NO. 45374-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ZYION DONTICE HOUSTON-SCONIERS
and
TRESON LEE ROBERTS, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 12-1-04161-1 & 12-1-04160-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted the statement of James Wright as an excited utterance where that statement was nontestimonial and hence, not subject to the Confrontation Clause of the Sixth Amendment or Article I, section 22 of the Washington State Constitution.

2. Whether Defendants' convictions and enhancements should be affirmed where, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes and enhancements beyond a reasonable doubt.

3. Whether Defendants failed to meet their burden of showing prosecutorial misconduct by failing to show either improper conduct or prejudice.

4. Whether, although not properly preserved at trial and not ripe for review, the trial court's imposition of the legal financial obligation was proper where the record shows it took account of Defendants' future ability to pay as required by statute.

5. Whether Defendants' convictions and sentences should be affirmed where both RCW 13.04.030(1)(e)(v), which requires the adult superior court to take exclusive original jurisdiction of the crimes here at issue, and RCW 9.94A.533, which allows for the firearm sentence enhancements herein, are consistent with the Eighth Amendment to the United States Constitution as interpreted by recent decisions such as ***Miller v. Alabama***, 132 S. Ct 2455, 183 L.Ed.2d 407 (2012).

6. Whether Defendant Roberts failed to show ineffective assistance of counsel where he failed to show that his trial counsel's performance was deficient.

B. STATEMENT OF THE CASE.

1. Procedure

On November 5, 2012, the State charged Zyion Dontice Houston-Sconiers, hereinafter referred to as Defendant Houston-Sconiers, and Treson Lee Roberts, hereinafter referred to as Defendant Roberts, by information in counts I through V with first degree robbery, in count VI with conspiracy to commit first degree robbery, and in count VIII with first degree unlawful possession of a firearm. CP 1-4, 269-72. Counts I through V also alleged a firearm sentence enhancement. CP 1-4, 269-72. See 11/05/12 RP 3-5; RP 3-6[1].

On May 2, 2013, the State filed an amended information in both cases, which added a count of second degree assault as count VI, and two counts of first degree robbery as counts VIII and IX. CP 17-22, 283-88. See RP 158-62, 1943-45. Counts I through X of the amended information included firearm sentence enhancements. CP 17-22, 283-88.

The court called the cases along with that of co-defendant A.T. for a consolidated trial on June 12, 2013. 06/12/13 RP 3-32. It heard motions in limine, 06/12/13 RP 46-72, RP 91-118, 151-54, including a motion to sever A.T.'s trial from the other two remaining co-defendants. 06/12/13 RP 68-71, 117-18.

[1] The verbatim report of proceedings in these cases consists of six dated volumes and 24 consecutively-paginated volumes. Citations to the former herein take the form of [Date of Proceeding] RP [Page Number]; citations to the latter take the form of RP [Page Number].

Prior to taking testimony in this trial, the State dismissed charges against juvenile co-defendant L.A. and co-defendant A.T., and both were granted immunity, and endorsed by the State as witnesses in the present case. RP 80-87, 125-33. *See* RP 1766-83, 1788.

The State also obtained an order of immunity pertaining to juvenile co-defendant, Z.J., who had already pleaded guilty, and endorsed Z.J. as witness. RP 210-21. The State ultimately sought and served material witness warrants on several witnesses, including A.T. *See, e.g.*, RP 714-24.

The court heard the defendants' motion to suppress evidence found in the car from which police arrested the defendants pursuant to CrR 3.6, and denied that motion. RP 203-07, 222-55. Houston-Sconiers moved for reconsideration, and this motion was denied, as well. RP 264, 281-89.

Defendant Roberts moved to dismiss based on the State allegedly providing untimely discovery. RP 289-305. That motion was denied. RP 306-08.

Defendants also moved to exclude evidence of two telephone calls made by Defendant Houston-Sconiers complaining that A.T. and L.A. are "snitches," and communicating that if they don't show up at trial, then he had a chance. RP 310-17. The court reserved ruling. RP 317-23. It reviewed full and redacted recordings of the telephone calls, RP 705, 709, 1616-21, 1623-49, *see* Exhibit 49A, 49B, 49C, 49D, and then partially

granted the defendants' motion by excluding some of jail telephone calls, but admitting other portions into evidence. RP 1652-54. 1670-81.

The parties selected a jury RP 155-73, 177-93, 196-99, 203, 255-56, 259-60, 265, 337, and gave their opening statements. RP 338, 343.

The State called Tacoma Police Officer Wendy Haddow-Brunk, RP 343-402, 419-52, Tifni Buchanan, RP 458-80, Crime Scene Technician Matthew Prolo, RP 493-505, 516-74, 588-666, Tacoma Police Officer Michael Galvin, RP 667-76, 685-93, Tacoma Police Officer Chris Martin, RP 727-68, D. P.-M., RP 768-83, 785-89, 795-809, A.G., RP 812-64, E.B., RP 864-83, 891-94, Tacoma Police Officer Jared Tiffany, RP 895-910, 918-47, I.G., RP 947-84, Andrew Donnelly, RP 984-1022, 1026-43, Tacoma Police Officer Rodney Halfhill, RP 1065-82, Z.J., RP 1086-95, 1102-09, S.D., RP 1120-40, Tacoma Police Lieutenant Jewell Lerum, RP 1141-92, 1212-19, Dorothy Worthey, RP 1219-58, Tacoma Police Detective Brian Vold, RP 1271-93, Tacoma Police Detective John Bair, RP 1303-16, Tacoma Police Detective Robert Baker, RP 1316-26, Tacoma Police Department Latent Fingerprint Examiner Timothy Taylor, RP 1326-79, L.A., RP 1416, 1432-1501, 1514-18, 1532-59, Tacoma Police Officer Carl Puccio, RP 1560-69, 1578-87, 1593-95, A.T., RP 1596-1600, 1811-25, 1842-60, and Tacoma Police Detective Michael Tscheuschner, RP 1681-1716, 1734-1804, 1929-40.

During the State's case-in chief, the court heard several noteworthy motions. *See, e.g.,* RP 1045, 1057-60, RP 1860-64, RP 1909, 1922-28, RP 1880-94.

First, just prior to the testimony of Officer Rodney Halfhill, Defendant Houston-Sconiers moved to exclude any statements made by James Wright to Halfhill as violative of his right to confront witnesses under ***Crawford***. RP 1045, 1057-60.

The State noted that such statements may be admissible as excited utterances or present sense impressions, and asked for permission to attempt to lay a foundation outside the jury's presence. RP 1046-47. Tacoma Police Officer Rodney Halfhill then testified outside the presence of the jury. RP 1047-53. Based on that testimony, the State argued that Wright's and Stewart's statements to Halfhill were admissible as excited utterances or present sense impressions. RP 1054-57.

Defendant Houston-Sconiers contended that Wright's responses to Halfhill's questions were testimonial under ***Crawford***, and hence, not admissible unless Wright testified. RP 1057-59.

The court determined that Wright's statements to Halfhill were nontestimonial and admissible as excited utterances at trial, RP 1061-64, but excluded statements made by Stewart to Wright as hearsay. RP 1062-64.

Second, after the State's examination of A.T., Defendant Roberts moved for mistrial and Defendant Houston-Sconiers moved for dismissal based on alleged prosecutorial misconduct. RP 1860-64. *See* RP 1909, 1922-28. The court denied both motions. RP 1867-69.

However, it conducted a contempt hearing regarding A.T.'s initial testimony. RP 1724-31. The court found A.T. in contempt, but when A.T. agreed to testify, reserved ruling on any sanction until after he again testified, giving him an opportunity to purge his contempt. RP 1724-31. However, after that testimony, the court found that A.T. "did not purge his contempt with his testimony," and imposed a sanction of 30 days in jail. RP 1880-94.

The parties stipulated that neither defendant was permitted to possess a firearm due to a prior serious felony conviction, RP 706-07, and the court read those stipulations to the jury RP 724-27.

The defendants also stipulated to the authenticity of recordings of telephone calls made from the jail by Houston-Sconiers, RP 1510-13, and the redacted versions of those recordings were ultimately admitted and published to the jury. RP 1704.

At the conclusion of the State's case-in-chief, Defendant Roberts moved to dismiss counts I through V, first degree robbery, count IX, first degree robbery of James Wright, count X, conspiracy to commit first degree robbery, and count XI, first degree unlawful possession of a

firearm, for insufficient evidence. RP 1945-57. The court denied the motion. RP 1958-59

Defendant Houston-Sconiers moved to dismiss all counts for insufficient evidence. RP 1959-74, 1978-80. The State agreed there was insufficient evidence of the first degree robbery charged as count VIII, and stipulated to its dismissal. RP 1943-44. The court denied Houston-Sconier's motion as to the remaining counts. RP 1980-83.

The State rested. RP 2011.

Defendant Roberts called T.R., RP 2011-49, and Shantell Bush, RP 2049-63, 2074-82, and then rested. RP 2083, 2105.

Defendant Houston-Sconiers chose not to testify or put on a case, and rested. RP 2100, 2105.

The State did not put on a rebuttal case. RP 2101, 2105.

The court considered the parties' proposed jury instructions, formulated its instructions to the jury, and took exceptions from the parties thereto. RP 2109-2202. *See* CP 136-95.

On August 1, 2013, the court instructed the jury, RP 220-27, CP 136-95, and the parties gave their closing arguments RP 2227-51 (State's closing argument); RP 2258-2300 (Defendant Roberts' closing argument); RP 2303-35 (Defendant Houston-Sconier's closing argument); RP 2335-44, 2344-57 (State's rebuttal argument).

On August 2, 2013, the jury returned verdicts and special verdicts. RP 2368-82. It found Defendant Houston-Sconiers guilty as charged, and returned special verdicts indicating that he was armed with a firearm at the time of his commission of the crimes charged in counts I through VI and X. RP 2370-72, 2375-77; CP 206-21. The jury was apparently not given a special verdict form as to count IX for Houston-Sconiers, RP 2381-82, 2390-91.

The jury found Defendant Roberts not guilty of first degree robbery as charged in counts I and II and the first degree unlawful possession of a firearm charged in count XI, but guilty of the crimes charged in counts III, IV, V, VI, IX, and X, and returned special verdicts indicating that he was armed with a firearm at the time of his commission of the crimes charged in counts III, IV, V, VI, IX, and X. RP 2372-77; CP 404-20.

On September 13, 2013, the court sentenced both defendants. RP 2385-2419. The court adopted the State's recommendation and sentenced Defendant Houston-Sconiers to an exceptional sentence below the standard range on all counts of zero months in total confinement, but imposed the statutorily-required minimum of 372 months for the seven firearm sentence enhancements. RP 2385-2407; CP 232-46.

The court also adopted the State's recommendation with respect to Defendant Roberts and imposed an exceptional sentence below the

standard range on all counts of zero months in total confinement, though, again, it imposed the statutorily-required minimum of 312 months for the six firearm sentence enhancements. RP 2407-19; CP 428-42.

The court also, among other obligations, imposed, on both defendants, legal financial obligations totaling $1,300.00. CP 232-46, 428-42.

On September 23, 2013, the defendants filed timely notices of appeal. CP 247-62, 443. *See* RP 2404, 2406-07.

2. Facts

On Halloween night, 2012, 19-year-old Andrew Donnelly was visiting his grandparents in Tacoma, Washington, and took his then 13-year-old brother, S.D., trick-or-treating. RP 346-48, 986-88, 1124-25. Andrew's costume consisted of a graduation robe and a red devil mask. RP 989, 1126. S.D.'s was that of a ninja. RP 989, 1124.

They started trick-or-treating from their grandparent's home, in the area of Oakes and S 15th at about 8:30 p.m., and moved north towards Tacoma General Hospital. RP 990, 1011, 1125. S.D. was collecting candy in a blue, gray, and black backpack and Andrew in a cloth bag bearing the "face of a pumpkin." RP 993, 1125.

Then, as they were trick-or-treating in the area of South 9th and Sheridan, they noticed they were being followed. RP 990-91. *See* RP

1030, 1130-31. Three people cut in front of them and stopped them. RP 991-92, 1131.

They were all black males, all wore black hoodies, and dark pants. RP 992, 1005. One wore a bandanna over his face, one wore a black cloth mask, and one wore a white hockey mask. RP 992, 1002-04. *See* RP 1131. Andrew Donnelly clarified that the black cloth mask only covered the bottom part of the assailant's face, as a bandanna would. RP 1006.

The one with the hockey mask was about 5'8'', and one of the three was significantly shorter than the other two. RP 1004-05, 1015.

The one with the white hockey, or "Jason mask," then said "this is a stick-up," told the brothers to give them their bags, and that this wasn't game. RP 992-93, 1003-04, 1020, 1131. *See* RP 1035. This person then pulled out a silver gun with a white grip and held it in S.D.'s face. RP 993, 996, 1017-19, 1133.

S.D. took off his backpack and handed it to the three. RP 993. One of the other three took the bag from Andrew's hands, and the red devil mask Andrew had been wearing. RP 99, 1000.

Both Andrew Donnelly and S.D. identified exhibit 19 as the backpack that was stolen from S.D., and exhibit 16 as the red devil mask that was stolen from Andrew. RP 996, 1001, 1037-39, 1137-38. Andrew

identified exhibit 24, the handgun recovered by police, as that displayed by the person in the hockey mask. RP 996, 1001, 1037-39.

After taking these items, the three assailants ran across the street in the opposite direction. RP 993, 997. *See* RP 1134-35.

Andrew was scared and his brother was terrified. RP 995, 1021, 1136. They called their mother, who called their grandparents, and then went back to their grandparent's house, where their grandparents called the police. RP 997, 999, 1135. It took them about 25 minutes to get back to their grandparent's house. RP 1000.

911 received their grandparent's call, and, at about 9:44 p.m, Tacoma Police Officer Wendy Haddow-Brunk responded to the house to contact the two boys. RP 344-45. *See* RP 392, 468, 1001.

When she arrived, she found Andrew and S.D. waiting outside their grandparents' home. RP 345-46. *See* RP 1027, 1136.

Haddow-Brunk testified that the two were physically shaking, that Andrew's voice was shaking, and that it "took them a little while to tell the[ir] story." RP 346-47, 431. They were nonetheless able to tell her that they had been robbed in the area of 900 South Sheridan shortly between 9:10 and 9:18 p.m., and that they ran home afterwards. RP 348-49, 393-94, 431. They said that there were three assailants and described them. RP 351.

They described the first as black, approximately 18 to 19 years of age, 5'8'' to 5'9'' in height, with a medium build, who was wearing a white hockey mask and black jacket and pants. RP 351-52. During the robbery he had been holding a silver handgun with an apparently white grip. RP 352, 396. *See* RP 1042-43.

The second robber was also a black male, 18 to 19 years of age, 5'8'' in height, with a medium build, who was wearing a "black cloth-type mask," a black jacket, and dark pants. RP 352-53, 396.

The third robber was a black boy, 14 to 16 years of age, 4'11'' in height, with a thin build, who was wearing a blue bandanna over his face, and a black jacket and dark pants. RP 353. Hence, this third suspect was "considerably shorter" than the other two. RP 449-50.

The brothers indicated that they did not know any of their attackers and that, due to the masks their assailants were wearing, their faces were covered. RP 353-54.

The brothers reported that the robbers stole a red devil mask, a black, blue, and gray backpack, and an orange plastic bag with candy that had been collected by trick-or-treating. RP 354.

They told her that once the robbery was completed, their attackers ran south towards South Cushman, which runs parallel to South Sheridan. RP 354-55, 360, 427-28, 440-41.

Haddow-Brunk estimated that she was on-scene for approximately 20 to 30 minutes, during which time she broadcast the information she had collected to a fellow officer who was then heading to a reported crime, similar in nature to the robberies reported to Haddow-Brunk. RP 355-56, 360.

This reported crime involved five friends who had also been out trick-or-treating around Stadium High School that night: D. P.-M., A.G., I.G., E.B., and R.J. RP 771-73, 796-97, 815, 868. 950-51.

About three hours into this group's trick-or-treating, RP 774, 817, while in the area of North 7th and Cushman, they were approached by three people, all wearing masks. RP 775, 798-99, 804, 819-20, 838, 859, 870-71, 941, 952-55. I.G. testified that these three people were actually part of a larger five-person group, but that two members of that group stayed behind and didn't approach them. RP 980.

A.G. testified that one of these three had a red mask, but could not remember details. RP 820. She did, however, identify a red mask admitted as exhibit 16 as the one worn by this person. RP 833-34. A.G. testified that one of them was wearing a hoodie with a white design on it, and that at least two of them were wearing blue bandannas tied to their pants. RP 832, 834-35. *See* RP 981.

I.G. also identified one of the males as wearing this red devil mask. RP 955-56. I.G. testified that the three were wearing dark blue or black pants. RP 969. All three of the males were black. RP 830-31, 847, 871, 892. I.G. estimated the heights of his three assailants as 5'11 to 6', 5'10, and 5'6''. RP 975. One of the three was significantly shorter than the other two. RP 960, 975.

D.P.-M. could not tell how old the three males were, but testified that she was 5'8'' and they appeared to be shorter than her. RP 776, 795-96. D. P.-M. testified that she did not remember what the three who approached them were wearing, RP 776, but A.G. testified that they were wearing black "hoodies" and black or dark blue pants." RP 819, 831-21, 840.

One of the three, a male wearing a white mask and dark clothing, asked what street they were on. RP 780, 820. *See* RP 835. This person as a black man, 5'7'', about 120 pounds, and around 18 years of age. RP 780, 823, 837.

The kids said they did not know, and continued to walk when the three approached again, and the one with a white mask told them "this is a stickup." RP 821, 954. *See* RP 781, 785-86, 843. He pointed a small silver gun at them, and told them to give them everything, including all of their

candy and their phones. RP 785-86, 821-22. 839, 850, 900, 954. *See* RP 872-73, 957.

The only one of the three assailants to speak during the incident was the one with the gun. RP 970. A.G. testified that she recognized his voice as that of a person she knew as "Tiny," and both A.G. and D.P.-M. identified "Tiny" as Defendant Houston-Sconiers RP 788-89, 808, 824-25, 848. *See* RP 901.

When Houston-Sconiers pointed the handgun at them, D. P.-M., E.B., and I.G. surrendered their bags and backpacks of candy, RP 786, 821-22, 873., 958-59. The other two males that were with Houston-Sconiers then took the bags and backpacks from D.P.-M., E., and I. RP 822-23. The three males in the masks were clearly working together. RP 823.

Meanwhile, R.J. ran off and hid in some bushes and A.G. managed to hide her candy on her person. RP 821, 845, 962-63.

After D.P.M. gave the three males her candy, she and A.G. walked away. RP 837. They departed so quickly that they left their three male friends behind. RP 837. *See* RP 876, 961. The three male robbers then "ran around the corner." RP 837. A.G. and E.B. estimated that the entire robbery lasted about one minute. RP 836-37, 876.

D. P.-M. testified that she was scared during the robbery, RP 787, so scared she "just wanted to get out of there," RP 805, and too scared to call the police. RP 777, 803. She testified that her friends, including A.G., "were just as shocked as [she] was." RP 787-88.

A.G. agreed that she and her friends were "[r]eally scared" by the robbery. RP 859. *See also* RP 860, 856.

They went to a corner house. RP 778, 802-03, 851, 961-62. A.G. testified specifically that she went to that house to get help. RP 826. They asked to come inside, and called her parents from there. RP 778, 802-03, 826.

D.P.-M.'s father called 911 at 9:32 p.m., from 1121 South 19th Street regarding the incident at North 7th Street and North Cushman Avenue. RP 469-70, 922.

Officer Jared Tiffany was dispatched to the scene at about 9:40 p.m., and arrived there at 9:49 p.m. RP 471, 896-97, 921. He contacted D. P.-M., her parent, and A.G. RP 897-98.

Officer Tiffany indicated that D.P.-M. was "highly agitated" and seemed scared and frightened when he arrived. RP 898, 934. She moved around a lot and her speech was "broken" and "seemed excited." RP 898. A.G. "seemed a little more calm," but still excited and nervous. RP 899, 934.

D.P.-M. told Tiffany that they had been in the area of North 7th and Cushman when three males approached them. RP 900. She reported that all of the males were wearing masks. RP 900. One was wearing a white mask and dark clothing. RP. 900. This male was about 18 years old, 5'7'', and roughly 120 pounds. RP 900. D.P.-M. said that this male then pulled out a silver revolver. RP 900.

A.G. told Tiffany that she recognized his voice as that of someone who goes by the name "Tiny" and gave him some information as to where she thought he lived. RP 901, 936-38, 944.

D.P.-M. wasn't able to provide a description of the other two assailants. RP 900. However, A.G. described the other two males as black, and wearing dark clothing. RP 900. She said that at least two of the three had blue bandannas RP 900-01. She reported that one of the other two was wearing a red mask with glitter on it, but could not describe the third mask "because of the stress of the incident." RP 901.

Officer Tiffany spoke to the girls for about 30 minutes before leaving the scene. RP 901. However, shortly after that, he heard a report of another robbery with a similar description to the previous two in the area of South 15th and Sprague or Ridgewood Avenue. RP 901-02.

The 911 call reporting this third robbery was received at 10:22 p.m., from the area of South 15th Street and South Ridgewood Avenue. RP 471-72[2].

Officer Rodney Halfhill was on patrol about a block and a half away from there, and was able to arrive on scene in less than a minute. RP 1066-67-68. *See* RP 471-72, 903.

When he arrived, he saw James Wright standing on the south side of South 15th across from Summer Tree Park Apartments. RP 1067. Wright was waving his hands and jumping up and down, pointing to the south. RP 1067, 1071. As Halfhill got closer, he noticed that Wright was shaking and still jumping up and down, pointing south. RP 1069, 1071, 1077. Halfhill exited his patrol vehicle, and Wright said "they're over there" and "they ran over there" while pointing to an alley that runs east and west. RP 1069, 1071.

Given what "had been going on in the area," Halfhill began to call for and organize containment units and a K-9 unit. RP 1071. This process took about two minutes, and during that time, Halfhill took a statement from Wright. RP 1071-72.

Wright reported that he had been walking on the north side of 15th Street in front of Summer Tree Park Apartments, talking on his cell phone

[2] It was assigned incident number 12-305-1341. RP 471-72.

when four to five black males came up behind him, stopped him, pointed a small, silver revolver at him, and demanded and took his cell phone. RP 1072-74, 1079-80. The person holding the revolver who took his cell phone was wearing "a Jason-style hockey mask." RP 1073. The males then ran south, across South 15th Street, into the small alley that runs east to west. RP 1074.

Based on this information, Officer Halfhill was able to have the K-9 unit come to his position, the last place the suspects were observed. RP 1074-75. *See* RP 1168.

Officer Halfhill then stayed with Wright until after the suspects were apprehended. RP 1075.

Haddow-Brunk was also dispatched to this robbery and asked to help to establish containment of an area around 1800 South Sprague for deployment of the "K-9" unit. RP 361 -65. *See* RP 736.

Tacoma Police Lieutenant Lerum and Officers Galvin, Tiffany, and Carl Puccio also responded to the area based on Halfhill's callout, and assisted in containing the area. RP 668-69, 903, 1145-47, 1561-62.

Tacoma Police K-9 Officer Chris Martin, and his canine partner, a German Sheppard police dog, named Oscar, RP 728-29, responded to the scene to try to track the suspects. RP 733-34, 744, 761. He and Oscar arrived to find Officers Halfhill and Wade White with the victim of the

crime, RP 735, and they began to track the suspects in the area of the alley off of 15th and Ridgewood, which was the area Wright reported seeing the suspects fleeing. RP 737. *See* RP 751. Officer Wade White accompanied them, serving as a cover officer. RP 737.

Oscar led the officers through the alley west towards Sprague Avenue. RP 738. When he reached the sidewalk of Sprague, he turned back east in the alley and then into the backyard of 1832 South 15th Street, where officers saw three cars parked. RP 738. Two were clearly empty and the third, a green Cadillac, had windows that were so "fogged over" officers couldn't see inside. RP 366, 501, 738, 752-53. The track lasted about five minutes, RP 743, *see* RP 365, 669, 905, and covered approximately one city block. RP 761, 762-63.

Officer Martin shined his flashlight through the back window of the Cadillac and saw a person trying to lay down in the back seat. RP 738-39. He then saw another person in the front seat. RP 739. Martin radioed other officers to assist in removing the suspects from the car, and backed off with the dog. RP 740, 759, 904.

Lieutenant Lerum and Officers Tiffany, White, Galvin, and Puccio then removed suspects from the Cadillac. RP 669-70, 903-04, 1148-49, 1562. Ultimately five black males exited the Cadillac, and were handcuffed. RP 740-41, 904.

Officers Haddow-Brunk drove her patrol car to the alley behind the house. RP 366-67. When she arrived, she could hear officers with guns drawn, ordering the occupants of the car out of that vehicle one person at a time. RP 368-69, 669-70.

Lieutenant Lerum instructed Z.J. to get out of the car, placed him in handcuffs, and brought him to Haddow-Brunk's vehicle, where he patted him down, and transferred custody to her. RP 369-70, 1149.

Haddow-Brunk described Z.J. as a 13-year-old black boy, 5'2'' in height, 110 pounds in weight, with black hair and brown eyes. RP 374. *See* RP 1149-50. Haddow-Brunk described him as significantly shorter than the other suspects. RP 449. He was wearing a black nylon jacket with a hood, black jeans, and a black "do-rag." RP 375, 1152-53.

During a pat-down search, Lerum found an LG flip phone in Z.J.'s hand, a Verizon flip phone in his left front jacket pocket, a dark blue bandanna in his right, front pants pocket, a loose cell phone battery, and a blue hairbrush. RP 375-78, 395-96, 1176-77.

Haddow-Brunk then placed Z.J. in the back of her patrol car, and read him the ***Miranda***[3] and juvenile warning from a standard form. RP 380.

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[3] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Officer Wade White then brought Defendant Houston-Sconiers to Haddock-Brunk. RP 380-81. Haddow-Brunk described him as a 17-year-old black boy, 5'9'' in height and 160 pounds in weight. RP 381. He "had a hat on that looked like the hood of a dark blue sweatshirt," a dark-gray zip-up vest over a dark long-sleeved thermal shirt, and black Carhartt pants. RP 381-83. Houston-Sconiers was found with a T-Mobile smartphone, a pair of ear buds, and a lighter. RP 384-86. Defendant Houston-Sconiers was then also placed in Haddow-Bunk's vehicle. RP 386.

Officer Tiffany took L.A. out of the back seat of the Cadillac, and noticed that L.A. was wearing a sweatshirt with some sort of graphic on it. RP 904-07, 924-26. Tiffany placed L.A. in handcuffs, read him the ***Miranda*** warnings, placed him in his patrol car, and interviewed him. RP 907-08.

Officer Galvin took Defendant Roberts from the driver's side of the Cadillac and took him into custody. RP 670, 676. Roberts was wearing a black jacket, a white t-shirt, and gray Carhartt pants. RP 672. He had a blue bandanna in his pocket. RP 673-74.

Officer Puccio removed A.T. from the vehicle, handcuffed him, and took him to his patrol car. RP 1562-64, 1579. Puccio testified that A.T. was wearing a "blue-hoodie-type" sweatshirt with a Florida Gators

logo, dark pants, and black shoes. RP 1564. Puccio then transported A.T. and L.A. to Remann Hall juvenile detention facility. RP 1581, 1586-87.

Officer Haddow-Brunk, using a flashlight, looked into the rear passenger-side window of the car from which the defendants had been removed, and saw a backpack that matched the description of that stolen from S.D. earlier that evening. RP 390-91, 399, 433-34, 445-46. She then took Z.J. and Houston-Sconiers to the Remann Hall juvenile detention facility. RP 438-39, 451.

Lieutenant Lerum then returned to the Cadillac and stood by until forensics arrived to insure that nothing was disturbed. RP 1154. While doing so, he saw two backpacks in the backseat, a red devil's mask in the backseat, and a white mask in the glove box. RP 1154.

While Lt. Lerum was waiting, he was contacted by Dorothy Worthey, the property owner, who gave consent to search the Cadillac and remove the stolen items therefrom. RP 1155-56, 1229. Worthey testified that the items found in the car and photographed by police had not been in the Cadillac before. RP 1230-32.

Worthey testified that she knew Defendant Roberts because he lived behind her and was a friend of her oldest grandson. RP 1235-36, 1241-43. She testified that he would come to her house just about every day, and even called her, "Granny." RP 1232-33, 1235-36. Worthey also

recognized some of the other assailants in the Cadillac as people who had been in her residence before, though she did not know their names. RP 1236-37.

Crime Scene Technician Matthew Prolo arrived at the scene about 20 minutes after Lerum secured the vehicle, at 10:55 p.m. RP 498-99, 1155, 1157. After he spoke with Lieutenant Lerum, RP 1179, Prolo looked over the green Cadillac from which the suspects were removed to determine if he could take fingerprints from its surfaces, but determined that due to weather, he could not. RP 500-01, 611. He then took photographs of both the exterior and interior of the Cadillac. RP 501-05.

After taking photos, Prolo searched the vehicle for any evidence relating to the robberies. RP 517. He found a blue and white bandanna on the driver's side of the rear seat of the Cadillac, RPO 523-26, a gray. black, and white bandanna on the passenger-side of the rear seat of the Cadillac, RP 526-28, a black cloth hood found in the glove box of the Cadillac, RP 527-28, a white, plastic mask found in the glove box, RP 541-45, a red plastic devil mask found on the center of the rear seat of the Cadillac, RP 545-46, a Nelson Rigg brand backpack found on the driver's side, rear floor board of the Cadillac, RP 547-49, a Tommy Hilfiger backpack found on the driver's side rear seat with candy and "plastic novelty items" inside, RP 550-52, 599, a black and gray Nike backpack

found on the passenger side of the rear seat of the Cadillac with five pieces of spiral notebook paper and school lessons on computer paper inside, RP 553, 556, a Seattle Seahawks knit cap found on the passenger side of the rear seat of the Cadillac, RP 554, a black, red, and white bandanna found on the rear seat, RP 555, a Harrington and Richardson .32-caliber revolver found underneath the front passenger seat, which was loaded with five live cartridges and one apparently spent cartridge, RP 559-66, 1173, 1174-75, 1180-81, and a white Apple iPhone, found in the center console. RP 591-93, 607. *See* RP 611-14. The white Apple iPhone was Defendant Robert's phone. *See* RP 691-92, 2030. Officer Tiffany testified that the red devil mask was covered in glitter. RP 928-29.

Officer Haddow-Brunk also gave Prolo a T-Mobile Prism smartphone, RP 530-31, a LG model VM 510 cell phone, RP 537-38, an AT&T model Z221 cell phone, RP 539-40, a ZTE brand battery. RP 540-41, 589-90, and another blue and white bandanna. RP 597-98.

Prolo swabbed the cell phones, firearm, and ammunition for later DNA testing, RP 566-67, 630, 633,636, and attempted to lift latent fingerprints from the firearm, ammunition, masks, and papers removed from a backpack, RP 566-71. He was able to obtain one such print from the red devil mask, and prints from several of the pieces of paper. RP 570-72, 644. He recovered 14 fingerprints in all. RP 1348. He could not lift a

fingerprint from the revolver. RP 596, 630, 644-45. For a number of reasons, this did not surprise Prolo. RP 644-46. *Cf.* RP 1334-37.

Tacoma Police Department Latent Fingerprint Examiner Timothy Taylor examined the fingerprint impressions that Prolo was able to obtain from the mask and papers and compared those to known fingerprint impressions, including those of Defendants Houston-Sconiers, Roberts, those of Tolbert and Z.J. RP 1337-41, 1345. Of the 14 latent fingerprint impressions recovered, Taylor determined eleven had value sufficient to make a comparison. RP 1348, 1356. Of those eleven, eight matched the fingerprints of known people: one matched the fingerprints of A.T. and the remaining seven matched those of Derrick Holliday. RP 1348-49, 1357. *See* RP 1369-70. A.T.'s fingerprint was lifted from the exterior of the red plastic devil mask. RP 1350, 1366, 1374-75, 1799-1800. Holliday's fingerprints were found on two pieces of paper found in the stolen backpack. RP 1351, 1366. One may not infer from the absence of a fingerprint that a person was not in contact with an object. RP 1373.

Lt. Lerum testified that the handgun was a silver revolver, with live rounds in the cylinder and identified exhibit 24 as the revolver recovered from the Cadillac. RP 1158, 1162, 1164, 1184-85.

Tacoma Police Detective Brian Vold, the Tacoma Police Department firearm expert who had tested approximately 1,200 firearms,

tested the revolver recovered from the Cadillac for operability and found that "[i]t fired as its designed to do without any problems." RP 1272-73, 1276-80, 1282.

Although the cartridges loaded into the revolver at the time of its recovery were designed for a semi-automatic weapon, during his testing Detective Vold loaded a semi-automatic cartridge into the revolver, was able to close the cylinder, and concluded that the weapon would have fired the ammunition found inside it at the scene. RP 1281-82, 1290.

Tacoma Police Detective Robert Baker tried to obtain surveillance footage from area businesses for October 31, 2012, after about 9:00 p.m. RP 1317-19. He was able to obtain surveillance video from a Wallgreens store located at 6th Avenue and Sprague in Tacoma, and download that video onto a disc identified at trial as exhibit 63. RP 1319-22, 1749-50, 1792. That disc was admitted into evidence and published for the jury. RP 1687-89.

A.T. testified that he did not remember what happened after they left Roberts' residence until he was arrested that night. RP 1823. He testified that he "was able to read one of my codefendant's statement," that he "memorized it, went to the interview, repeated it, and then got a get-out-of-jail-free card." RP 1823, 1842. *See* RP 1849. He testified that the statement in question was L.A.'s statement. RP 1823. However, after

being told that L.A. did not write a statement, RP 1824, A.T. testified that it was L.A.'s "proffer" that he read. RP 1842. A.T., however, could not, at the time of trial, remember a single thing from that proffer. RP 1842, 1853.

Z.J. testified that he pleaded guilty to two counts of first degree robbery pertaining to the events of October 31, 2012. RP 1088, 1105. He identified an exhibit as being the clothing he was wearing when arrested that night. RP 1088-89. He identified both Houston-Sconiers and Treson Roberts as "homies," or friends. RP 1090-91. Z.J. testified that he knew A.T. and L.A., but that he did not associate with them. RP 1090-91.

T.R., Defendant Roberts' twin brother, testified that Roberts left home at about 9:00 to 9:30 at night. RP 2014, 2028. Defendant Robert's girlfriend, Shantell Bush, testified that, on October 31, 2012, she watched a movie with Defendant, that he smoked marijuana, and that he left the residence between 9:00 and 10:00 that night. RP 2051, 2056, 2059-60, 2080. T.R. believed that Roberts was wearing a blue bandanna at the time, RP 2044-45, and Bush testified that he does so regularly. RP 2061.

L.A. testified that on Halloween night, 2012, he met his friend A.T., also known as "Money," in the Hilltop neighborhood of Tacoma. RP 1435-36, 1813. L.A. was wearing a black sweatshirt, gray pants, a bandanna, and blue, black and gray shoes. RP 1465-66, 1500-01. A.T. was

wearing a Florida Gators sweatshirt, which had been in L.A.'s possession, and a bandanna. RP 1466-68, 1500-01.

They met at about "dinner time" that night and then went to the residence of Defendant Roberts, where they met up with Roberts, Houston-Sconiers, and some others. RP 1436-38.

The group was there for about two to three hours and was "just chilling," smoking marijuana, drinking vodka, and "hooping," or playing basketball. RP 1438-40, 1478-81, 1536-40, 1788-89, 1794, 1816.

He, Z.J., also known as "Baby LS," Houston-Sconiers, also known as "Tiny," Roberts, and A.L. then went to Stanley Elementary School. RP 1440-41. Z.J. was wearing a bandanna at the time. RP 1500-01.

L.A. testified that when they arrived at Stanley, Defendant Houston-Sconiers was wearing "a Jason mask," by which he meant a white hockey mask. RP 1447. No one else was wearing a mask at the time. RP 1447.

Because no one was at the school, L.A. and A.T. changed their plans and left to go to a store. RP 1441. In fact, they went to several stores and restaurants before again meeting up with Houston-Sconiers, Roberts, and Z.J. RP 1441-47, 1484-99, 1540-47.

When they met them again, Defendant Roberts was wearing a red devil mask. RP 1448, 1500. Z.J. had a backpack with candy inside that he

hadn't had before. RP 1459, 1550. Houston-Sconiers, Roberts, and Z.J. said they had been in the north end of Tacoma. RP 1448.

L.A. testified that the group of five then began walking back towards Roberts' house. RP 1448. While they were doing so, they saw a man leaving from an apartment complex on foot, talking on a cell phone. RP 1452. Defendants Houston-Sconiers and Roberts said something to the effect of "we're about to get him" and then ran. RP 1453. LA., A.T., and Z.J. walked in a different direction, but when they saw Houston-Sconiers and Roberts again, they were with the man on the phone. RP 1454. Houston-Sconiers told the man, "give me your phone," and displayed a silver revolver. RP 1454-55. Both Houston-Sconiers and Roberts were wearing their masks at the time. RP 1455. L.A. described the man as black, probably middle age. RP 1456. The man gave Houston-Sconiers and Roberts his phone. RP 1456-57.

Houston-Sconiers and Roberts came back running, with their masks lifted to the top of their heads, and one of them had a phone in his hands at which both were looking. RP 1449-51, 1456-57.

L.A. continued to walk, saw the man on a different phone, and then he, A.T., and Z.J. ran down an alley, apparently with Houston-Sconiers and Roberts until they came to the green Cadillac. RP 1457-58. L.A. told

the others the man was calling the police, and Houston-Sconiers told then to get into the car. RP 1458-59.

Roberts was in the driver's seat of the Cadillac, Houston-Sconiers in the front, passenger seat, A.T. was on the driver's-side of the backseat, L.A. was sitting to the right of A.T., in the middle of the backseat, and Z.J. was sitting on the passenger-side of the backseat. RP 1516-17. *See* RP 1817. All of them ducked down. RP 1460-61. L.A. testified that the police found them in the car about ten minutes later. RP 1463, 1817. *See* RP 1554-55.

The State admitted a published a video taken from Robert's cell phone, which depicted Houston-Sconiers in possession of a firearm similar to that used in the robberies at issue here. RP 1605, 1610-1616, 1654-63, 1689-1704. The court read a limiting instruction prohibiting the jury from using the video as evidence of prior misconduct. RP 1704.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED THE STATEMENT OF JAMES WRIGHT AS AN EXCITED UTTERANCE BECAUSE THAT STATEMENT WAS NONTESTIMONIAL AND HENCE, NOT SUBJECT TO THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION OR THAT OF ARTICLE I, SECTION 22 OF THE WASHINGTON STATE CONSTITUTION.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." *See* Wn. Const. Art. I §22 (*mandating* that "[i]n criminal prosecutions the accused shall have the right... to meet the witnesses against him face to face"); ***State v. Pugh***, 167 Wn.2d 825, 225 P.3d 892 (2009).

"In ***Crawford [v. Washington***, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)], the United States Supreme Court held that the confrontation clause bars 'admission of ***testimonial*** statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (emphasis added). ***State v. Koslowski***, 166 Wn.2d 409, 413, 209 P.3d 479 (2009).

Hence, "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." ***Davis v. Washington***, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

"Nontestimonial hearsay" is thus "admissible under the Sixth Amendment subject only to the rules of evidence." ***Pugh***, 167 Wn.2d at 831-32.

> ***Statements are nontestimonial when made in the course of police investigation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.*** They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 224 (2006) (emphasis added); ***Koslowski***, 166 Wn.2d at 418.

The Court in ***Davis***

> adopted four factors that help to determine whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or instead to establish or prove past events: (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she

> describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (*quoting* ***Davis***, 547 U.S. at 827).

With respect to the first factor, "it is not inconsistent to speak of past events in conjunction with an ongoing emergency and, in appropriate circumstances, considering all of the factors the [***Davis***] Court identified, the fact that some statements are made with regard to recent past events does not cast them in testimonial stone." ***Koslowski***, 166 Wn.2d at 422. *See* ***Pugh***, 167 Wn.2d at 832-34.

With respect to the second factor, "under some circumstances the fact that questioning concerns an at large suspect who is armed may, when considered with other evidence, indicate the interrogation is intended to resolve an ongoing emergency." ***Koslowski***, 166 Wn.2d at 427.

"[A] conversation which begins as an interrogation to determine the need for emergency assistance" can "'evolve into testimonial statements.'" ***Davis***, 547 U.S. at 828. *See* ***Koslowski***, 166 Wn.2d at 419.

"[T]he rule of forfeiture by wrongdoing... extinguishes confrontation claims on essentially equitable ground." ***Crawford***, 541 U.S. at 62. Thus, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." ***Davis***, 547 U.S. at 833.

"A confrontation clause challenge is reviewed de novo." ***Koslowski***, 166 Wn.2d at 417. *See* ***State v. Mason***, 160 Wn.2d 910, 912, 162 P.3d 396 (2007).

"Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error test," that is, "[i]f the untainted evidence is so overwhelming that it necessarily leads to a finding of defendant's guilt, the error is harmless." ***Koslowski***, 166 Wn.2d at 431 (*citing, inter alia*, ***Lily v. Virginia***, 567 U.S. 116, 139-40, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999)).

In the present case, the defendants argue that they were "deprived of [their] state and federal rights to confrontation when the court admitted an officer's testimony about... what James Wright had told him about being robbed, ***because Wright's statements were testimonial***, Wright did not testify and [defendants] had no prior opportunity for cross-

examination." Opening Brief of Appellant Roberts (BOR), p. 23-26 (emphasis added); Opening Brief of Appellant Houston-Sconiers (BOHS), p. 13-19. Because Wright's statements were not testimonial, Defendants' confrontation protections were not invoked or violated, and the statements were properly admitted.

The statements at issue were made to Tacoma Police Officer Rodney Halfhill. *See* BOR, p. 23-26; BOHS, p. 13-19; RP 1047-53.

Officer Halfhill testified that he responded to an 8:24 p.m.-911 call, and, because he had been in the area, arrived on scene in less than a minute. RP 1048. As he was arriving, he saw James Wright standing by himself on the side of South 15th Street. RP 1048. Halfhill testified that Wright was "shaken up," "frantic" and "waving his arms, pointing south." RP 1048-49. After Halfhill stopped and exited his patrol car, Wright, still pointing south, said "they're there. They just ran there, they ran there." RP 1049.

Halfhill called for K-9 and containment units, and then began talking to Wright to determine if a crime had been committed and if so, its nature. RP 1049-50. Halfhill indicated that he spoke to Wright for about three minutes and that Wright seemed shaken up and scared throughout that time. RP 1050. Wright told the officer that four to five black males approached him from behind, and demanded that he give them his cell

phone. RP 1050. Wright indicated that one of them then pulled a silver revolver, took his cell phone, and ran away. RP 1050-51.

As Halfhill was speaking with Wright, a car pulled up with three men inside, who asked Halfhill if he was "chasing kids." RP 1051. When he asked why, one of the men, Theotis Stewart, who was in the backseat of the vehicle, reported that he had just been robbed at gunpoint about ten minutes earlier at 12th and Ridgewood. RP 1051-52. Halfhill described Stewart as "a little more calm" and more angry than Wright. RP 1051-52.

As Halfhill was taking Stewart's statement, he was still trying to set up containment. RP 1052.

The trial court determined that Wright's statements to Halfhill were nontestimonial and admissible as excited utterances at trial, RP 1061-64.

The trial court was correct. Applying the four ***Davis*** factors reveals that "the primary purpose" of Wright's statements was "to enable police assistance to meet an ongoing emergency," ***Davis***, 547 U.S. at 822, and hence, that they were "nontestimonial" for purposes of confrontation protections.

The first of the ***Davis*** factors asks whether the declarant was "speaking about current events as they were actually occurring, requiring police assistance," or whether "he or she [was] describing past events."

Koslowski, 166 Wn.2d at 418-19. "The amount of time that has elapsed (if any)" between the events described and the statements "is relevant." *Id.* Again, however, "it is not inconsistent to speak of past events in conjunction with an ongoing emergency." ***Koslowski***, 166 Wn.2d at 422.

In this case, there was an ongoing emergency. Before Officer Halfhill had even arrived on scene to contact Wright that night, officers knew that there had been numerous robberies" of a similar nature in the same area that evening, all involving a firearm. *See, e.g.,* RP 1146. They had no reason to believe that the people responsible for these robberies would not rob another person if not stopped.

As Officer Halfhill was arriving on scene, Wright was "waving his arms" and "pointing south," RP 1048-49, and before Halfhill asked anything, Wright said, "[t]hey just ran there, they ran there." RP 1049. Hence, Wright was speaking about the direction in which the people who had just robbed him were currently running.

In other words, he was "speaking about current events as they were actually occurring, requiring police assistance," ***Koslowski***, 166 Wn.2d at 418-19.

While he also briefly discussed "past events," ***Koslowski***, 166 Wn.2d at 418-19, in doing so, he only communicated to Halfhill that he had been robbed in a manner similar to at least two other parties that

evening by a similarly-described group of people, which was carrying a similarly-described weapon. *See. e.g.,* RP 1071. Because Wright communicated immediately where those people currently were, that they were on foot, and armed, RP 1048-51, "the primary purpose" of his statements, was "to enable police assistance to meet an ongoing emergency." ***Koslowski***, 166 Wn.2d at 418-19. The "fact that some [of his] statements [were] made with regard to recent past events does not cast them in testimonial stone," ***Koslowski***, 166 Wn.2d at 422.

Rather, because Wright was communicating the current location of armed robbery suspects who were, by reasonable inference, engaged in an ongoing string of armed robberies, he was "speaking about current events as they were actually occurring, requiring police assistance." ***Koslowski***, 166 Wn.2d at 418-19. Therefore, the first ***Davis*** factor weighs in favor of finding his statements to be nontestimonial.

The second factor asks whether a "reasonable listener" would "conclude that the speaker was facing an ongoing emergency that required help." ***Koslowski***, 166 Wn.2d at 418-19. With respect to this factor, "the fact that questioning concerns an at large suspect who is armed may, when considered with other evidence, indicate the interrogation is intended to resolve an ongoing emergency." ***Koslowski***, 166 Wn.2d at 427.

Indeed, it does so in this case. Here, local residents and their police were faced not just with the robbery of Wright, but with an ongoing chain of armed robberies in the same area in the same, very brief period of time. *See, e.g.,* RP 348-49, 351-52,393-94, 431, 351, 821, 954, 1146. Moreover, these robberies were occurring on Halloween night, a time at which there were many, vulnerable victims in that area. Thus, when Wright told Halfhill that he, too, had just been robbed, and that the robbers were armed and currently at large in the area, there was "an ongoing emergency that required help." ***Koslowski***, 166 Wn.2d at 418-19. As a result, the second ***Davis*** factor also weighs in favor of finding that Wright's statements were nontestimonial.

The third ***Davis*** factor asks whether "the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past." ***Koslowski***, 166 Wn.2d at 418-19.

In this case, many of Wright's statements were spontaneous, and not in response to any questions. *See* RP 1048-49. Based on these unsolicited statements alone, Halfhill called for containment units, but he did not have sufficient information to instruct those units and achieve containment, much less detain suspects, until after he asked Wright about the nature of the incident he was reporting. RP 1049-50. Wright then told

the officer that he was robbed of his cell phone by four to five black males, that one of them was armed with a silver revolver, and the direction in which they were then running. RP 1050-51. These statements, which were complete within four minutes of the robbery itself, *see* RP 1050, gave the officer sufficient information from which to infer that Wright was a victim in an ongoing series of robberies, suspect information to communicate to the containment unit, and notice that at least one of the suspects was armed. As in the example given by the Court in ***Davis***, Officer Halfhill here was simply, and prudently, trying to discern the suspects' identity and "whether [officers] would be encountering a violent felon," and therefore, the third ***Davis*** factor also "indicate[s] the elicited statements were nontestimonial." ***Koslowski***, 166 Wn.2d at 418-19 (*quoting* ***Davis***, 547 U.S. at 827).

The final ***Davis*** factor concerns "the level of formality of the interrogation": "[t]he greater the formality, the more likely the statement was testimonial." ***Koslowski***, 166 Wn.2d at 418-19.

Here, there was virtually no formality. Wright's statements were made largely spontaneous rather than in response to formal interrogation. RP 1049-51. They were made under the stress of a robbery that had occurred less than a minute before. RP 1049-51. They were made while standing on a sidewalk in the dark, rather than while seated comfortably in

a lighted police station or courtroom. RP 1049-51. They were made while the assailants who had just stolen his cell phone at gunpoint were in the immediate area, and still armed with a revolver. RP 1049-51.

In other words, here, as in the example cited originally by ***Davis***, "the caller [was] frantic and in an environment that was not tranquil or safe." ***Koslowski***, 166 Wn.2d at 418-19 (*citing* ***Davis***, 547 U.S. at 827).

As a result, the fourth and final factor, like all the ***Davis*** factors, indicates that Wright's statements were nontestimonial.

Although Defendants rely on the facts of ***Koslowski*** to reach the opposite result, ***Koslowski*** is factually distinguishable.

In ***Koslowski***, "the evidence about the interrogation" did not disclose that the declarant, "the officers, ***or another person***, such as an onlooker or potential witness, was in danger," ***Koslowski***, 166 Wn.2d at 428 (emphasis added).

Such was not the case here. In the present case other people were in danger. There had already been several robberies with multiple victims in this case, all committed by the same group in the same area, all at a time when children were on the street celebrating Halloween. *See, e.g.,* RP 348-49, 351-52, 393-94, 431, 351, 821, 954, 1146. The assailants were still in the area, still at large, and still armed. *See, e.g.,* RP 1049-51. The officers

had no reason to believe that these assailants would not commit another robbery if not stopped.

Thus, as application of the four ***Davis*** factors indicated, "the primary purpose" of Wright's statements was "to enable police assistance to meet an ongoing emergency," and hence, under ***Davis***, 547 U.S. at 822, these statements were "nontestimonial" for purposes of confrontation protections.

As a result, those protections were not implicated in this case, and the trial court could not have violated them.

Because Wright's statements were properly admitted as excited utterances under ER 803(a)(2), a fact which is both supported by the record, *see* RP 1049-52, and unchallenged by either defendant, *see* BOR, p. 1-37, BOHS, p. 1-50, the trial court did not otherwise err in their admission.

Therefore, the defendant's convictions should be affirmed.

2. DEFENDANTS' CONVICTIONS AND ENHANCEMENTS SHOULD BE AFFIRMED BECAUSE, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CHARGED CRIMES AND ENHANCEMENTS BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Lopez***, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (*quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941

P.2d 1102 (1997)). "Determinations of credibility are for the fact finder and are not reviewable on appeal." ***Brockob***, 159 Wn.2d at 336.

In the present case, Defendants argue that there was insufficient evidence to support (a) their convictions of second degree assault, as charged in count VI, or (b) the firearm enhancements. BOHS, p. 19-25, 48; BOR, p. 18-23, 26-28.

a. Second Degree Assault.

Both defendants argue that there was insufficient evidence to support their convictions for second degree assault of A.G, as charged in count VI of their respective amended informations, CP 17-22, 283-88, because they argue that "[n]o reasonable juror could conclude that [A.]G[.] felt a 'reasonable apprehension and imminent fear of bodily injury.'" BOHS, p. 19-21; BOR, p. 26-27. The record shows otherwise.

Count VI of both defendants' amended informations charged second degree assault under RCW 9A.36.021(1)(c) against A.G. CP 17-22, 283-88.

RCW 9A.36.021(1)(c) provides, in pertinent part, that "[a] person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree... [a]ssaults another with a deadly weapon[.]" *See* CP 136-95.

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 183.

In the present case, the evidence showed that the second time the three boys approached A.G. and her friends, the one with a white mask told them "this is a stickup." RP 821, 954. *See* RP 781, 785-86, 843. He then pointed a small silver gun at her and her friends, and told them to give them everything. RP 785-86, 821-22. 839, 850, 900, 954. *See* RP 872-73, 957.

A.G. testified that she recognized the voice of the person with the gun as that of "Tiny," and identified "Tiny" as Defendant Houston-Sconiers. RP 788-89, 808, 824-25, 848. *See* RP 901.

She testified that, after D.P.M. surrendered her candy to the three assailants, she and D.P.M. went to a corner house "to get some help." RP 778, 802-03, 826, 837, 851, 961-62. In fact, they departed so quickly that they left their three male friends behind to deal with the robbers. RP 837.

A.G. testified that she asked the occupants of the house to call the police. RP 853, 860. *But see* RP 856 ("[*w*]*e* were scared to call the police.")(emphasis added).

Although Defendants argue that "[n]o reasonable juror could conclude that [A.]G[.] felt a 'reasonable apprehension and imminent fear of bodily injury," BOR, p. 27, *see* BOHS, p. 20-21, "a rational fact finder could" have reasonably inferred from the evidence that A.G. had been threatened with a firearm, left the scene, went to a nearby house for "help," and asked the residents therein to call police, that she did indeed suffer "a reasonable apprehension and imminent fear of bodily injury." CP 183.

Because all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant, ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), this inference must be drawn.

When it is, there is sufficient evidence of "a reasonable apprehension and imminent fear of bodily injury," CP 183, to support defendants conviction of second degree assault as charged in count VI.

However, one need not rely on inferences in this case because there was direct evidence that A.G., when threatened with a gun, had "a reasonable apprehension and imminent fear of bodily injury." CP 183 .

Contrary to the Defendants' assertion, that A.G. "did not testify that she was scared or frightened," BOHS, p. 21, BOR, p. 27, A.G. did

testify that she and her friends were "really scared" by the robbery. RP 859.

Because a claim of insufficiency admits the truth of the State's evidence, ***Cannon***, 120 Wn. App. at 90, it must be admitted that A.G. was "really scared" by the assault with a deadly weapon. When it is, there is sufficient evidence that she suffered "a reasonable apprehension and imminent fear of bodily injury," CP 183, to support Defendants' convictions of second degree assault as charged in count VI.

Therefore, those convictions of count VI should be affirmed.

b. Firearm Enhancements

Defendants make two arguments with respect to the firearm enhancements. First, both argue that there was insufficient evidence to support the enhancement pertaining to count X.

Defendants were charged in count X of their respective amended informations with conspiracy to commit first degree robbery while armed with a firearm. CP 17-22, 283-88. Those informations alleged, in relevant part that the defendants,

> [o]n or about the 31st day of October, 2012, with intent that conduct constituting the crime of ROBBERY IN THE FIRST DEGREE, as prohibited by RCW 9A.56.190 and 9A.56.200(1)(a)(i)(ii), be performed, agree with one or more persons to engage in or cause the performance of such conduct, and any one of the persons involved in the agreement did take a substantial step in pursuance of the

> agreement,[] and ***in the commission thereof the defendant, or an accomplice, was armed with a firearm***, to-wit: a handgun, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, contrary to RCW 9A.28.040, and against the peace and dignity of the State of Washington.

CP 17-22, 283-88 (emphasis added). *See* RCW 9A.28.040 (criminal conspiracy); RCW 9A.56.190 (robbery definition); RCW 9A.56.200(1)(a)(i)(ii) (robbery in the first degree).

Conspiracy to commit first degree robbery is a class B violent offense. RCW 9A.56.200(2); RCW 9A.28.040(3)(b); RCW 9.94A.030(54)(a)(ii).

RCW 9.94A.533(3) provides that additional time "shall be added to the standard range for" conviction of this offense "if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010."

"'[A] person is 'armed' if [1] a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.'" ***State v. Eckenrode***, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007)(*quoting* ***State v. Valdobinos***, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)), *see* ***State v. Easterlin***, 159 Wn.2d 203, 206, 149 P.3d 366 (2006), and [2] there is "some nexus between the defendant, the weapon, and the crime." ***Eckenrode,*** 159 Wn.2d at 493. *See* ***Easterlin***, 159 Wn.2d at 206; ***State v.***

Barnes, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); ***Valdobinos***, 122 Wn.2d at 282.

A "[f]irearm" is defined as "a weapon or device from which a projectile or projectiles ***may*** be fired by an explosive such as gunpowder." RCW 9.41.010(9). (emphasis added).

In the present case, the court instructed the jury, in relevant part, that

> For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was ***armed with a firearm at the time of the commission of*** the crimes of robbery in the first degree, ***conspiracy to commit robbery in the first degree***, and assault in the second degree.
>
> ***A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime***. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime.
>
> If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed so armed, even if only one firearm is involved.

CP 195 (court's instruction no. 44) (emphasis added).

Both defendants also argue that "there was insufficient evidence" that they "were 'armed' with a firearm at the time of the crime." BOR, p.

27-28. *See* BOHS, p. 22-25. Houston-Sconiers argues specifically that "[t]here were no facts presented in this case from which a juror could infer a connection between the gun and the crime of conspiracy." BOHS, p. 23. The record shows otherwise.

First it shows that a firearm was "easily accessible and readily available for use, either for offensive or defensive purposes,'" ***State v. Eckenrode***, 159 Wn.2d at 493, at the time of the conspiracy.

Undisputed testimony established that Houston-Sconiers, Roberts, L.A., Z.J., and A.T. had been at Roberts' residence on the evening of October 31, 2012, smoking marijuana, drinking vodka, and playing basketball. RP 1436-40, 1478-81, 1536-40, 1788-89, 1794, 1816. Undisputed testimony also established that the group was in possession of a silver handgun that evening, RP 1454-55, *see, e.g.,* RP 788-89, 808, 824-25, 848, 993, 970, 996, 1017-19, 1133, 1461, and that it decided to go to Stanley Elementary school, apparently hoping to find other people. RP 1440-41.

It may be reasonably inferred from this evidence that, when the defendants arrived at Stanley, (1) at least one of them was armed with the silver handgun, and (2) none of them had yet agreed with one or more persons to engage in first degree robbery.

However, when the group arrived at Stanley and discovered that no one else was there, their plans changed. *See* RP 1441. L.A. testified that ha and A.T. went to several restaurants and stores, RP 1441-47, 1484-99, 1540-47, and other testimony showed that Roberts and Houston-Sconiers went and engaged in the first two robberies. RP 788-89, 808, 824-25, 848, 993, 970, 996, 1017-19, 1133, 1448, 1459, 1500, 1550.

It may be reasonably inferred from this evidence that Roberts and Houston-Sconiers therefore agreed with one or more persons to engage in first degree robbery sometime after they arrived at Stanley, but before meeting up with L.A. and completing the final robbery. *See* RP 1454-55. Because one of them was in personal possession of the firearm at this time, *see* RP 1454-55, a firearm was "easily accessible and readily available for use, either for offensive or defensive purposes.'" ***State v. Eckenrode***, 159 Wn.2d at 493.

Because all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant, ***Salinas***, 119 Wn.2d at 201, this inference must be drawn.

When it is, there is sufficient evidence that the defendants were "armed with a firearm" when they "agree[d] with one or more persons to engage in or cause the performance of [first degree robbery], and any one

of the persons involved in the agreement did take a substantial step in pursuance of the agreement." CP 195.

With respect to Defendants' specific contention that "[t]here were no facts presented in this case from which a juror could infer a connection between the gun and the crime of conspiracy," BOHS, p. 23. *See* BOR, p. 27, a rational fact finder could reasonably have inferred that the fact that one of the defendants was armed with a firearm that both co-defendants and their co-conspirator were emboldened. In other words, one could reasonably infer that possession of that firearm enabled them to formulate a plan to commit robberies they may have been reluctant to plan to commit in the absence of that firearm.

Because all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant, ***Salinas***, 119 Wn.2d at 201, this inference must be drawn.

When it is, there is sufficient evidence of "some nexus between the defendant, the weapon, and the crime," ***Eckenrode,*** 159 Wn.2d at 493, and with this, sufficient evidence to support the firearm enhancement to count X, conspiracy to commit first degree robbery.

Defendant's second argument with respect to the firearm enhancements is that "none of the firearm enhancements were supported by sufficient evidence" BOR, p. 18, because, they contend, "the [S]tate

failed to present sufficient evidence to prove the gun met the statutory definition of a 'firearm.'" BOR, p. 23. *See* BOHS, p. 48. The record shows otherwise.

Again, a "[f]irearm" is defined by statute as "a weapon or device from which a projectile or projectiles ***may*** be fired by an explosive such as gunpowder." RCW 9.41.010(9). (emphasis added).

With respect to this definition, this Court has held that "a firearm" must be "a gun in fact, not a toy gun; and ***the real gun need not be loaded or even capable of being fired to be a firearm.***" ***State v. Faust***, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998) (emphasis added).

Here, Defendants argue that the loaded .32-caliber Harrington and Richardson revolver with which they were armed, *see. e.g.,* RP 559-66, 1173, 1174-75, 1180-81, did not meet the statutory definition of a "firearm" because it was then loaded with .32-caliber semiautomatic ammunition rather than .32-caliber long ammunition. BOR, p. 18-23; BOHS, p. 48. *See* RP 1281-82.

However, the testimony clearly established that the .32-caliber revolver in question was "a weapon or device from which a projectile or projectiles ***may*** be fired by an explosive such as gunpowder." RCW 9.41.010(9) (emphasis added).

Tacoma Police Detective Brian Vold, the Tacoma Police Department firearm expert who had tested approximately 1,200 firearms, tested the revolver recovered from the Cadillac for operability and found that "[i]t fired as its designed to do without any problems." RP 1272-73, 1276-80, 1282.

Although the cartridges loaded into the revolver at the time of its recovery were designed for a semi-automatic weapon, during his testing Detective Vold loaded a semi-automatic cartridge into the revolver, was able to close the cylinder, and concluded that the weapon would have fired the ammunition found inside it at the scene. RP 1281-82, 1290.

Moreover, a fact finder could have drawn a reasonable inference from the fact that the revolver contained one apparently spent cartridge, RP 559-66, that the bullet from that cartridge had in fact been fired from that revolver, even though it was a semi-automatic cartridge rather than a revolver cartridge.

Because such inferences must be drawn in a sufficiency of the evidence analysis, ***Cannon***, 120 Wn. App. at 90, this inference must be drawn.

Given this inference, and Vold's testimony, there is sufficient evidence to support the firearm sentence enhancements in this case.

Therefore, Defendants' convictions and their enhancements should be affirmed.

3. THE DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT BY FAILING TO SHOW EITHER IMPROPER CONDUCT OR PREJUDICE.

"Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial." ***State v. Boehning***, 127 Wn. App. 511, 518, 111 P.3d 899, 903 (2005). Prosecutorial misconduct violates this duty and deprives a defendant of his right to a fair trial. *See* ***Boehning***, 127 Wn. App. at 518.

However, "[w]ithout a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice." ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011); ***State v. Larios-Lopez***, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (*citing* ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (*quoting* ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)).

This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically

prejudicial to an appellant in the context of the trial." ***State v. Swan,*** 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (emphasis in original).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). *See* ***State v. Thorgerson***, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); ***State v. Fisher***, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); ***State v. McKenzie***, 157 Wn.2d 44, 134 P.3d 221 (2006) (*quoting* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. ***Anderson***, 153 Wn. App. at 427. "The State is generally afforded wide latitude in making arguments to the jury, and prosecutors are allowed to draw reasonable inferences from the evidence." ***Anderson***, 153 Wn. App. at 427-28, 220 P.3d 1273.

It is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, ***State v. Russell***, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (*citing* ***State v. Graham,*** 59 Wn. App. 418, 429, 798 P.2d 314 (1990), ***State v. Contreras***, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the

prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." ***Russell***, 125 Wn.2d at 87.

Moreover, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Id.* at 86.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (*quoting* ***Brown***, 132 Wn.2d at 561, 940 P.2d 546); ***Fisher***, 165 Wn.2d at 747.

"A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (*quoting* ***Brown***, 132 Wn.2d at 561); ***State v. Johnson***, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). "[R]emarks must be read in context." ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); ***Larios-Lopez***, 156 Wn. App. at 261.

Prosecutorial misconduct may be neutralized by a curative jury instruction, ***Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court's instructions. ***State v. Weber,*** 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, both defendants argue that the deputy prosecutor committed prosecutorial misconduct in four ways. BOHS, p. 25-33, BOR, p. 28-29.

First, they argue that, during closing argument, the deputy "prosecutor repeatedly implied that other uncharged and unproved crimes were committed by Houston-Sconiers and the other men." BOHS, p. 27-29; BOR, p. 28.

Appellate courts "review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions," and "a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury," ***Boehning***, 127 Wn. App. at 519.

"However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant." ***Boehning***, 127 Wn. App. at 519. As the State Supreme Court has noted, "[a] prosecutor has no right to call to the attention of the jury matters or considerations

which the jurors have no right to consider." ***State v. Belgarde***, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In ***Boehning***, this Court found that arguments that inadmissible hearsay statements were consistent with a victim's trial testimony, and that these statements disclosed even more serious, uncharged allegations "were highly prejudicial and constitute[d] flagrant misconduct." ***Boehning***, 127 Wn. App. at 521. It concluded that "[s]uch argument improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds." *Id.* at 522.

In this case, Defendants argue that there were four instances during closing argument at which the deputy prosecutor "implied that other uncharged and unproved crimes were committed by them or "other men." BOHS, p. 27-29; BOR, p. 28.

First, in referring to exhibit 11, "an overhead photograph of the relevant areas of the alleged crimes and where the various defendants were arrested," the deputy prosecutor stated that "in any event, these crimes occurred, the ones that we know about, in this location and general area." RP 2228-29. *See* BOHS, p. 28.

On appeal, Defendants argue that the State "presented no evidence that the group committed robberies other than the three incidents charged

in this case, so it was improper for the prosecutor to imply that there may have been more." BOHS, p. 28.

However, Defendants did not object to this statement at trial, *see* RP 2228-29, and hence, "cannot raise the issue... on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice." ***State v. Curtiss***, 161 Wn. App. 673. Such is not the case here.

Here, the trial court instructed the jury that "[y]our decisions as jurors must be made solely upon the evidence presented during these proceedings," "that the lawyers' statements are not evidence," that "[t]he evidence is the testimony and the exhibits," and that "[y]ou must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 136-95 (instruction no. 1).

Hence, even were the deputy prosecutor's statement regarding the crimes " that we know about," RP 2228-29, construed as implying that there were other uncharged crimes the jury should consider, the jury was instructed by the court to disregard this statement, and juries are presumed to follow the court's instructions. ***State v. Weber,*** 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Moreover, the prosecutor himself told the jury to disregard any of his statements that were not supported by evidence, in telling the jury that

"[w]hat we [the lawyers] say in front of you is not evidence," RP 2345-46, and reminding jurors to "make [their] decisions about what factors have been proved based on a reasonable analysis of the evidence." RP 2357.

Finally, the jury heard similar, if more specific, remarks from defense counsel:

> Well, the "crimes that we know about" is inflammatory language. They're the crimes that are charged. If the State knew about other crimes, they'd be charged. He says "the crimes that we know about" because he wants to scare you. He wants to frighten you into thinking that these guys, Mr. Houston-Sconiers and Mr. Roberts, were on some type of rampage and that they must have done other things that we just don't know about. And that, boy, you better convict them because who knows what these little terrors did that night. Who knows?
>
> That's just not how we convict people in this society; it's just not. We convict them based on evidence beyond a reasonable doubt. We don't convict them on innuendo. We don't scare people into convicting people. It's not the American way, and you're not going to fall for that.

RP 1205-06.

Given these instructions of the court, the other remarks of the prosecutor, and the statements of defense counsel, the prosecutor's four words "that we know about," RP 2228-29 , could not have been "so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice." ***Curtiss***, 161 Wn. App. 673.

Therefore, Defendants "cannot raise the issue... on appeal," *Id.*, and their convictions should be affirmed.

The second statement that Defendants challenge occurred when, in discussing the suspect descriptions provided by victims, the deputy prosecutor stated that "[w]e know that Mr. Houston-Sconiers, on the 14th of October, was in that same Cadillac displaying and holding the same firearm that was used in the robbery." RP 2233-34. *See* BOHS, p. 28. Counsel for Houston-Sconiers objected to this statement. RP 2234.

On appeal Defendants argue that "[t]hough the interior of the vehicle and the firearm resembled the Cadillac and the silver gun later found under the seat, there is no testimony that they were in fact the same." BOHS, p. 28. *See* RP 2305; BOR, p. 28. Of course, there need not be such testimony.

It is reasonable to infer from the facts that "the vehicle and the firearm" in the video "resembled the Cadillac" in which Houston-Sconiers was ultimately found "and the silver gun," BOHS, p. 28, he was seen displaying, that they were in fact the same vehicle and firearm.

Because a prosecutor in closing argument may "draw reasonable inferences from the evidence and... express such inferences to the jury," ***Boehning***, 127 Wn. App. at 519, the deputy prosecutor's statement here was not improper.

Nor would it, even if improper, have been prejudicial. The deputy prosecutor told the jury that this piece of evidence was "relevant because it links [Houston-Sconiers] to that gun[.]" RP 2348-49.

However, he also cautioned the jury that

> you can't use the fact that he [i.e., Houston-Sconiers] apparently was in possession of this firearm 17 days before to conclude that he's committing some bad act before and therefore, he must be doing it again, that kind of thing. The Court expressly forbids you in the instructions from doing that. His character is not at issue. Any priors, not at issue.

RP 2348.

Hence, there is no "substantial likelihood the misconduct [if any] affected the jury's verdict,'" *Yates*, 161 Wn.2d at 774, and the prosecutor's statements, even if improper, could not have been prejudicial.

Therefore, Defendants have failed to show prosecutorial misconduct in this regard, as well.

The third set of statements challenged by Defendants was made when the deputy prosecutor was discussing the limitations on inferences that can be drawn from fingerprint evidence. RP 2341-43; *See* BOHS, p. 28. The deputy prosecutor stated that what was known about what was stolen, including a bag and backpacks, was gleaned from the victims, but asked rhetorically

> [s]o where are they? Where's the orange pumpkin bag? Where are the backpacks and guess what, there's two backpacks in that car that can't be identified other than Mr. H[.]'s homework being in it.
>
> How did those get in there and why are they in there?
>
> [DEFENSE ATTORNEY FOR HOUSTON-SCONIERS]: Objection, Your Honor. These could belong to the perpetrators. They could have been there a long time. Counsel is using them to suggest other acts of misconduct that are completely improper.
>
> THE COURT: Objection is noted for the record.
>
> [PROSECUTOR]: Those backpacks could belong to other people that might have been in the car. They could also belong to other people that weren't in the car.... There's a lot here that we'll never know. And no amount of fingerprinting on a mask or any other item, which by the way, fingerprint all these items—

RP 2341-43. *See* BOHS, p. 28.

The court then interrupted the State's rebuttal argument to allow a juror a recess, RP 2344, but the deputy prosecutor's contention, as illustrated by his remarks before and after this excerpt, was that fingerprint evidence would not have indicated whether the backpacks found in the car were stolen, and if so, by whom. Hence, the prosecutor was not attempting to call to the attention of the jury any uncharged allegations as in ***Boehning***, 127 Wn. App. at 521. He was making a proper argument from the evidence in the record, including the unidentified backpacks found by

police, RP 547, 550-53, 556, 599, as to the limitations of fingerprint evidence.

Therefore, these statements were not improper, and Defendants have failed to show prosecutorial misconduct.

Finally, in discussing the improbability of the Defendant Houston-Sconiers' contention that he was being set up by his former co-defendants, *see* RP 2307-35, the prosecutor stated the following:

> It's so incredibly unlucky that he [i.e., Houston-Sconiers] chose to make phone calls to his buddies and say niggas be snitching. I'm not telling you to do something to that – and I'm not going to say it again—but what happens to that happens to him. Oh, no, that's not a threat. Who is he talking about? Money, by name. It is a surprise that Money takes the stand after that, don't remember, don't remember, don't remember.

RP 2349-51. Counsel for Houston-Sconiers objected that the statements. RP 2351. On appeal, Defendant Houston-Sconiers argues that the deputy prosecutor "appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds," BOHS, p. 29, in so arguing, the prosecutor was simply responding to Houston-Sconier's argument in closing that he had been set up by L.A. Compare RP 2307- *with* RP 2349-51.

Because it is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, and "the prosecutor, as an

advocate, is entitled to make a fair response to the arguments of defense counsel," ***Russell***, 125 Wn.2d at 87, the prosecutor's statements here were not misconduct, and Defendant's convictions should be affirmed.

The second way in which Defendants argue that the deputy prosecutor committed prosecutorial misconduct is by making "several comments disparaging defense counsel." BOHS, p. 25-33, BOR, p. 28-29. The record shows otherwise.

"[A] prosecutor must not impugn the role or integrity of defense counsel." ***State v. Lindsay***, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). Hence, "[p]rosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." ***Lindsay***, 180 Wn.2d at 432.

Here, Defendants argue that the following five groups of statements "disparage[ed] defense counsel" or her role. BOHS, p. 30-31.

First, Defendants argue that the prosecutor's statement that "[d]efense counsel just argued against herself in regard to the standard of proof," RP 2335-36, disparaged defense counsel, but the prosecutor here was simply "mak[ing] a fair response to the arguments of defense counsel." ***Russell***, 125 Wn.2d at 87.

Defense counsel had made at least arguably inconsistent statements during her closing remarks regarding the concept of "abiding belief" as it

pertains to the reasonable doubt definition. RP 2333-34. First, she argued that the "abiding belief" did not mean "you feel confident of your verdict, you know, next week, next month, you know five years from now[.]" RP 2333. However, she seemed to almost immediately reverse her position, and at least to imply that an "abiding belief" should mean that "[t]his is a decision that will last," and that an abiding belief should last after you leave the jury room because "[i]t's permanent." RP 2334.

It was in this context that the deputy prosecutor noted that "[d]efense counsel just argued against herself in regard to the standard of proof in this abiding belief." RP 2335. However, the deputy prosecutor went on to state, in relevant part,

> [a]nd this is when I said she [i.e., defense counsel] argued against herself, she said it's a final decision, and it is. But that's the point. It's not difficult to understand. And this concept of believe it today, believe it in your lounge chair or whatever, that applies, she's right.

RP 2337.

In ultimately arguing that defense counsel was "right," the deputy prosecutor could not have been disparaging or impugning her. He was simply making a fair response to her argument.

Because "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel," ***Russell***, 125 Wn.2d at 87, the prosecutor's statements here were not misconduct.

Second, Defendants argue that the deputy prosecutor impugned counsel through the following comments:

> I absolutely 100 percent disagree with [counsel for Houston-Sconier's] statement as to what witnesses said and what the evidence was in this case. And some of the issues that were woven in their as if they're premises, they're true things, the foundation of what she's saying is true.

RP 2338. *See* BOHS, p. 30-31.

After making this statement, the deputy prosecutor went on to offer his recollection of the testimony of Detective Tscheuschner, Tim Taylor, and K-9 Officer Chris Martin. RP 2339-41. Counsel for Houston-Sconiers did present a different recollection of such testimony. *See* RP 2330-32.

Here, the deputy prosecutor simply stated that he "disagree[d]" with defense counsel's recollection of the testimony. If expressing "disagree[ment]" with defense counsel were equivalent to impugning defense counsel, prosecutors would be unable to effectively argue their cases, particularly where counsel may not accurately recall the testimony of a particular witness.

Indeed, the deputy prosecutor here was simply arguing that the evidence did not support the defense theory, and because "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel," ***Russell***, 125 Wn.2d at 87, his statements were not misconduct.

Third, Defendants argue that the deputy prosecutor "disparage[ed] defense counsel," BOHS, p. 30-31, in the following statements:

> We don't know based on the forensics analysis, whether this hockey mask, so to speak, had nicks on it from her client's glasses, okay. What's the premise involved in that? What's the misrepresentation based on the evidence about that? And that is that the defendant wears glasses at all. He's in the video with the gun, no glasses. Nobody mentioned that he wears glasses, the officers, et cetera, but he has glasses on in the courtroom.

RP 2344.

Here, the deputy prosecutor did not impugn or disparage defense counsel at all. He made a direct response to her argument that the police investigation lacked sufficient forensic analysis because it failed to examine the back of the hockey mask "for little nicks from glasses." RP 2230. Although the deputy prosecutor used the word "misrepresentation," he was referring to the defendant, not the defendant's attorney, and even then, he was making an argument based on evidence in the record: the surveillance video which showed that Houston-Sconiers was not wearing glasses on the night of the robberies.

Because "the prosecutor... is entitled to make a fair response to the arguments of defense counsel," ***Russell***, 125 Wn.2d at 87, these statements were not misconduct.

Finally, Defendants argue that the deputy prosecutor improperly "implied that, contrary to defense counsel's role, his role is to elicit the truth," BOHS, p. 31, through the following two sets of statements:

> I treated [witness Shantell Bush] with respect. You may disagree. But I was strong for a reason because when individuals get on the stand, ***my job is to challenge the evidence so that you can ultimately decide whether somebody's credible or not.***

RP 2346 (emphasis added).

> So, in order to get to that point, ***my job and the process as an advocate as a person, as I said, to challenge the evidence*** is not to take what Ms. Bush says and just, okay, Ms. Bush, open-ended question, what's your answer to this? Thank you very much. It's to challenge it. And that's the only way you discover, for instance, that she's been talked to during her testimony by somebody who was in here [i.e., the courtroom].

RP 2348 (emphasis added).

However, these statements do no more than simply and accurately state that an advocate's role is to challenge the evidence at trial. In making these statements, the deputy prosecutor never said or implied that the prosecutor, as an advocate, is "elicit[ing] truth," BOHS, p. 31, or that defense counsel is not. Thus, neither of these statements "impugn[ed] the role or integrity of defense counsel." ***Lindsay***, 180 Wn.2d at 431-32. Rather, the deputy prosecutor did no more than make a fair response to the

arguments of defense counsel. *See* RP 2346 (noting that these arguments were meant to counter those of defense counsel for Roberts); BOR, p. 29.

The deputy prosecutor's statements may also be seen as a response to Counsel for Houston-Sconiers –perhaps rather inartfully, phrased contention that, "[u]nlike the prosecutor," she was not going to start from the presumption that Mr. Houston-Sconiers is guilty. RP 2303.

Because "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel," ***Russell***, 125 Wn.2d at 87, the prosecutor's statements here were not misconduct, and Defendant's convictions should be affirmed.

The third way in which Defendants argue that the deputy prosecutor committed prosecutorial misconduct is by "clearly express[ing] his personal opinion that [A.]T[.] was lying on the stand and was hiding his knowledge of and involvement with the robberies." BOHS, p. 31-32, BOR, p. 28-29. The record shows otherwise.

It is improper for a prosecutor to "assert[her or] his personal opinion of the credibility of the witness and the guilt or innocence of the accused." ***State v. Reed***, 102 Wn.2d 140, 684 P.2d 699 (1984). *See* ***State v. Warren***, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); ***State v. McKenzie***, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

The incidents of which Defendants now complain include the following exchanges between the deputy prosecutor and A.T. while A.T. was testifying the second time:

> Q. But you can be charged with perjury if you don't tell the truth?
>
> [COUNSEL FOR HOUSTON-SCONIERS]: Your Honor, I'm going to object to this line of questioning. It's apparent Counsel's trying to badger the witness. There's no indication that he hasn't testified truthfully.
>
> THE COURT: I'm going to overrule the objection, and I will limit that statement to what you just said, sir.
>
> [DEPUTY PROSECUTOR]: Thank you.
>
> Q. You understand that?
>
> A. Yeah.

RP 1822-23.

> Q. All right. So understanding you can't be charged with any offense related to this, did you do any robbery that evening?
>
> A. No.
>
> [COUNSEL FOR ROBERTS]: Objection, Your Honor.
>
> THE COURT: I'm going to sustain the objection.
>
> ....
>
> Q. Were you present when any robbery –
>
> A. No.
>
> Q. – was committed?
>
> A. No.
>
> Q. And you're sure of that?
>
> A. Yeah. I think – I don't remember. I don't know.
>
> Q. Well, you just said "no" twice.
>
> A. I don't remember. I was just saying "no" because you got a smart attitude.

RP 1859-60.

At no point in these exchanges did the deputy prosecutor "express his personal opinion that [A.]T[.] was lying on the stand and was hiding his knowledge of and involvement with the robberies." BOHS, p. 31-32.

Though he did draw out the inconsistency in A.T.'s testimony that he both answered "no" to the questions or whether he engaged in a robbery or was present during one and testified that he didn't remember, RP 1859-60, he never "assert[ed] his personal opinion of the credibility of the witness." ***State v. Reed***, 102 Wn.2d 140, 684 P.2d 699 (1984).

Therefore, they were not improper, and Defendants have failed to show prosecutorial misconduct in this regard.

The final way in which Defendants argue that the deputy prosecutor committed prosecutorial misconduct is by allegedly "express[ing] his ***personal belief*** that [Defendants] committed the robberies[.]" BOHS, p. 32 (emphasis added). In support of this contention, the Defendant's point to the following statement by the deputy prosecutor during his closing argument: "[w]e know ***from that evidence*** there is no issue that Mr. Houston-Sconiers is guilty of every crime charged, period." RP 32 (emphasis added).

The "evidence" to which the deputy prosecutor was referring here was a recording of the telephone calls made by Houston-Sconiers from jail. RP 2234-35. Because the prosecutor was arguing that "[w]e know

from that evidence," he was not "assert[ing] his personal opinion of... the guilt or innocence of the accused." ***State v. Reed***, 102 Wn.2d 140. He was properly "draw[ing] reasonable inferences ***from the evidence*** and... express[ing] such inferences to the jury." ***Boehning***, 127 Wn. App. at 519 (emphasis added).

Therefore, his statements were not improper, the Defendants have failed to show prosecutorial misconduct, and their convictions should be affirmed.

4. ALTHOUGH THE ISSUE WAS NOT PRESERVED AND IS NOT RIPE, THE TRIAL COURT'S IMPOSITION OF THE LEGAL FINANCIAL OBLIGATION WAS PROPER BECAUSE IT CONSIDERED DEFENDANTS' FUTURE ABILITY TO PAY.

There are mandatory court costs and fees, which sentencing courts must impose, including a criminal filing fee, a crime victim assessment, and a DNA database fee. RCW 36.18.020(h); RCW 7.68.035; RCW 43.43.7541. Trial courts may also require a defendant to pay costs associated with bringing a case to trial, such as recoupment for a publicly-provided defense, through in Pierce County, the Department of Assigned Counsel, pursuant to RCW 10.01.160.

There are two limitations in the statute to protect defendants:

> (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In

> determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.
>
> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs.

RCW 10.01.160.

In this case, Defendants challenge the discretionary cost imposed: the $500.00 Department of Assigned Counsel recoupment.

a. Defendant has failed to show why this Court should treat defendant's legal financial obligation as illegal sentencing, therefore the issue may not be raised for the first time on appeal.

Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). The specific issue of whether a sentencing court considered a defendant's ability to pay is not one of constitutional magnitude that can be raised for the first time on appeal. ***State v. Calvin***, 316 P.3d 496, 507 (2013) (*citing* ***State v. Blank***, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997)). A defendant may only appeal a non-constitutional issue on the same grounds on which he objected below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

In this case, Defendants had an opportunity to object to the discretionary legal financial obligation (LFO) imposed and provide information of extraordinary circumstances that would make payment inappropriate. Defendants failed to object. Therefore, they failed to properly preserve the issue for appeal.

An appellate court may grant discretionary review for three issues raised for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). *See also* ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); ***State v. Sisouvanh,*** 175 Wn.2d 607, 618, 290 P.3d 942 (2012). Defendant does not specifically claim relief on any of these three grounds.

Therefore, the issue was not properly preserved for appeal and this Court should decline to grant review of it.

b. Defendant's challenge to the legal financial obligations is not ripe for review because the State has not attempted enforcement.

Challenges to orders establishing LFOs are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. ***State v. Lundy***, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). *See also* ***State v. Smits***, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009) ("the

time to examine a defendant's ability to pay is when the government seeks to collect the obligation").

In the present case, there is nothing in the record showing that the State has attempted to enforce the LFO. Therefore, the issue is not yet ripe for review.

State v. Bahl, upon which Defendant relies to assert his claim is ripe, does not require a different result. 164 Wn.2d 729, 193 P.3d 678 (2008). The Court in ***Bahl***, held: "a defendant may assert a preenforcement vagueness challenge to sentencing conditions if the challenge is sufficiently ripe." *Id.* at 751 (emphasis added). The Court specifically contrasted a vagueness challenge, which may be ripe for review before enforcement, with challenges to the imposition of LFOs, which are not ripe. *Id.* at 749.

c. Because the record shows the judge considered evidence of Defendant's ability to pay, the trial court judge did not act in a clearly erroneous manner by imposing legal financial obligations.

Even were the issue preserved and ripe for review, the LFO at issue should be affirmed. The question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. ***Lundy***, 176 Wn. App. at 105. A decision by the trial court "is presumed to be correct and

should be sustained absent an affirmative showing of error." ***State v. Wade***, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); ***Sisouvanh***, 175 Wn.2d at 619. If the appellant fails to meet this burden, the decision stands. ***State v. Tracy***, 128 Wn. App. 388, 294-95, 115 P.3d 381 (2005), *aff'd*, 158 Wn.2d 683, 147 P.3d 559 (2006).

Although formal findings of fact about a defendant's present or future ability to pay LFOs are not required, the record must be sufficient for the appellate court to review the trial court judge's decision under the clearly erroneous standard. ***State v. Bertrand***, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1914, 287 P.3d 10 (2012).

In this case, the court's consideration of Defendant's financial situation is indicated by Paragraph 2.5 of the Judgment and Sentence. CP 232-46, 428-42. Defendant asserts that "[t]his type of finding... cannot reliably establish that the trial court complied with RCW 10.01.160(3)," BOHS, p. 38. However, in similar LFO cases, Washington courts have not found the standard form language to be clearly erroneous. *See, e.g.,* ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *review granted*, 178 Wn.2d 1010 (2013); ***Calvin***, 316 P.3d at 508.

Although Defendant is critical of Paragraph 2.5, including Paragraph 2.5 on every Judgment and Sentence provides a safeguard to

protect defendants. Incorporating this paragraph into every Judgment and Sentence a judge must sign serves as a reminder to judges to consider the defendant's ability to pay before imposing LFOs. Thus, Paragraph 2.5 serves as an important judicial tool and safeguard for defendants.

Moreover, the record supports the trial court's determination. The sentencing judge in this case was the trial judge, and knew the defendants were able-bodied teenagers capable of physical work, as evidenced by their ability to walk and run on the night in question. *See. e.g..,* RP 1069, 1071; CP 232-46, 428-42. Assuming the sentences imposed stand after appeal, both will be in their 40s when released (Roberts, 44, and Houston-Sconiers, 49), still young enough to work and
earn the discretionary $500.00 Department of Assigned Counsel recoupment imposed. *See* CP 232-46, 428-42.

Hence, the record shows the judge considered evidence of Defendant's ability to pay, and did not act in a clearly erroneous manner by the imposing legal financial obligations.

Therefore, the Defendants' sentences, including the imposition of legal financial obligations, should be affirmed.

5. DEFENDANTS' CONVICTIONS AND SENTENCES, SHOULD BE AFFIRMED BECAUSE BOTH RCW 13.04.030(1)(e)(v), WHICH REQUIRES THE ADULT SUPERIOR COURT TO TAKE EXCLUSIVE ORIGINAL JURISDICTION OF THE CRIMES AT ISSUE, AND RCW 9.94A.533, WHICH ALLOWS FOR THE FIREARM SENTENCE ENHANCEMENTS HEREIN, ARE CONSISTENT WITH THE EIGHTH AMENDMENT AS INTERPRETED BY RECENT DECISIONS SUCH AS ***MILLER v. ALABAMA***, 132 S. Ct 2455, 183 L.Ed.2d 407 (2012).

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." *See* Wn. Cont. Art. I, § 14 (*prohibiting* infliction of "cruel punishment"); ***State v. Witherspoon***, 180 Wn.2d 875, 887-91, 329 P.3d 888 (2014).

The Eighth Amendment applies to the states through the Fourteenth Amendment. ***In re Boot***, 130 Wn.2d 553, 569, 925 P.2d 964 (1996) (*quoting* ***State v. Dodd***, 120 Wn.2d 1, 13 n. 2, 838 P.2d 86 (1992) (*citing* ***Robinson v. California***, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed.2d 758 (1962)).

RCW 13.040.030, often referred to as the "automatic decline" statute provides, in relevant part, that

> (1) Except as provided in this section, the juvenile courts in this state shall have exclusive original jurisdiction over all proceedings:
> ...
> (e) Relating to juveniles alleged or found to have committed offenses, traffic or civil infractions, or violations

as provided in RCW 13.40.020 through 13.40.230, unless:

...

(v) ***The juvenile is sixteen or seventeen years old on the date the alleged offense is committed and the alleged offense is***:

(A) A serious violent offense as defined in RCW 9.94A.030;

(B) A violent offense as defined in RCW 9.94A.030 and the juvenile has a criminal history consisting of: (I) One or more prior serious violent offenses; (II) two or more prior violent offenses; or (III) three or more of any combination of the following offenses: Any class A felony, any class B felony, vehicular assault, or manslaughter in the second degree, all of which must have been committed after the juvenile's thirteenth birthday and prosecuted separately;

(C) ***Robbery in the first degree***, rape of a child in the first degree, or drive-by shooting, committed on or after July 1, 1997;

(D) Burglary in the first degree committed on or after July 1, 1997, and the juvenile has a criminal history consisting of one or more prior felony or misdemeanor offenses; or

(E) ***Any violent offense as defined in RCW 9.94A.030 committed on or after July 1, 1997, and the juvenile is alleged to have been armed with a firearm***.

(I) ***In such a case the adult criminal court shall have exclusive original jurisdiction, except as provided in (e)(v)(E)(II) and (III) of this subsection***.

(II) The juvenile court shall have exclusive jurisdiction over the disposition of any remaining charges in any case in which the juvenile is found not guilty in the adult criminal court of the charge or charges for which he or she was transferred, or is convicted in the adult criminal court of a lesser included offense that is not also an offense listed in (e)(v) of this subsection. The juvenile court shall enter an

> order extending juvenile court jurisdiction if the juvenile has turned eighteen years of age during the adult criminal court proceedings pursuant to RCW 13.40.300. However, once the case is returned to juvenile court, the court may hold a decline hearing pursuant to RCW 13.40.110 to determine whether to retain the case in juvenile court for the purpose of disposition or return the case to adult criminal court for sentencing.
>
> (III) The prosecutor and respondent may agree to juvenile court jurisdiction and waive application of exclusive adult criminal jurisdiction in (e)(v)(A) through (E) of this subsection and remove the proceeding back to juvenile court with the court's approval.
>
> If the juvenile challenges the state's determination of the juvenile's criminal history under (e)(v) of this subsection, the state may establish the offender's criminal history by a preponderance of the evidence. If the criminal history consists of adjudications entered upon a plea of guilty, the state shall not bear a burden of establishing the knowing and voluntariness of the plea

RCW 13.04.030(1)(e)(v) (emphasis added).

In this case, both Defendants, given the charged offenses, were subject to the exclusive original jurisdiction of the adult criminal court under RCW 13.04.030(1)(e)(v). *See* CP 1-4, 269-72.

The Washington State Supreme Court has held that this original jurisdiction system does not violate the Eighth Amendment or due process protections. ***In re Boot***, 130 Wn.2d 553, 570-72, 925 P.2d 964 (1996). It found that "the Eighth Amendment is not violated if a youthful offender is

tried as an adult or receives a sentence in adult criminal court extending beyond the offender's twenty-first birthday." ***Boot***, 130 Wn.2d at 570.

This decision has not been overruled and remains good law.

Nevertheless, in this case, both Defendants argue that "[t]he automatic decline statute is in violation of the Eighth Amendment and due process and [that] ***Boot*** is no longer good law." BOR, p. 18, 10-18. *See* BOHS, p. 47-48. They base their argument on the proposition that, in their view, ***Boot*** is "based upon caselaw and reasoning which no longer holds true." BOR, p. 14. *See* BOR, p. 6-18; BOHS, p. 47-48. The case law in question shows otherwise.

Defendants rely on the United States Supreme Court decisions in ***Roper v. Simmons***, 543 U.S. 551,568-75, 568-125 S. Ct. 1183 (2005), which held that the Eighth Amendment prohibits "the imposition of the death penalty on juvenile offenders under 18," ***Graham v. Florida***, 560 U.S. 48, 67-75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2011), which held that "the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender," and ***Miller v. Alabama***, 132 S. Ct. 2455, 2469,183 L. Ed. 2d 407 (2012), which "h[e]ld that the Eighth Amendment forbids a sentencing scheme that mandates ***life***

in prison without possibility of parole for juvenile offenders" regardless of their crimes of conviction.

However, these decisions concern *only* the punishment imposed by a court, not the jurisdiction of the court imposing such punishment. As such, none of them can erode the ***Boot*** Court's underlying holding that "the Eighth Amendment is not violated if a youthful offender is ***tried as an adult***[.]" ***Boot***, 130 Wn.2d at 570.

Moreover, the decisions cited by Defendants together stand for the proposition that the Eighth Amendment prohibits "the imposition of the death penalty on juvenile offenders under 18," ***Graham***, 560 U.S. at 67-75, or "a sentencing scheme that mandates ***life in prison*** without possibility of parole for juvenile offenders." ***Miller***, 132 S. Ct. at 2469.

As such, they cannot diminish the holding of the ***Boot*** Court that "the Eighth Amendment is not violated if a youthful offender... receives a sentence in adult criminal court extending beyond the offender's twenty-first birthday," ***Boot***, 130 Wn.2d at 570, as long as that sentence is not death or life without the possibility of parole.

Indeed, the simple fact that the adult criminal court takes exclusive original jurisdiction, does not mean such punishments will be imposed. The adult criminal court is just as capable as its juvenile department of following the mandates of the United States Supreme Court.

Nor were these mandates violated in this case through the imposition of the 312-month or 372-month sentences imposed by the trial court. CP 232-46, 428-42.

Because ***Boot*** remains good law, "the Eighth Amendment is not violated if a youthful offender is tried as an adult or receives a sentence in adult criminal court extending beyond the offender's twenty-first birthday." ***Boot***, 130 Wn.2d at 570.

Given this, and the fact that the sentences at issue here are consistent with the Eighth Amendment to the United States Constitution as interpreted by ***Roper v. Simmons***, 543 U.S. 551,568-75, 568-125 S. Ct. 1183 (2005), ***Graham v. Florida***, 560 U.S. 48, 67-75, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2011), and ***Miller v. Alabama***, 132 S. Ct 2455, 183 L.Ed.2d 407 (2012), the defendant's convictions and sentences should be affirmed.

6. DEFENDANT ROBERTS HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE HAS FAILED TO SHOW THAT HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X)." ***State v. Yarbrough***, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009). *See* ***In Re Elmore***, 162 Wn.2d 236, 251,

172 P.3d 335 (2007); ***State v. Johnston***, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed de novo. ***Yarbrough***, 151 Wn. App. at 89.

"Washington has adopted the Strickland test to determine whether a defendant had constitutionally sufficient representation." ***State v. Cienfuegos***, 144 Wn.2d 222, 25 P.3d 1011 (2001) (*citing* ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also* ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "First, the defendant must show that counsel's performance was deficient" and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; ***Cienfuegos***, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Hendrickson***, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); ***In Re Rice***, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A failure to establish either element of the test defeats an ineffective

assistance of counsel claim." ***Riofta v. State,*** 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Specifically, "[t]o establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness." ***Johnston***, 143 Wn. App. at 16. "The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *Id.*; ***State v. Garrett***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined based upon the entire record below." ***State v. Townsend***, 142 Wn.2d 838, 15 P.3d 145 (2001) (*citing* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969).

"To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective." ***Yarbrough***, 151 Wn. App. at 90. This presumption includes a strong presumption "that counsel's conduct constituted sound trial strategy." ***Rice***, 118 Wn.2d at 888-89. "[W]hen counsel's conduct can be categorized as legitimate trial strategy or tactics, performance is not

deficient." ***State v. Carson***, 179 Wn. App. 961, 976, 320 P.3d 185 (2014) (*quoting* ***State v. Kyllo***, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). *See* ***Yarbrough***, 151 Wn. App. at 90 (*citing* ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

An ineffective assistance of counsel claim must not be allowed to "function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." ***Harrington v. Richter,*** 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* (*quoting* ***Strickland***, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (*quoting* ***Strickland***, 466 U.S. at 690).

This Court "defer[s] to an attorney's strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances." ***Riofta***, 134 Wn. App.

at 693. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ." *Id.*

With respect to the second prong, a "defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." ***State v. Crawford***, 159 Wn.2d 147, 99, 147 P.3d 1288 (2006). "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Crawford***, 159 Wn.2d at 99-100 (quoting ***Strickland***, 466 U.S. at 694). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (*quoting* ***Strickland***, 466 U.S. at 694); ***Cienfuegos***, 144 Wn.2d at 229.

In the present case, Defendant Roberts argues that "[t]o the extent" his trial counsel "did not clearly join in the confrontation clause objection made by counsel for Houston-Sconiers, counsel was constitutionally ineffective." BODR, p. 25-26.

Trial counsel's "decision of when and whether to object is a classic example of trial tactics" and "[o]nly in egregious circumstances" relating to evidence "central to the State's case, will the failure to object constitute incompetent representation that justifies reversal." ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (*citing* ***Strickland v.***

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L .Ed. 2d 674 (1984) *and* ***State v. Ermert***, 94 Wn.2d 839, 621 P.2d 121 (1980)). To prevail on a claim of ineffective assistance of counsel based on a failure to object to or otherwise "challenge the admission of evidence, the defendant must show (1) "the absence of legitimate strategic or tactical reasons supporting the challenged conduct," (2) "***that an objection to the evidence would likely have been sustained***, and (3) that the result of the trial would have been different had the evidence not been admitted." ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (emphasis added).

In this case, even if Roberts' trial counsel did not object to the admission of Wright's statements as violative of the Confrontation clause, Roberts cannot show "that an objection to the evidence would likely have been sustained," ***Saunders***, 91 Wn. App. at 578.

As explained above, Wright's statements were nontestimonial, excited utterances, and hence, not subject to confrontation clause protections and properly admitted at trial. *See* § C(1), *supra.* As a result, any objection to their admission made by trial counsel would have been properly overruled, and Defendant Roberts cannot show "that an objection to the evidence would likely have been sustained," ***Saunders***, 91 Wn. App. at 578. Because he cannot make this showing, he cannot show that his trial counsel's performance was deficient.

Therefore, he cannot show ineffective assistance of counsel and his conviction should be affirmed.

D. CONCLUSION.

The trial court properly admitted the statement of James Wright as an excited utterance because that statement was nontestimonial and hence, not subject to the Confrontation Clause of the Sixth Amendment or Article I, section 22 of the Washington State Constitution.

Defendants' convictions and enhancements should be affirmed because, viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the charged crimes and enhancements beyond a reasonable doubt.

Defendants failed to meet their burden of showing prosecutorial misconduct by failing to show either improper conduct or prejudice.

Although not properly preserved at trial and not ripe for review, the trial court's imposition of the legal financial obligations was proper because the record shows it took account of Defendants' future ability to pay as required by statute.

Defendants' convictions and sentences should be affirmed because both RCW 13.04.030(1)(e)(v), which requires the adult superior court to take exclusive original jurisdiction of the crimes here at issue, and RCW 9.94A.533, which allows for the firearm sentence enhancements herein,

are consistent with the Eighth Amendment to the United States Constitution as interpreted by recent decisions such as ***Miller v. Alabama***, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Finally, Defendant Roberts failed to show ineffective assistance of counsel because he failed to show that his trial counsel's performance was deficient.

Therefore, Defendants' convictions and sentences should be affirmed.

DATED: November 26, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-26-14
Date Signature

PIERCE COUNTY PROSECUTOR

November 26, 2014 - 1:32 PM

Transmittal Letter

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