWIS: Your Honor, may I be heard on my objections?

THE COURT: If you need to make a record, sure.

MS. LEWIS: I do. Mr. Longacre has repeatedly, throughout this trial, misrepresented testimony. And, in fact, Your Honor has had to point out in the transcripts where what he is saying, what he is representing happened or was testified to, is just blatantly wrong.

When we have situations where he is doing that –

again, for example, nothing about trafficking in stolen property in these phone calls, and clearly there is. I can make the objection. The Court can instruct the jury that those comments are not evidence, but at some point Mr. Longacre has to have an obligation to correctly refer to the evidence. He can't just make up evidence and argue it and rest back on the "my comments are not evidence."

THE COURT: You are correct. The case law is fairly clear that neither attorney can state facts which would – that are not in evidence that would mislead the jury.

MS. LEWIS: I guess that at what point – I mean, I guess that I just need to continue to object, then.

THE COURT: Well, I will look at it over the evening, but I am mindful that the restrictions on the defense are less than the restrictions on the State in a criminal trial. If I impose – I need to balance the defendant's right to due process, his constitutional rights, that is a Sixth Amendment right to effective assistance of Counsel versus the obligation that everyone has, the lawyers anyway, not to mislead the jury.

MS. LEWIS: Your Honor, I would submit that Mr. Conner's constitutional rights have nothing whatsoever to do with whether or not evidence is accurately reflected to the jury. I don't think that any case would suggest that any attorney is allowed to, in part of their zealously advocating for their client, misrepresent any evidence.

THE COURT: I know that case law, so I think what we should do is bring this issue up in the morning. There are a couple of cases that talk about the defense attorney's obligation with respect to the factual statements, and I will also – the Court has broad discretion with respect to the limitations of argument of Counsel, but I am mindful of what you say. There is – there have been some memory issues, so I am not sure what I can do about it right now. Mr. Longacre, hopefully you can reflect on your notes overnight and craft your oral argument to the jury so that you are not drawing these continued objections in front of the jury with respect to what the witnesses

> actually said or didn't say. I know that Ms. Kelsey has been taking copious notes throughout the trial, so I would hope – I guess maybe I am encouraging you to sit with the notes and to reflect on those so that you are not continuing to draw objections and will see what I can do about the rest of it tomorrow. Okay.

34RP 2594-96.

Conner argues that the argument was proper because "Alexander testified that he had read the police reports prior to his interview with the police, and he went into the interview determined to save himself by giving the police whatever information they wanted so that he could get out of jail. 28RP 1803-04. Alexander further testified that in his interview, Detective Davis gave Alexander a long speech about what he needed to do in order to get a deal, and after that speech Alexander first referred to the .40 caliber firearm as Conner's gun. 28RP 1801-02." Brief of Appellant at 52-53.

The State would first challenge the latter interpretation of the evidence. *Counsel* referenced a supposed speech in his question; the detective's actual words were not in evidence. Alexander never confirmed that the detective discussed a deal, and on the very page cited actually denied there was ever a deal discussed with the detective. 28RP 1801.

In any event, the State did not object because Conner made a statement such as, "Alexander had access to the police reports and therefore had an opportunity to tailor his statements to the police." The

argument that drew the objection, and which was sustained was an argument that essentially accused the police, the prosecutor's office, and/or Alexander's own counsel of suborning perjury. There was absolutely no evidence for this theory and the objection was therefore properly sustained and the argument was properly stricken. *See State v. Dhaliwal*, 150 Wn.2d 559, 576-81, 79 P.3d 432 (2003) (proper response to improper argument is to admonish the jury to disregard it).

In the second incident Conner cites, counsel argued that Alexander had a long history of and lots of practice changing his stories:

> MR. LONGACRE: … But in terms of when you have someone – we talked about this in voir dire. When you have someone that tells you that the house on the corner is yellow, you are going to go down and check it out before you believe them. They can lie that effectively. They lie effectively because they add facts and fiction together. You don't know where facts begins and ends, and you don't know where fiction begins and ends, and they know that, and they take advantage of that.
>
> And that is why you have Mook saying things like, "I was in the car looking back into the house." Because he doesn't think that anyone is going to go out there and check and look at angles and doesn't think that anybody is going to call him on that.
>
> That is why he says stories like it came to what car they drove on September 15 or September 28 for the Dato residence. "It was Mr. Conner's car." And when I called him on it and said, "Well, Mr. Conner didn't even have the LeSabre at that time," then he says, "Well, it was one of his cars. He is always changing his cars."
>
> So they are very quick, and they move very quick. So it's almost like shadow boxing because they know how to do it because they are experienced in it. They have been

doing it a long time.

MS. LEWIS: Objection, Your Honor.

THE COURT: Sustained. Move on.

MR. LONGACRE: I submit that the evidence shows that when you look in your record in terms of what Mr. Mook Alexander's record is, that he talks about on the stand –

MS. LEWIS: Objection, Your Honor. Facts not in evidence.

35RP 2613-14. The court then had the jury removed from the courtroom. 35RP 2614. The court then heard the basis of the State's objection, and sustained it:

THE COURT: Please be seated. Ms. Lewis?

MS. LEWIS: Well, Your Honor, we are back to where we were when you were discussing this morning about the facts in evidence. There is absolutely nothing to suggest that Mook has been a liar for a long time. There is an admission that he was convicted of a residential burglary in 2008. There is no mention of whether or not he testified against codefendants in that, and for Mr. Longacre to say that the jury can look back at their notes is completely disingenuous.

THE COURT: Mr. Longacre, where do you believe in the record there is evidence to suggest that Mr. Smith or Mr. Alexander have been, quote, lying for a long time, end quote?

MR. LONGACRE: Crimes of dishonesty, Your Honor.

THE COURT: Which ones for Mr. Smith and Mr. Alexander?

MR. LONGACRE: I don't remember the exact crimes, but I know that they were crimes of burglary and theft.

THE COURT: For whom?

MR. LONGACRE: They were crimes of dishonesty. They were admitted for crimes of dishonesty for both of them.

THE COURT: How does a burglary mean that you are a liar?

MR. LONGACRE: I have often asked that question, but the Courts have ruled time and again that it's a crime of dishonesty.

THE COURT: Well, one can be a theft, [sic] which is dishonest, and one can be a liar.

Okay. Mr. Smith has no previous convictions. He has a pending case for Attempted Residential Burglary in Kitsap County Superior Court. And Mr. Alexander has convictions for the pending convictions for these incidents in a prior residential burglary and a prior misdemeanor. All right. So –

MS. LEWIS: Well, Your Honor, by the same token, then, the State should be allowed to argue that Mr. Conner has been a liar for a long time.

MR. LONGACRE: Be my guest.

THE COURT: Theft in the First Degree, which is also a crime of dishonesty. Mr. Longacre, the statement "they have been lying for a long time" is improper argument based upon the facts that are in evidence. So I ask you to move on and stay away from that. I will instruct the jury on their return to disregard that last remark.

35RP 2614-16. Upon their return, the court admonished the jurors:

THE COURT: Have a seat when you get to the chair. Okay. Members of the jury, I have sustained the objection, and you are instructed to disregard the last remarks of Counsel.

35RP 2616-17.

In his brief, Conner fails to cite any evidence that established that Alexander had been a "liar for a long time." He certainly had a prior

burglary conviction, and while the jury could consider this conviction in weighing his veracity, it does not support the broad argument that he was "very quick" to change his stories because he was "experienced" at it, and had been doing it for a "long time." Conner fails to show the trial court erred in sustaining the objection.

Moreover, the argument presented is that the judge commented on the evidence. Not a single case cited by Conner holds that a judge's ruling sustaining of an objection and granting of a motion to strike, even if erroneous, amounts to a comment on the evidence. *State v. Becker*, 132 Wn.2d 54, 63, 935 P.2d 1321 (1997) (jury instruction that took one of the elements from the jury); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) (same); *State v. Eaker*, 113 Wn. App. 111, 118, 53 P.3d 37 (2002) (same); *State v. Eisner*, 95 Wn.2d 458, 626 P.2d 10 (1981) (judge "took over" examination of victim and proved element that the State was unable to); State v. Lane, 125 Wn.2d 825, 839, 889 P.2d 929 (1995) (trial court read a statement to the jury resolving a disputed issue of fact); *State v. Bogner*, 62 Wn.2d 257, 249, 382 P.2d 254 (1963) (trial judge responded, "Don't you think we are getting a little ridiculous, or aren't we?" to defense assertion that State had to prove that crime actually occurred); *cf. State v. Sivins*, 138 Wn. App. 52, 155 P.3d 982 (2007) (judge's brief inadvertent reference to suppressed evidence did not amount

to a comment on the evidence). They State has found none.

Applying the analysis in the comment cases, it is clear that the judge here also did not comment on the evidence. Merely sustaining an objection and striking the offending comment cannot reasonably be construed as expressing the court's attitude toward the merits of the case or its evaluation relative to a disputed issue of fact. This is particularly true given that the the jury was explicitly told that –

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 236. This contention should be rejected.

F. THE CAUSE SHOULD BE REMANDED WITH INSTRUCTIONS TO CORRECT THE JUDGMENT AND SENTENCE.

Conner next claims that his judgment contains a clerical error imposing a firearm enhancement that he was acquitted of. He is correct. The matter should be remanded to correct the judgment.

IV. CONCLUSION

For the foregoing reasons, Conner's convictions should be affirmed and the matter remanded for correction of Conner's judgment and sentence.

DATED September 30, 2013.

Respectfully submitted,
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Prosecuting Attorney

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KITSAP COUNTY PROSECUTOR

September 30, 2013 - 3:59 PM

Transmittal Letter

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Case Name: La'Juanta Conner

Court of Appeals Case Number: 43762-7

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