

No. 45744-0-II
Lewis County Superior Court No. 12-1-00413-1

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

RICK ALLEN RIFFE,
Defendant-Appellant.

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

The Honorable Richard L. Brosey, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in suggesting that Dr. Mark Reinitz was not qualified by experience or education. Finding of Fact Re: Expert Testimony 1.9; Conclusion of Law 2.4.
2. The trial court erred in finding that Dr. Reinitz “in his writing submitted to the court, shows a preconceived notice (sic) the memories are inherently faulty.” Finding of Fact Re: Expert Testimony 1.10.
3. The trial court erred in finding that the “subject matter of the proposed testimony of Dr. Mark Reinitz was covered in voir dire.” Finding of Fact Re: Expert Testimony 1.11.
4. The trial court erred in finding that “the subject matter of the proposed testimony of Dr. Mark Reinitz was covered in direct examination by the State.” Finding of Fact Re: Expert Testimony 1.12.
5. The trial court erred in finding that “the subject matter of the proposed testimony of Dr. Mark Reinitz was covered in cross-examination by the State.” Finding of Fact Re: Expert Testimony 1.14.
6. The trial court erred in concluding that “the proposed testimony of Dr. Mark Reinitz is not generally accepted in the scientific community.” Conclusion of Law 2.5.

7. The trial court erred in concluding that the proposed testimony of Dr. Reinitz is within the common knowledge of a juror of ordinary intelligence. Conclusions of Law 2.6, 2.8, 2.9.

8. The trial court erred in concluding that the proposed testimony of Dr. Reinitz would not be helpful to the jury. Conclusion of Law 2.7.

9. The trial court erred in concluding that Dr. Reinitz's proposed testimony would be a comment on the "veracity of witnesses, either directly or indirectly." Conclusion of Law 2.10.

10. The trial court erred in concluding that "the Erwin Bartlett matters were fully explored by all parties." Findings of Fact Re: Defendant's Motion to Dismiss/Disqualify 1.30.

11. The trial court erred in concluding that "any misconception the jury may have had regarding what, if any, consideration Mr. Bartlett obtained from the State to secure his testimony has been fully explained through the testimony of Mr. Bartlett and through the testimony of David Arcuri." Finding of Fact Re: Defendant's Motion to Dismiss/Disqualify 1.31.

12. The trial court erred in concluding that "it doesn't make sense to this court that defense counsel argued that he was unaware of the full scope of consideration when all documents were in Mr. Bartlett's

criminal case file in the Clerk's Office." Finding of Fact Re:

Defendant's Motion to Dismiss/Disqualify 1.34.

13. The trial court erred in holding that Ricky's smile and nod "adopted" otherwise inadmissible hearsay.

14. The trial erred in holding that Robin Riffe's statement "You mean the one where two old people were killed?" was admissible even though Ricky had no opportunity to cross-examine her.

15. The prosecutor committed misconduct in closing arguments.

II.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. The evidence in this case was primarily eyewitness identifications made 27 years after the commission of the crime. The prosecutor asked the witnesses about their level of confidence in their belated identifications. Many of the witnesses made or attempted to make identifications over the 27-year period. Under these circumstances, did the trial court violate Riffe's right to present a defense when he excluded the testimony of Dr. Mark Reinitz, an expert on scientific reasons why eyewitness identifications are frequently unreliable?

2. Where the trial prosecutor in this case negotiated a plea bargain for the jailhouse snitch, Irwin Bartlett, was present in court when Bartlett entered a plea that reduced Bartlett's exposure to punishment and where

the prosecutor failed to tell the Riffe about this plea bargain, did the prosecutor violate his duty under the mandate of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when he failed to provide the defense with clearly exculpatory evidence before trial?

3. Where the prosecutor elicited Bartlett's statement that he did not receive any consideration for his testimony in this case and where the prosecutor had actual knowledge this was not true and failed to correct the falsity, did the prosecutor violate the due process clause?

4. Where witness Nonna Pierce gave two statements to the police in 1985 that directly conflicted with her trial testimony, and where she refused to acknowledge her prior statements, did the trial court err in failing to permit Riffe to impeach witness Nonna Pierce and in failing to admit as exhibits her prior statements?

5. Did the trial court err in admitting Robin Riffe's response to police questioning with the statement, "You mean the one where two old people were killed?" when the statements were admitted for their truth and where the witness was dead and, thus, not available for cross examination?

6. Did the trial court err in admitting two composite sketches when a primary eye witness who developed the sketches and the sketch artists were not available for cross examination?

7. Did the trial court err in admitting Riffe's smile and nod as an "adoptive admission?"

8. Did the prosecutor commit misconduct in closing argument when he misstated the law of accomplice liability when the State argued that Ricky Riffe could be guilty of premeditated murder as an accomplice without actual knowledge that his brother intended to murder the Maurins?

III. STATEMENT OF THE CASE

A. THE MURDERS

Edward (Ed) and Wilhelmina (Minnie) Maurin, both in their 80's, were murdered on December 19 or 20th, 1985. Twenty-seven years later, the State charged Ricky Allen Riffe with two counts of first-degree murder, two counts of first-degree kidnapping, two counts of first-degree robbery, and one count of first-degree burglary in relationship to the Maurin murders.

The State also alleged that the crimes were committed against particularly vulnerable victims, with deliberate cruelty and with an egregious lack of remorse. Because the State believed that Riffe acted in concert with his deceased brother, John Gregory Riffe, the State alleged that Ricky was a principle or an accomplice. CP 1-7.

On December 19, 1985, Ed and Minnie Maurin planned to entertain friends at a Christmas luncheon. RP 44. When the guests arrived at the Maurin home, no one was present. RP 45. After members of the extended family¹ were notified, they proceeded to the home. RP 45-49. Family members noted that Minnie's purse was under some newspapers sitting beside a big overstuffed chair and a bank statement was open by the telephone. RP 48, 70. There was \$160 cash in the purse. RP 733. Another family member found a box containing bank statements on the bathroom floor. RP 72. There were three sets of plates and three sets of silverware in the dishwasher. RP 736. Sometime later, the police found \$2,100 cash in the house. RP 880.

The police were notified and a search began for the couple. Although the house had a broken window used for entry by family members over many years, there were no signs of forced entry. RP 139, 167, 340, 703. There was no sign of a struggle. RP 141.

On December 20, 1985, the Maurins' 1969 green Chrysler Newport was discovered in the Yardbird's shopping complex parking lot. RP 368. There were blood stains inside and the key was in the

¹ Minnie had been previously married to George Hadaller, who died in 1958. According to Minnie's son, Dennis Hadaller, there were 440 members of his extended family, 300 of whom lived in Lewis County. RP 147-48.

ignition. RP 375, 434-44. The police also found shotgun pellets in the vehicle. RP 380, 415.

Ed and Minnie's bodies were discovered on Christmas Eve in a wooded area on Stearns Road. RP 74, 550. Crime scene investigators opined that they had been shot with a "12 gauge shotgun that had a shortened barrel, much like ... a sawed-off shotgun." RP 483, 636-50. *See also*, Exhibits 689, 690.

B. THE INVESTIGATION

Lewis County law enforcement investigated immediately. They learned that Minnie's son, Dennis Hadaller, and grandson, Michael Hadaller, had driven by the Maurin residence at about 5:30 a.m. on the 19th. RP 91-92, 161-62. It was dark and foggy,² but they noticed a light on in Ed and Minnie's bedroom. RP 92-93, 162. According to them, this was an unusual hour for the couple to be awake. *Id.*

They also learned that Ed probably called Sterling Bank on the evening of December 18, 1985 about closing time to request withdrawal of a large sum of money. RP 1348-50. He called again between 9:30 and 10:00 a.m. on the morning of the 19th. He told the teller on duty,

² Nearly all of the witnesses agreed that December 19, 1985 was a very foggy day in Lewis County.

Pat Hull, that he wanted to come in and get \$8,500 in cash. RP 1345-51. They joked on the phone. RP 1382. Ed arrived at the bank about 10:30 a.m. When Hull asked about Minnie, Ed told her she was outside in the car because she was not feeling well. RP 1351.

. . . I asked about Minnie and I told him to go have her come in and have coffee and cookies, because that's what we usually did. He said, no, she didn't feel well and he would go ask her if she wanted to come back in so he went back out to the car.

RP 1351.

Ed also told Hull he would use the money to buy a car. RP 1350, 1353. He was calm and again joked with Hull. *Id.* The Maurins still had more than \$30,000 in another untouched account. RP 707.

Many people called in with tips. There were two groups of witnesses: those who saw the Maurins' car in and around Chehalis on the morning of the 19th and those who saw a man walking near Yardbirds carrying a gun. The times and locations varied and were often conflicting.

Merle Pickering and Rock Swartz reported seeing a white car pulling out of the Maurins' driveway about 9:30 a.m. on December 19, 1985. RP 907, 912. Lindsey Senter reported seeing two white males walking a mile from the Maurin home on the 19th about 8:00 to 9:00 a.m. RP 921-24.

Norman Laymon saw the Maurins driving up Highway 12 about 11:00 a.m. on the 19th. RP 966-977. He wasn't entirely sure about his description of the man he thought he saw with the Maurins:

A I don't remember telling him the description because I don't really know for sure.

Q You don't know for sure. Do you believe you gave them a description of the guy in the back?

A No.

Q Did you tell them that the guy in the back was a good sized person?

A Well, I thought so but best I could tell.

Q That he was wearing a khaki colored jacket?

A I thought so yes.

Q You told --

A I just assumed so.

Q Well, you assumed it but you also told the officer about 10 or 12 days later, didn't you?

A Something like that. Yeah, something like that.

RP 982-83.

Kenneth Paul saw three people in a car similar to the Maurins' on Bunker Creek Road. RP 1055-59. Virginia Cummings also saw a young man walking alone near Yardbirds. RP 1149-58. Steve Amoraso saw three people in a green car. RP 1085-88. There was a young man in the back seat with a partial beard. RP 1089.

William Reisinger observed the Maurins' car with a passenger in the back seat. RP 1274-78. Later, he saw the same car being driven by one person either with dark hair or wearing a dark stocking cap and gloves. RP 1279-82. Deanne and Jeff Scherer saw a green car in the Yardbird's parking lot about 9:00 a.m. RP 1309-12, 1315-17.

James Heminger saw a dark haired man wearing a stocking cap and green coat walking near Yardbirds carrying a gun. RP 1318-19, 1321-26. Similarly, Marjorie Hadaller saw a man walking near Yardbirds with a gun. RP 1337. Beverly Gestrine also observed a man in that area with a gun. RP 1622-46. *See also*, testimony of Yvonne Miller, 1930-1942.

Seventeen-year-old Jason Shriver and his mother were driving to a dentist appointment on the morning of December 19, 1985. RP 2267-68. The Shriver family lived in Mossyrock. They saw the Maurin vehicle on the road. RP 2268. When the sheriff came to the Shriver home on December 23, 1985 to talk to them about what happened to the Maurins, Shriver refused to talk to him:

A Sure. I was in bed the 23rd, when the sheriff came and I didn't want to talk to him.

Q You remember that, because you still weren't feeling well?

A I remember that, because my mom said the Sheriff's here, he wants to talk to you about what happened to the

Maurins. I said, I'm not talking to him. I told you not to say anything.

RP 2268. Shriver's mother was deceased by the time of trial.

Frank Perkins told the police that he pulled into a truck stop on December 19 about 8:30 to 9:30 a.m. While there, he saw a car with an older couple in the front seat and a "younger fellow sitting between the two in the backseat." RP 997. The person in the back was white, in his 20's with a dishwater blond beard. RP 997, 1036. He was wearing a stocking cap and military fatigue jacket or old army jacket. RP 998. Later that day, Perkins drove by Yardbirds. RP 1003. He stated that the man was carrying a small caliber rifle or a small bore shotgun. RP 1023, 1036. He told the police two or three times he could not identify the face of the young person in the backseat because he only got a glimpse of him. RP 1027.

On December 26, 1985, Officer William Forth reported that he believed that he had seen the Maurin vehicle being driven into Chehalis at 11:10 a.m. RP 1217. There was only one person in the car. He told his fellow officers he saw only three inches of the back of the driver's neck. RP 1226. He never saw that person look into the rearview mirror. He followed the vehicle into town but never stopped it. RP 1178.

Detective Frank Bennett contacted Nonna Pierce, the Maurins' neighbor, on December 20, 1985. In her recorded statement she said she saw headlights at the Maurin home on the morning of December 19, 1985. RP 212, 218. Defendant's Ex. 696: marked for identification on 12/20/85.

On December 22, 1985, Pierce called back and said she needed to report something that happened "two weeks prior." According to the police report:

She stated that the subject in a older red Ford pickup followed her home. She stated that the subject came to her door, knocked on the door, and asked if husband was home.

She described the person as 6', 30 years plus, 170-75 lbs, dark brown hair, mustache, blue jeans, plaid shirt, and a blue jean jacket.

Defendant's Exhibit 697.

Detective Glade Austin learned that Sheri Amell and Mary Jones were potential witnesses. Amell told Austin that on December 19, 1985, she and Jones were on their lunch break at about noon. RP 1676. They were about to enter the Yardbirds parking lot when she saw a man walk out from behind some "containers" carrying a gun. RP 1676. She described the man as 27 or 28 years old, about 5'10", thin, about 140 lbs. RP 1682. He was wearing a green army jacket and a stocking cap. *Id.* He was white, with dark hair, a mustache, and "two or three days

growth beard.” RP 1683, 1713. She and Jones were shown montages, but neither could identify the person they saw. RP 792.³

The investigators took taped statements from both women.⁴ The police took Amell and Jones to Portland that same day. RP 756-57. The two women gave information to a police officer/forensic artist named Boulin, who produced a “composite” sketch. RP 756-57. This composite sketch was widely distributed on December 24, 1985. RP 762-63.

Later, Amell and Jones were taken to a second sketch artist in Seattle. RP 1694. Detective Austin explained that the police did this because “Sheri Amell in particular mentioned she wasn’t entirely happy with the first one.” RP 794.

On January 6, 1988, Gordon Campbell went to the Lewis County police and told them about his observations in the Yardbirds parking lot around December 19, 1985. RP 4636-37, 4660. He could not remember the date, but he reported that about two years earlier he had seen a man walking near Yardbirds carrying a weapon. RP 4638, 4668. He could not identify anyone from the montages presented to him. RP 4642,

³ According to Kimsey, the records prepared before 2005 did not make it clear what pictures or montages were shown to potential witnesses. RP 3523-24.

⁴ By the time of trial, Mary Jones had died.

4675. He confirmed that statement with Detective Kimsey in June, 2012. RP 4642.

In sum, people had seen the Maurins in their car with one or two other people. The general description of the person seen near the Yardbirds parking lot was a white male under 30 wearing a green army coat, and a stocking cap. RP 3465. This person had a two to three day growth of beard. RP 3465. But on Christmas Day 1985, Ricky Riffe had a full beard. RP 1820-21, 3507; Exhibit 887.

For years, Hadaller family members believed that Ricky and John Gregory Riffe were responsible for the murders. RP 104-05. Dennis Hadaller obtained updated photos of the brothers and he gave them to law enforcement officers. RP 188-90. Both Riffe brothers were well known in their home town of Mossyrock. RP 2367. One State's witness said that Mossyrock gossip had identified the Riffe brothers as potential suspects for years. RP 2382-83.

In 1991, Lewis County deputies received a tip they should contact Robin Riffe, Ricky's ex-wife. She was dead by the time of trial, so the defense moved to exclude any of her conversations or actions with the police. After considerable argument, the judge decided that Deputy David Neiser could testify to one thing: when he called Robin and introduced himself, he told her he wanted to talk about an "old

homicide.” RP 1494. She replied: “You mean the one where two old people were killed?” *Id.* The judge ruled: “The statement on the phone can come in, because that's not hearsay.” RP 1480.

The police knew that Ricky had access to a sawed-off shotgun in 1984-85. RP 1777, 1902. His friend, Les George, had purchased the gun on October 3, 1984, to put in his long haul truck for protection. RP 2065-70. He gave it to Ricky to cut down. RP 2071-72. But Ricky returned it in the fall of 1985. RP 2148. Les's mother testified that later found the shotgun in Les's room and told her husband Richard to get rid of it. RP 2404. But her husband, Richard, said that at some point, local police talked him about the homicides. RP 2433-34. So Zandeki wanted to “get rid of it.” RP 2433. He threw the gun off the Mayfield Lake Bridge. RP 2426-27. It was never recovered.

Neither John Gregory nor Ricky Riffe was arrested and there were no solid leads from the official investigation. RP 813-14. Dennis Hadaller, became frustrated with the investigation. RP 176. He said that at his mother's funeral: “I laid my hand on her casket and I said, mom, I'll find out who did this to you and Ed and until the day I die I will keep this up.” RP 178. Sometime around 2000 he hired two private investigators to look into the case. RP 181. He received monthly reports from them. RP 182.

In 2005, Lewis County Detective Kimsey was assigned to the case. RP 3229. He began re-interviewing witnesses and developed the theory that at Christmas 1985, Ricky appeared to have more money than usual (RP 1794-96, 1830-43, 2690-93, 2855-2871), and that he and Robin engaged in a large purchase of drugs.⁵ RP 2816-52.

As discussed below, after speaking with Kimsey, several witnesses changed their statements and for the first time in 27 years, identified pictures of Ricky Riffe and his brother John Gregory Riffe, as being the person in the Maurins' car or the person walking along the road near Yardbirds. John Gregory died shortly before Ricky was arrested. The media reported Ricky's arrest in the summer of 2012 and published pictures of the brothers. At that point, additional witnesses appeared.

C. THE TRIAL

No evidence recovered from the home or the vehicle was ever tied to the Riffe brothers. RP 690-91. The State even subjected some items to updated DNA testing. The State's case was based exclusively on various eyewitness identifications made from montage photos or the

⁵ It was undisputed that in the 1980's Ricky, Robin and Greg used drugs. *See, e.g.*, RP 2036-50, 2733-34.

composite sketches and the testimony of a jailhouse snitch, Erwin Bartlett.

Nonna Pierce changed her story. She acknowledged that she had been interviewed by the police on December 20, 1985. RP 212. She repeated that on the morning of December 19, 1985, it was foggy. RP 215. The fog was thick and dense. *Id.* But she heard voices and observed headlights coming from the direction of the Maurin home. RP 217-18. She heard no sounds of distress. RP 241-42.

However, she changed her statement concerning the stranger who had appeared at her door. She now stated the man had knocked on her door on December 18, 1985 – not two weeks before the murders. RP 223. She described him as “probably 5-foot-9” and in his “mid to late 20’s” with a medium build and dark hair, and wearing jeans and a blue jean jacket. RP 228-29, 255.

Kimsey showed Pierce a photomontage. Over Ricky Riffe’s picture, someone wrote: “Looks most like the person you saw on December 18, 1985.” Someone dated the picture “6-12-2012” and Nonna Pierce initialed it, “N.P.” RP 231-34; Exhibit 189.

At trial the prosecutor asked:

Q: Nonna are you – is your testimony today that the individual in this photograph that you selected out is

absolutely 100 percent the person you saw on your front porch that day?

A: Yes, I believe with all my heart, yes, it is.

RP 235, 247.

In cross-examination, defense counsel attempted to impeach Pierce with her statement from 1985. Exhibit 700. The prosecutor objected and stated:

Object to this line of questioning with this exhibit. It is not a statement.

RP 249. Outside the presence of the jury, the prosecutor argued that Exhibit 700 was not Pierce's "statement." Rather, it was a summary "of her statement" to law enforcement in 1985. The Court ruled:

This is not her statement. This is Detective Bennett's statement.... This is what the officer says the witness related to him, so it is hearsay.

RP 251. Further, the judge ruled that it was not Pierce's statement because "she hasn't signed it and it is not tape recorded." *Id.* The judge said "I will not allow you to use the statement." RP 252.

When the examination resumed, defense counsel asked about the timing of her statement to the police about the stranger on her porch. RP 254. He asked:

Q: Is it true that you told the officer that in fact the person showing up on your doorstep came at a much later date about four or five days after the Maurins disappeared?

A: No.

RP 254. Defense counsel persisted:

Q: Is it true, ma'am, four or five days after the Maurins disappeared that was the first time you told the police officer about this fellow showing up on your doorstep.

A: No. That's not true.

RP 254-55. Defense counsel again asked:

Q: Is it true, it was four or five days after the Maurins disappeared that you told the officer the guy that showed up on your doorstep to get gas actually came to your door two weeks prior and not the day prior at all?

A: No.

Q: Isn't it true that on that day – on that second day four or five days after the Maurin's disappeared. You actually told that officer that the guy that showed up on your doorstep was thirty years plus years-old; is that true?

A: No. I guessed he was probably in his mid to late 20's, and I was I was guessing. I didn't know how old he was.

Q: Is it true that you also told that person that same officer that the person that came to your doorstep two weeks prior to the Maurins disappearing weighed between 170 to one 175 pounds?

A: I didn't tell anybody that someone came to my door two weeks prior.

RP 255.

On cross-examination Pierce said that the man who came to her door had no beard. RP 264. She also conceded that when she picked Riffe's picture from the montage he was the "most consistent" with the

person on her front porch in 1985. RP 277. She also conceded that after picking Riffe's photo she might have picked the wrong person. RP 280.

For the next 11 pages of transcript, defense counsel questioned Pierce about her 2012 statement to Kimsey. Exhibit 726. Defense counsel repeatedly attempted to get Pierce to acknowledge that Kimsey was the person who suggested to her that the person appeared on her porch on December 18, 1985. Kimsey began his interview by stating to Pierce:

And so you provided a statement of information that you heard as far as cars and fog and the time period and what I was interested in is you made a report to the Sheriff's office back in December of 1985 and what you're talking about is before the Maurins went missing so it's probably December 18 in the mid-morning about 10:30, 11:00 a truck pulls into your driveway.

Exhibit 726.

And, even in Kimsey's interview, Pierce never said the person was on her porch on December 18, 1985. Exhibit 726. Similarly, Pierce refused to admit that during the 2012 interview she twice stated that she was not "100 percent sure" that she had picked the correct person.

Exhibit 726; RP 270-90. The judge acknowledged that the witness appeared to be very "hostile" to the defense. RP 268. And that:

I suspect she's probably of the opinion that she's not going to do anything or say anything that would in any way, shape or form help the defense...

Id. At one point, Pierce refused to reread her prior statement. RP 292.

Defense counsel moved to admit her June 2012 statement to Kimsey. Exhibit 726; RP 289. The trial judge denied the motion. *Id.* Defense counsel questioned Pierce further and she stated she could not remember “exactly” what she told Kimsey. RP 294. But she stated that on that day her memory was “good.” RP 294-95. Defense counsel again moved to admit the statement. The judge again denied the motion. RP 295.

On redirect, the prosecutor asked:

Q: Did you tell Detective Kimsey at any point during this interview that you could not make a 100 percent positive identification?

A: No.

RP 296. After Pierce was excused, defense counsel complained that once shown her prior inconsistent statement, Pierce would refuse to answer, frustrating cross-examination. RP 302. The Court stated that the defense could not impeach Pierce by asking her “isn’t it true” that you told Kimsey something different. RP 304-06. He stated that the proper impeachment was to call Kimsey. RP 306.

The next day, the judge modified his ruling and permitted defense counsel to recall Pierce. When Pierce was recalled she professed she did not remember her statement to Kimsey. RP 603. She could read

that portion of the statement where she said that she was not “100 percent sure” that the person she saw on her porch was Riffe. RP 604-07. But in re-direct, she again stated that she was 100 percent sure that it was Riffe. RP 616.

William Forth changed his story. He testified that as a police officer he had followed the case and saw the composite sketches. He had been upset for years he did not stop the green car he observed on December 19, 1985. It appeared to be one reason he left the Sheriff’s Department. RP 1231, 1249.

In his testimony, Forth asserted that he had seen the person driving the car. He said that he had locked eyes with the driver. RP 1167. He said that his first thought was “this is an individual that may have done something wrong.” RP 1168. He also thought: “That individual had committed a crime such as burglary.” RP 1169. Further, he said:

You could see fear in those eyes. There was a deep concern, a very deep concern for me being back there.

RP 1176. He asserted the driver was in his mid to late-20’s with whiskers. RP 1170. And, he even reported that he saw a red blanket on the seat of the car. RP 1174-75.

On April 11, 1991, six years later, Forth was shown a montage by Lewis County Detectives. He picked Ricky Riffe's picture and said, "That's the son of a bitch that killed the Maurins." RP 1233. More than 21 years later, in late January 2012, he was again shown a montage by Detective Kimsey. This time he picked John Gregory Riffe's picture. RP 1197-1207, 3484. He told Kimsey he was 100 percent positive it was John Gregory Riffe who he saw driving the car. RP 3484.

Forth met with Kimsey again on February 22, 2012. According to Kimsey, during the 2012 interview "there should have been additional questions of what happened." RP 3473. Kimsey later agreed in his testimony that in Forth's 1985 statement there was no description of the driver of the green car. RP 3477.

More than a year and half later, the day before trial in October 2013, prosecutors told Forth he had picked two different people as the driver of the car. RP 1209. The prosecutor asked:

If you had to select between two of these photographs, which one would you believe was more reliable as far as your selection?

RP 1208. Forth said:

I would pick the photo that I picked in 1991 because that was the most current to the time of the homicide.

RP 1208-09.

Gordon Campbell changed his story. He testified that he was watching T.V. in September 2012, more than 27 years after the murders, when a report about the case jogged his memory. RP 4643. His new testimony was that on December 19, 1985, he had driven into the Yardbirds parking lot and saw two men wiping down a green car. RP 4643. He went over suggested they go through the car wash. *Id.* Further, unlike in 1985, he could now identify those two men as Ricky and John Gregory Riffe. RP 4646-48.

Moreover, the night before Campbell's scheduled testimony – 27 years later – he recalled for the first time that John Gregory had spoken to Ricky in his presence. According to Campbell, John told Ricky to close the door on the green car. RP 4655-56.

Sheri Amell changed her story as well. Amell said she had spoken to law enforcement ten times over the last 27 years. RP 1695-96. She first testified that State's Exhibit 113 was a "picture that Ms. Boulin made when we – me and Mary went down to Portland." RP 1690.

In explaining the process Amell said:

She would ask us – show us a bunch of different eyes or different noses and different mouths and different features and then we would pick one that looked similar. Then, she drew it together, and Mary and I disagreed a little bit on the width of his face, but I felt like his face was too wide.

RP 1690-91.

Amell stated that the second composite was based “mostly” on Mary’s input. RP 1694. She said that she “agreed” with that composite but not “100 percent.” RP 1695-96; *see also* 1749. This composite was also distributed to the media in 1985. RP 796.

The defense objected to the introduction of the composites as hearsay. The trial judge stated that “The hearsay objection is intriguing.” RP 762. But he said that if Amell testified that the composite was a drawing “the police artist came up with in her presence” there is “probably not a legitimate hearsay objection.” RP 762. Both composite sketches were admitted. Exhibit 113 and 206, see attachments to this brief.

In February 2012, Kimsey contacted Amell. She was shown yet another montage. She picked a picture and wrote: “Looks like this one a lot.” RP 1698; Exhibit 183. But, on July 9, 2012, she read a newspaper article on the case and viewed the accompanying photographs. RP 1728-29. She stated that the picture in the article did not look like the person she saw on December 19, 1985. RP 1730. She printed a copy of the article and took it to Kimsey. Exhibit 877, 859. She also viewed the picture of John Gregory Riffe included in the article. Exhibit 860. She

then told Kimsey she must have seen John Gregory Riffe, not Ricky Riffe, on December 19, 1985. RP 1736, 1742, 3489.

On redirect, the prosecutor asked her whether the composite looked more like John Gregory Riffe or Ricky Riffe. She said it looked more like the montage photo of Ricky she selected in February 2012.⁶

Frank Perkins changed his story. At trial he said the man he saw near Yardbirds was carrying a large bore rifle or shotgun – not a rifle. RP 1005, 1023-24. After receiving his subpoena, he watched news reports in the week preceding his testimony. RP 1012-13. During one report, he saw pictures of Ricky and John Gregory Riffe. RP 1013. He stated:

It shocked me, because it was like going back to thirty years ago . . . I recognized the person I saw in the car in that photograph.

RP 1013. He immediately called the prosecutor's office and arranged a meeting with the prosecutor and Kimsey. RP 1015. Kimsey interviewed Perkins and showed him pictures of the two brothers. RP 3491; Exhibit 999. Perkins pointed to the picture of John Gregory Riffe, but called him "Ricky." RP 3491-92.

⁶ The composites were also shown to witnesses: Campbell (RP 1654-55); Tammy Graham (RP 1874); Jerry Nixon (RP 2383); Linda Zandeki (RP 2405) (who said they were posted all over); and Jeff McKenzie (RP 2460).

Donald Burgess was typical of the “new” witnesses. Donald Burgess was a well-known drug dealer and informant in Lewis County. RP 3400. In 27 years, Burgess never implicated Ricky. At trial, defense counsel suggested that Burgess had never implicated Ricky because “you didn’t know anything about Ricky being involved; right?” RP 2800. Burgess responded, “I did, but I couldn’t say a word.” RP 2801. He never explained why he couldn’t speak for 27 years despite having been questioned by police about the homicides seven or eight times. RP 2799-2800.

He testified he used to hang out with 15 to 20 people in Mossyrock. RP 2789. At some point, the group decided that Ricky committed the Maurin homicides. RP 2789-90. But he waited 27 years before reporting to Kimsey that at some undefined time Ricky came to his home with another person and said, “I think we are going to get away with it.” RP 2772. According to Burgess, Ricky did not mention the Maurin murders in relationship to this statement but “I knew that was what he was talking about.” RP 2792.

Marty Smetzler contacted Detective Kimsey after reading about Ricky’s arrest in the paper in 2012. RP 3326-27. He testified that in early December 1985 he heard Ricky say he would take two old people to the bank to get money and then kill them. RP 939, 958-59. He said

that he reported it to a police officer at the time, but there is no record of that. RP 946-48. Late in December 1985, while he was in jail, he heard about the Maurin murders. So he reported the comment to another police officer who came by the jail. RP 948-49. Again, he did not remember who he had spoken to. RP 950. He admitted that he suffered from a severe brain injury and said: "I'm slow of remembering." RP 952. Smetzler was actually a suspect in the Maurin murders. RP 952-53. And, when asked to swear that his statements to the police were true he said: "I'm pretty sure it is the truth." RP 962.

Jason Shriver testified that he was contacted by Hadaller's private investigators in 2004 and told them "everything." RP 2300. He stated he waited almost 20 years to tell anyone what he observed on December 19, 1985, because he was afraid of the Riffe brothers. RP 2202-2318. He was interviewed by Kimsey again on February 12, 2012.

He said that on December 19, 1985, as he and his mother passed the Maurins' vehicle, he looked over and saw the Maurins and John Gregory and Ricky Riffe. RP 2204-08. He saw no weapon. RP 2208. He had about a 30-second view. RP 2208. According to Shriver, sometime later Greg threatened to kill him and his family if Shriver said

anything. RP 2234. That was Shriver's excuse for not saying anything until 2004 even though he knew of the murders.

Brenda King called Kimsey after reading about Ricky's arrest. RP 3331. King referred to the Riffes as "Muzzleman." RP 1968. She heard about the murders in 1985 and had seen the composite. RP 1994. But, she had been too busy in the proceeding 27 years to come to the police station to report what she considered to be information regarding the Maurin homicides. RP 1994-95, 2008-2010. But in 2012 she saw the story in the newspaper and now thought, "I could contribute to the investigation." RP 1996. She read the article and saw the photos before she contacted Kimsey. *Id.*

She first testified that on December 17th, 1985, she had seen the Maurin vehicle in the Yardbirds parking lot. RP 1948, 2020. But she "rectified that with Detective Kimsley [sic] and I specified it wasn't the 17th, it was the 19th." RP 2020. She saw the vehicle at 8:00 or 8:30 a.m. (well before the Maurins went to the bank). RP 3485. She said she observed John Gregory Riffe getting out of the vehicle holding a shotgun. RP 1951.

King also stated that she served the brothers when she was working at a local tavern. RP 1968. On some earlier unidentified date in 1985, she was delivering beer to the two men at their table when she

heard John “talking about needing to get money and the boat and going to Alaska.” RP 1993. She said that Ricky told John Gregory to “shut up.” *Id.* Kimsey showed her a montage on October 23, 2013, just before she testified. RP 3334-35. She picked both brothers’ pictures from the group. RP 3334-35.

Brenda’s husband, Steve, knew that the Maurins had been murdered and he realized he might know something about the case. RP 2031-32. But he, too, was too busy to “get involved.” RP 2031-32. Steve and Brenda both read the article regarding Ricky’s arrest in 2012. RP 2011. They went together to see Kimsey. RP 2033.

Steve testified that he remembered a time in December 1985 when he and Brenda were in the Yardbirds parking lot. RP 2021-22. He saw a person getting out of a green car and Brenda said “I know that guy.” RP 2024. He saw no gun. RP 2025. Later, he saw a person walking near Yardbirds carrying a gun. RP 2027-28. He was not sure whether this was the same person he had seen earlier getting out of the green vehicle. RP 2028.

In 1985, Jeff McKenzie saw a newscast about the case. He also saw the composite drawings. RP 2469-70, 2482. He identified the composite as “familiar.” RP 2482. He told the investigators he had been at AM/PM minimart in Chehalis “right after dark.” RP 2448-50. When

he was walking into the minimart, a man wearing a green jacket approached him and asked him for a ride. RP 2452. The man was carrying a crumpled up grocery bag. RP 2455. McKenzie said no, but the man persisted. His eyes were dilated and it occurred to McKenzie that the man may have been drinking or “on something.” RP 2452, 2456. The man had not shaved for a “a few days.” RP 2476-77. When a patrol car pulled into the parking lot the man ran away. RP 2453. McKenzie got a 35-45 second look at the man. RP 2477.

On September 21, 2012, after Ricky’s arrest, Kimsey interviewed McKenzie and showed him pictures from a montage. McKenzie then picked two pictures from the montage as similar to the man he saw at the minimart. RP 2465-66. The pictures were of Ricky and John Gregory Riffe. RP 3405.

Catherine Dixon Thola testified that she was in a relationship with Ricky Riffe in 1986 after he and Robin had split up. RP 2698. She recalled that John Gregory Riffe always wore jeans, a green army jacket, and a stocking cap. RP 2702. At some point, Thola and Ricky had an argument with John Gregory present. RP 2711-12. During the argument, she told Ricky she would leave him. RP 2713. At that point, John Gregory said, “We’ve killed once. We can kill again.” RP 2713. In her original statement on November 20, 2011, she said only that Ricky

smiled at John Gregory's comment. RP 2727. She did not say he "nodded." RP 2727-28. He later threw a pot of beans at the wall. RP 2714.

Defense counsel objected to the admission of this evidence. He argued that John Gregory's statement was inadmissible hearsay. The judge permitted the testimony because it was an "admission by party opponent." RP 2709-10.

Deborah George was married to Les George, Ricky's friend from Mossyrock. She had a head injury and had difficulties with her memory. RP 3642. She also stated that he had an anxiety disorder. RP 3662-3. She said that she was "scared of everything." RP 3664. As a result, she continually stated that she did not remember certain things. Her testimony was also disjointed. RP 3642-43. Prior to Ricky's arrest, she started a correspondence with him via Skype and the internet. RP 3554. She went to visit Ricky in the Lewis County Jail on August 24, 2012. RP 3513. They talked about sex and hid this from Les. RP 3556-58. Ricky asked her what people were saying about him and the homicides in Lewis County. RP 3559, 3599. He did not seem concerned about the gossip, however. RP 3639.

George could not remember much but she said that Ricky said something about putting bloody clothes near Mayfield Lake. RP 3611.

She also stated that Ricky told her that Mr. Maurin was hit over the head because he would not get out of the car. RP 3615. She admitted that she never told the police about this statement even though she had been talking to Kimsey over a period of at least a year and a half. RP 3644-45. On both comments, George said she heard them after Ricky had turned off the visual feed on Skype. RP 3660-61. It sounded to her like he was talking to himself. RP 3662.

Finally, the State called jailhouse snitch, Erwin Bartlett. In 1990, Bartlett escaped from prison in New Mexico where he was serving a sentence for 2 counts of attempted first-degree murder. RP 2872-73. He came to Washington but was arrested and returned to prison. RP 2873-74. In 2007, he was released and returned to Lewis County. RP 2874.

In 2012, he was rearrested for fourth-degree assault and sentenced to six months in the county jail. RP 2874-75, 2912. During that sentence he was allowed out of jail to attend medical appointments with a liver specialist. RP 2875. However, the jail would not let him use his prescription for Tramadol in the jail. RP 2876-77. So he tried to smuggle the drug in and was caught. RP 2877. He was charged with felony possession of a controlled substance in a jail. RP 2877. According to Bartlett, while he was in jail for his misconduct, he and Ricky Riffe

communicated via an air vent. RP 2891-92. During one of those conversations, “he told me that he had committed a crime and that he had killed two old people.” RP 2894. Ricky also said he had “an accomplice.” RP 2895-96.

Bartlett wanted “some leniency in my situation.” RP 2900. He contacted law enforcement. RP 2901. The following exchange then occurred between the prosecutor and Bartlett:

Q: So you contacted law enforcement?

A: Yes, I did.

Q: You told them what you knew?

A: Yes, I did.

Q: You told them everything you knew?

A: Yes, sir.

Q: Now you have already testified and you plead guilty to the charge?

A: Yes, sir.

Q: You haven't been sentence yet; correct?

A: No, sir.

Q: What consideration from the State have you received?

A: None, and I was told by you that I wouldn't get any.

RP 2901. A few minutes later, direct examination concluded. RP 2902.

On cross-examination, Bartlett admitted that the moment he was caught smuggling in the contraband; he began negotiating with the jail staff in exchange for information about other cases. RP 2923-24. In fact, he gave information about two other inmates involved in murder cases. RP 2923-24. He admitted that his goal was to get consideration on the controlled substance case. RP 2925.

Bartlett said he entered a plea to the controlled substances charge, but sentencing had been continued until after his testimony against Ricky. RP 2928-29.

Defense counsel showed Bartlett the plea offer. That form, completed on May 1, 2013, stated:

Defendant pleads as charged, sentencing is continued to a date after Riffe trial. Defendant to testify truthfully if called as a witness by the State. 30 days all options. Otherwise State will seek high end and may add enhancement for contraband in jail.

RP 2932-33; CP 300-01.

Bartlett denied knowing that this was part of the agreement. RP 2933. He also denied that Halstead, the trial prosecutor in this case, was in the courtroom when he pled guilty. RP 2935.

The State argued that the plea agreement should not be admitted but the Court admitted it as Exhibit 963. RP 2941-42. The plea was entered on May 8, 2013. RP 2947. At that time, Halstead was present for

the State. Bartlett's attorney stated that he went over the plea form line by line. CP 202. He also stated that "Part of this plea involves Mr. Bartlett giving truthful testimony in any trial of Mr. Riffe down the road." CP 203.

This agreement had not been disclosed in discovery. RP 2953. On cross, Bartlett again denied knowing anything about the plea offer. RP 2959.

The prosecutor continued to insist that Bartlett did not receive any consideration. RP 3581-82. Mr. Halstead proposed to call Bartlett's lawyer, David Arcuri, to explain "what the deal was." RP 3582. Halstead continued to insist that if Bartlett did not think he got "consideration" for his testimony, it did not matter that the prosecutor had actually given him consideration. RP 3584. The judge ruled that it appeared to him that Bartlett:

may have very well been confused by design or expressed confusion by design, because he didn't want to answer Mr. Crowley's questions directly, because in essence it makes him look like he's in here fabricating testimony in exchange for getting a sweetheart deal in sentencing.

RP 3586.

Arcuri testified that he did not know what Bartlett told Kimsey. RP 3675.⁷ He had numerous discussions with Halstead regarding the plea. RP 3675-76. He stated that the offer was to plead or the State would go to trial and get one year and an enhancement. RP 3683.

Halstead asked:

[C]an an enhancement be added – if someone pleads guilty to a charge, can an enhancement be added after they have plead guilty?

RP 3683. Arcuri said: “No.” *Id.* The State asked:

Q: Mr. Bartlett changed his plea on May 8?

A: He did.

RP 3686.

Arcuri also testified that Bartlett received consideration in this case. RP 3688. But over defense counsel’s objection, Arcuri was permitted to testify:

THE WITNESS: So this is what I told Mr. Bartlett, and I’m saying they may figure it out, and if they do, they got to change the charge to simple possession, but then they add an enhancement which would add time. First off, I don’t think they’ll try, because I just don’t think they will do that, but I do think they’ll follow through with this promise to recommend 12 months, but I don’t think you’re going to get that either.

⁷ There is no evidence in the record that Acuri had a release from Bartlett to discuss matters that were covered by the attorney-client privilege.

I've been here for 17 years. I've been in front of these judges. I know what this case is worth and I know what it's not worth. You are not going to get 12 months I don't think. They can ask. I'm going to argue and the judge is going to decide. You are probably going to get three or four months; so when you asked what did Mr. Bartlett get for this arrangement? I think he got three or four months confinement, depending on if I was right and I'm pretty sure I was that he was just going to get 30 days of electronic home monitoring, which I thought was a deal, and I said, well, all you have to do to is testify, tell the truth and you get this. Also, I told Mr. Bartlett, guess what? You can't refuse to testify anyway, because –

MR. CROWLEY: I object.

THE COURT: Sustained.

THE WITNESS: That's the consideration I gave. That's the discussion pretty much that I gave Mr. Bartlett.

RP 3695-96. Arcuri confirmed that the written offer was from Halstead.

RP 3701. Arcuri agreed that if Halstead added the enhancement, Bartlett could get up to 24 months in jail. RP 3704.

Defense counsel moved to admit the transcript of Bartlett's plea hearing. RP 3716-17. He explained that it impeached Bartlett's testimony that he did not understand the plea offer. RP 3717-18. The judge denied the motion because he didn't "see where the transcript is helpful, relevant, material." RP 3718.

Riffe moved to dismiss or for a mistrial on the grounds that the prosecutor had committed misconduct. CP 175-307. The defense also asked that prosecutor Halstead be disqualified. *Id.* The defense alleged

that Halstead presented perjured testimony and that he failed to correct it as required by law. Defense counsel also pointed out that the State never revealed this plea deal.

The prosecutor responded that Halstead had corrected Bartlett's statement by calling Arcuri. As to the discovery failures, the State never explained why it withheld these documents. The trial judge appeared to find that the prosecutor had no obligation to turn this exculpatory information over to the defense.

D. THE DEFENSE CASE

The defense proposed expert witness Dr. Mark Reinitz, a professor of psychology at the University of Puget Sound. He previously testified as an expert in perception and memory in state and federal courts in Washington and California. CP 157.

Dr. Reinitz's offer of proof stated that he did not propose to "issue judgments about whether a particular witness's memory in the case at hand is correct or incorrect." Instead, his role was to "provide information to the jury about the scientific bases of various relevant aspects of perception and memory." CP 164. He stated that he would testify about "decades of scientific research" that demonstrate the particular circumstances that result in erroneous eyewitness identification. CP 166. He said there were three relevant points: 1) initial

memories are fragmented, disorganized, and incomplete; 2) memory changes over time and becomes “more detailed, more coherent, and more complete”; and 3) “unbeknownst to the witness the memory is – critically and non-intuitively – not necessarily becoming more accurate; hence the witness ends up with an eventual memory that is strong, detailed, and confidence inducing, but nonetheless incorrect in important aspects.”

He said:

A striking and directly relevant class of such memories is those of eyewitnesses who strongly and confidently – yet falsely – identify as perpetrators, defendants who are later shown unequivocally to *not* to have been the person that the witness saw commit the crime.

CP 166. He said:

Of most relevance to the case at hand is that the witness may well have begun with perceptions and memories of an individual’s appearance that were highly fragmented and incomplete – and yet, at the present time, have a reconstructed memory that includes a strong representation of Mr. Riffe as the perpetrator.

The State moved to prohibit Dr. Reinitz from testifying. CP 167-174. The trial court granted that motion.

E. CLOSING ARGUMENT

Mr. Halstead argued for a full day in his initial closing statement.

Mr. Halstead argued:

I'm hoping some of you will remember this, but we talked about accomplice and the example I gave was the first one, the bank robber and the driver. That's an example of somebody who's an accomplice. You are the driver. You know somebody is going to go rob the bank, you are sitting outside, you never go inside the bank, but you are sitting outside and you got the engine started and you are ready to go. Guy runs out, oops, you didn't know it, but when he was in the bank he shot five people. Guess what? You are on the hook.

Another example, a driveby shooting with multiple passengers, happens all the time. We hear about it all the time on the news in Seattle, Tacoma, the bigger cities. Drive-by shooting, a car is loaded with people. Drive-by shooting, somebody on the sidewalk gets shot. Guess what? If the people inside knew about it and were involved in it, even though they didn't pull the trigger, they are guilty as well.

Now, an assault, another example of this can be elicited by two guys beating up another guy. One guy holding him, the other guy is pounding on him. Clearly the guy hitting him is going to be guilty. What about the guy holding him? He's not doing anything, he's just standing there. He's aiding. He would be guilty as well.

The reason I bring these up is because all of you I asked, not individually, some of you I did, all of you said you didn't have a problem with that concept, whether someone was an accomplice you would hold them responsible, if the fact the State proved they're an accomplice.

RP 4027-28. He later argued that the brothers were "interchangeable."

RP 4039. He said:

[I]n the end it doesn't really matter who shot the Maurins. We all want to know, but all we have to do is prove that they were coconspirators, accomplices involved, so the question for you as I go through this is, when does Ricky

the defendant or John the dead would-be defendant, when do they both become accomplices?

RP 4028.

Halstad argued that the brothers became accomplices when they were spotted in the car with the Maurins by Jason Shriver. RP 4058.

Was it Ricky or John? Who was the shooter? It doesn't matter. Based upon the circumstantial evidence and the direct evidence, they are both selected out of the montages, they are both accomplices based upon all the evidence that you have already heard

You saw the accomplice instruction. It does not matter who was the shooter. They are both equally liable for all of these crimes. The State would submit to you that Ricky was the shooter, based upon the photo montages that were selected from the witnesses at Yardbirds, particularly, Shirley Potter, who saw him right there as well as Gordon Campbell, when he drove through Yardbirds, as well as Jason Shriver who saw them in the Maurin vehicle. But again, it doesn't matter.

Are we saying these are the only two people involved in the case? Of course not. But they are the only two charged now.

Could there be another person out there? Deborah George talked about somebody in bib overalls, when she had a conversation with the defendant. Could there be someone else out there that's responsible or had a part in this? Absolutely, but that doesn't mean the defendant is not guilty.

RP 4166-67.

The prosecutor told the jury to review the accomplice instruction:

It is extremely important in this case. There was more than one person involved. There are two, if not more. We know who those two are.

RP 4169-70. In rebuttal the prosecutor said the defense had only argued that Ricky was not guilty, but had not argued that John Gregory did not do it. He said: “[S]o if you believe that Greg was involved in this crime and his brother was involved, we have proved our case.” RP 4288.

F. VERDICT AND SENTENCING

The jury convicted Ricky Riffe as charged. The trial court imposed 1,234 months (102 years) in prison. CP 1113. This timely appeal followed. CP 1136-57.

**IV.
ARGUMENT**

A. RIFFE WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT EXCLUDED THE EXPERT TESTIMONY OF DR. REINITZ

1. Federal Due Process and the Sixth Amendment

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.... This right is abridged by evidence rules that infring[e] upon a weighty

interest of the accused” and are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

This right is a fundamental element of due process of law. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). While these rights are not absolute, if the offered evidence is relevant, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State’s interest in excluding prejudicial evidence must also “be balanced against the defendant’s need for the information sought,” and relevant information can be withheld only “if the State’s interest outweighs the defendant’s need.”... [F]or evidence of high probative value, “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.” *Jones*, 168 Wn.2d at 720-21 (Court’s emphasis; citations omitted).

The United States Constitution “protects a defendant against a conviction based on evidence of questionable reliability ... by affording the defendant means to persuade the jury that the evidence should be

discounted as unworthy of credit.” *Perry v. New Hampshire*, 132 S.Ct. 716, 723, 181 L.Ed.2d 694 (2012). In *Perry*, the Supreme Court addressed the issue of whether due process requires judicial inquiry into the reliability of a suggestive eyewitness identification that was not the result of police arrangement, and held it does not. But, as part of its analysis, the Court listed the presentation of expert testimony as one of the safeguards against convictions based upon unreliable hearsay.

2. ER 702

ER 702 governs testimony by experts, providing:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under the rule, expert testimony is admissible if it will be helpful to the trier of fact. “Helpfulness” is to be construed broadly. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)). This means the rule favors admissibility in doubtful cases. *Likins*, at 148.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine facts in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

otherwise. The admissibility of expert testimony under this rule depends upon whether: (1) the witness qualifies as an expert; (2) the opinion is based upon an explanatory theory generally accepted in the scientific community; and (3) the expert testimony would be helpful to the trier of fact. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984).

a. Expertise

The trial court erred in suggesting that Dr. Reintz was not qualified by experience or education. He stated that he was a Professor of Psychology at the University of Puget Sound. He had been teaching and researching for 25 years. He had published 20 peer reviewed articles. He has testified in other state and federal courts. CP 157. The State presented no evidence to contradict his credentials in any way.

The trial court also stated that Dr. Reintz had a preconceived notion that memories are faulty. But that was not at all when he opined. He said that scientific research supported a finding that while memories may get more organized and detailed over time, they do not get more accurate.

b. Generally Accepted

The trial court erred in holding that scientific findings regarding the limits of eyewitness testimony is not generally accepted. That conclusion was simply incorrect. It is unclear why the trial judge came

to this conclusion. Certainly the State did not present any evidence to support this finding.

And the case law makes it clear that similar expert testimony is generally accepted in the scientific community. *See, e.g., State v. Taylor*, 50 Wn. App. 481, 489, 749 P.2d 181, 184 (1988) (“[E]xpert testimony on the unreliability of eyewitness identification can provide significant assistance to the jury beyond that obtained through cross examination and common sense.”); *see also United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985), *reh’g denied*, 828 F.2d 1020 (1987), *cert. denied*, 484 U.S. 1017, 108 S.Ct. 725, 98 L.Ed.2d 673 (1988) (interpreting Federal Rules of Evidence); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985) (same).

In August 2011, the New Jersey Supreme Court issued a landmark decision concerning identification evidence. *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011). The court conducted an extensive and thorough review of the topic, appointing a special master who presided over a hearing that probed the testimony of seven experts, analyzed hundreds of scientific studies, and produced more than 2,000 pages of transcripts. *Id.* at 877, 916. The results, adopted unanimously by the court, were powerful:

In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence,... a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.

We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications...

In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. *It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.*

Id. at 877-78 (emphasis added and citations omitted).

c. Helpful to the Trier of Fact:

The trial judge was simply incorrect when he held that this testimony would not be helpful to the trier of fact. The average juror does not understand the weaknesses of eyewitness identification. If the average juror did understand the weakness then perhaps eyewitness misidentification would not continue to be the leading cause of wrongful convictions. It is widely accepted by courts, psychologists and commentators that “[t]he identification of strangers is proverbially untrustworthy.” Felix Frankfurter, *The Case of Sacco and Vanzetti*: A

Critical Analysis for Lawyers and Laymen 30 (Universal Library ed., Grosset & Dunlap 1962) (1927) (“What is the worth of identification testimony even when uncontradicted? . . . The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent – not due to the brutalities of ancient criminal procedure.”); *see also Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (citing a study that concluded that “mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined.”); *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987) (wrongful conviction based on victim’s eyewitness testimony); *State v. Youngblood*, 153 Ariz. 50, 734 P.2d 592 (Ariz. Ct. App. 1986), *cert. granted*, 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232, *and judgment reversed*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), *reh’g denied*, 488 U.S. 1051, 109 S.Ct. 885, 102 L.Ed.2d 1007 (1989) (same); *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (same); C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 *Crime & Delinq.* 518, 524 (1986) (“the single most important factor leading to wrongful conviction in the United States . . . is eyewitness misidentification”).

The Innocence Project at the Benjamin Cardozo School of Law report on the 200 persons exonerated by DNA testing around the country found that 77% of those freed were convicted in part on eyewitness misidentification. Earlier, in a study of 40 cases of DNA exoneration researchers concluded: Of these 40 cases, 36 (or 90%) involved eyewitness identification evidence in which one or more eyewitnesses falsely identified the person. One person was identified by five separate eyewitnesses. It is important to note that the 40 cases were not selected because they happen to have eyewitness identification as the primary evidence. Instead, these cases are simply the first 40 cases in the U.S. in which DNA was used to exonerate a previously convicted person. Hence, the kind of evidence that led to these wrongful convictions could have been anything. The fact that it happens to be eyewitness identification evidence lends support to the argument that eyewitness identification evidence is among the least reliable forms of evidence and yet persuasive to juries. Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero, and C.A.E. Brimacombe, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law and Hum. Behav.* No. 6, at 1 (1998); A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?* 42 *Canadian Psychology* 92, 93 (May

2001) (“[E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence.”); Gary L. Wells and Elizabeth A. Olson, *Eyewitness Testimony*, 54 *Annu. Rev. Psychol.* 277, 278 (2003) (“ . . . eyewitness researchers have noted that mistaken identification rates can be surprisingly high and that eyewitnesses often express certainty when they mistakenly select someone from a lineup.”)

Modern research further reveals that the factors courts have traditionally used to evaluate the reliability of eyewitness identification are not only inconclusive, but also misleading. Jurors tend to overestimate “the likely accuracy of eyewitness evidence.” John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 *Law & Hum. Behav.* 19, 28 (1983). Jurors may make this mistake because they “rely heavily on eyewitness factors that are not good indicators of accuracy.” Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System?: A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, in 2 *Handbook of Eyewitness Psychology: Memory for People* 453, 484 (R.C.L. Lindsay et al. eds., 2007). Social scientists theorize that jurors rely heavily on factors that are not correlative of accuracy because many of the scientific principles

underlying the reliability of eyewitness testimony are counter-intuitive or do not comport with common sense. Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 *Psychol. Pub. Pol’y & L.* 909, 921 (1995). Whatever the cause, the effect is that jurors cannot accurately discriminate between correct and mistaken eyewitnesses, and that jurors frequently rely on the testimony of mistaken eyewitnesses. *Id.* at 925.

In addition, jurors are compelled by a witness’s certainty in her identification. “[M]ock-juror studies have found that confidence has a major influence on mock-jurors’ assessments of witness credibility and verdicts.” Neil Brewer & Gary L. Wells, *The Confidence – Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates*, 12 *J. Experimental Psychol.: Applied* 11, 11 (2006). The impact of the eyewitness’s confidence in his identification here cannot be underestimated, because jurors tend to confound certainty and accuracy. *State v. Romero*, 191 N.J. 59, 74-75, 922 A.2d 693, 702 (N.J. 2007) (“Jurors likely will believe eyewitness testimony ‘when it is offered with a high level of confidence . . .’”). Moreover, “[w]hen witnesses are briefed or coached about cross-examination, as they almost always are in an actual trial, they maintain their confidence under cross-examination

and thereby sustain (or increase) their incriminating effect on jurors.”
Leippe, supra at 923. Yet scientific research has shown that “eyewitness
confidence is a poor postdictor of accuracy.” Steven M. Smith et al.,
Postdictors of Eyewitness Errors: Can False Identifications Be
Diagnosed?, 85 J. Applied Psychol. 542, 548 (2000).

Here, the task of understanding the counter-intuitive principles of
reliability was left to jurors. The expert testimony proposed by Riffe
would clearly have assisted them in understanding the various factors
that made the witnesses’ observations unreliable. Moreover, without the
expert testimony, the jurors lacked even a “basic” understanding of the
factors that could have affected reliability of the identifications made.
And, the prosecutor asked each witness about their certainty. This was a
direct effort to get the jury to accept that the witnesses’ level of certainty
equated with accuracy. And, this was precisely why expert testimony
was essential to the defense case.

Moreover, voir dire and cross-examination did not and cannot
address the *scientific* basis to challenge the witnesses in-trial confidence
regarding their identifications of Ricky Riffe as the person in the green
car or near the Yardbirds on December 19, 1985. Certainly, For
example, voir dire and cross-examination were not sufficient to explain
that the eye witnesses evidence - offered by Pierce, Forth, Campbell,

Amell and other – that became more detailed and more certain 27 years later was actually the very unreliable and could lead to an entirely false identification of Ricky Riffe as the person they thought they saw.

3. Prejudice to Riffe

Because of the circumstances of the witnesses' initial observations, the later introduction of new information such as media reports and the passage of 27 years, Riffe's argument was that the purported "eyewitnesses" simply misidentified him as the person they saw in relation to the murders.

The exclusion of the expert gutted Riffe's defense. There was no independent forensic evidence to support the State's charge. The State's only evidence was the assertion that Riffe fit the description of a man allegedly seen either in the Maurin vehicle or walking along the road carrying a shotgun on December 19, 1985. But these identifications did not take place until 27 years later. Some of these witnesses were shown multiple photo montages over the course of many years. Some of those witnesses had already seen media reports of Riffe's arrest and the published pictures of the two brothers. Some of the witnesses presented excuses for waiting 27 years to come forward. Some of the witnesses refused to acknowledge that they had given conflicting statements.

As Riffe quite reasonably told the arresting officers, he could not recall his movements in late December 1985. Thus, his only defense was that these witnesses – while well meaning – were simply wrong. And, he was entitled to present evidence of the scientific reasons why they could be wrong.

Without this testimony the prosecutor was left free to argue that “eyewitnesses” did not lie or were never wrong. But in closing argument the prosecutor referred to Nonna Pierce, Jason Shriver, Frank Perkins, Billy Forth, Brenda King Cordon Campbell and Jeff McKenzie and other witnesses. He argued that none of them had a “motive” to misidentify Ricky Riffe by picking his picture out of the line-ups. He said there was no evidence that any one of them had a “personal vendetta against the Riffe brothers.” RP 4332. But Riffe could not rebut this with scientific evidence that would have helped explain that the witnesses were not lying. Rather, their memory and identification was unreliable.

It was decidedly unfair for the State to move to exclude Dr. Reinitz’s testimony in light of the 27-year delay between the crime and the trial. None of the delay can be attributed to Riffe. The State interviewed the witnesses many times over. The State did not keep accurate records of which montages were shown to various critical

witnesses at which times. Private investigators, not accountable as State actors to the local police, interviewed witnesses, but there was no clear evidence about what they told the witnesses or what pictures or montages they used.

B. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE PROSECUTOR COMMITTED MISCONDUCT BY FAILING TO TIMELY REVEAL EXCLUPATORY EVIDENCE IN HIS POSSESSION, ELICITING FALSE TESTIMONY AND THEN FAILING TO CORRECT IT

The Lewis County Prosecutor's Office violated Riffe's right to due process by failing to provide defense counsel with a full accounting of Halstead's negotiations and the plea bargain with Erwin Bartlett. Those materials should have been provided to defense counsel shortly after Bartlett's plea on May 8, 2013. The suppression of evidence favorable to the accused by the prosecution violates due process, irrespective of the good or bad faith. *Brady*, 373 U.S. at 87. The defendant need not even request the evidence. The prosecution has the duty to produce it. *Banks v. Dretke*, 540 U.S. 668, 696, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The failure to disclose a reduction in sentence in exchange for testimony for the State is a *Brady* violation. *See, e.g., Benn v. Lambert*, 283 F.3d 1040 (9th Cir.), *cert. denied*, 537 U.S. 942, 123 S.Ct. 341, 154 L.Ed.2d 249 (2002). Defense counsel should never

have been forced to seek out this information – Mr. Halstead had a duty to provide it to the defense in the first instance.

The State may not present false testimony or fail to correct testimony when the State later discovers it to be false. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

A conviction obtained using knowingly perjured testimony violates due process, even if the witness's perjured testimony goes only to his credibility as a witness and not to the defendant's guilt.

United States v. Houston, 648 F.3d 806, 814 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1727, 182 L.Ed.2d 264 (2012) (citations omitted).

Bartlett's testimony that he did not receive any consideration for his testimony, elicited by the State, was actually false. Mr. Bartlett received a much reduced sentence in exchange for his plea and avoided the amendment of his charges to a felony, which included a sentencing enhancement.

Halstead knew or should have known that the testimony was actually false. Halstead clearly knew that Bartlett received consideration because he drafted Bartlett's plea bargain. CP 199. He negotiated with Bartlett's counsel. He was present in court when Bartlett entered his plea.

Halstead's action in eliciting the false testimony is even more egregious considering the fact that the State did not provide the plea agreement to defense counsel in discovery. Their excuse appeared to be that defense counsel could have easily discovered the document by examining the Bartlett court file. In essence, the State's argument appears to be that this conduct is permissible. But even if defense counsel failed to exercise due diligence, which Riffe does not concede, the prosecutor's *Brady* obligation was not excused. *Amado v. Gonzalez*, 2014 WL 3377340 (9th Cir. July 11, 2014). The trial judge relied on this argument in his findings of fact and conclusions of law. But his conclusion that there was no *Brady/Napue* violation because defense counsel was "fully aware of the plea agreement" is contrary to controlling precedent. *Id.*

The false testimony was material. It cannot be disputed that there was a significant likelihood that the false testimony could have affected the judgment of the jury. *Napue*, 360 U.S. at 271. The rest of the evidence presented against Riffe was 27-years old, unreliable and entirely circumstantial.

Moreover, if, as here, "it is established that the government knowingly permitted the introduction of false testimony, reversal is virtually automatic." *Houston*, 648 F.3d at 814. The false testimony

was never corrected and the trial judge should have granted a mistrial. After the evidence came to light, the State insisted on calling Mr. Acuri to try to persuade the jury that there really was no plea bargain. In doing so, Halstead elicited testimony from Acuri that included speculation that no enhanced sentence would ever have been imposed in the case. But if Bartlett had refused to testify, the State could have moved to withdraw from the plea bargain. And, Halstead went further in eliciting Acuri's speculation that no judge in Lewis County would ever give Bartlett more than 30 days in jail.

In the end, the State bushwhacked the defense by failing to provide the *Brady* material. Halstead elicited false testimony and let the testimony stand uncorrected until defense counsel revealed that he had the plea agreement. Then, the State continued to suggest to the jury that it had not offered any consideration to Bartlett for his testimony when, in fact, Halstead had done exactly that. Under these circumstances, the trial court should have granted the requested mistrial.

C. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE REPEATEDLY MISSTATED THE LAW OF ACCOMPLICE LIABILITY IN CLOSING ARGUMENT AND URGED THE JURY TO CONVICT ON AN IMPROPER BASIS

A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is

done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

The putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate “the crime” for which he or she is eventually charged, and that knowledge of “‘a crime’ does not impose strict liability for any and all offenses that follow.” *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000); *see also State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). “The crime” means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first-degree murder as it was in *Roberts*, “the crime” for purposes of accomplice liability is murder, regardless of degree.

The State’s argument in closing resurrects the “in for a dime in for a dollar” notion of accomplice liability which the Supreme Court rejected in *Cronin* and *Roberts*. In *Cronin*, the Court carefully explained that to find the defendant guilty of first-degree premeditated murder, the

State had to prove beyond a reasonable doubt that: (1) Cronin acted with premeditated intent and murdered the victim; or (2) actually had knowledge his confederate would murder the victim. *Cronin*, 142 Wn.2d at 581.

In this case, the State had to prove that either Ricky Riffe acted with the premeditated intent to commit murder and killed the victims or he aided John Gregory Riffe with the actual knowledge that John Gregory would murder the victims.⁸ Here, the State argued in closing that it did not have to determine who was the principle and who was the accomplice. The State argued that so long as the two brothers committed any act in concert, they were both guilty of murder. This was particularly prejudicial because, although many of the eyewitnesses identified John Gregory, and many others said they saw only one other person with the Maurins, there was virtually no evidence of premeditation on John Gregory's part.

Thus, the State misled the jury when Halstead argued:

You are the driver. You know somebody is going to go rob the bank, you are sitting outside, you never go inside the bank, but you are sitting outside and you got the

⁸ The same theory of liability is true for the theft, robbery and burglary charges. Because the State's theory regarding those crimes necessitated a finding of guilty on the murder counts, those counts would also be contaminated by the State's improper arguments.

engine started and you are ready to go. Guy runs out, oops, you didn't know it, but when he was in the bank he shot five people. Guess what? You are on the hook.

RP 4027. Ricky was not “on the hook” if he helped John Gregory with any criminal activity unless he knew what John Gregory intended to do. In particular, Ricky had to know that John Gregory was premeditating a murder. And there was simply no evidence to support that claim.

Nor can there be any doubt that the prosecution misstatements were intended. The Supreme Court has held that the flagrancy of misconduct is illustrated by repeated misstatements of the law. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). In *Warren* the court found the prosecutor’s misconduct was “certainly flagrant” where she misstated the meaning of proof beyond a reasonable doubt three times. *Id.* Here, the misstatement was the foundation of the State’s closing argument and was repeated over and over again in both the prosecutors’ oral statements as well as the accompanying slides.

[T]rained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997).

If, as here, the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *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) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995)). The prosecutor’s closing argument was flagrant and ill-intentioned. There can be no argument that the prosecutor knew or should have known the proper legal requirements for accomplice liability. It appears that he made these arguments because of the paucity of evidence. Moreover, no admonition to the jury would have been successful in this case. The State relied on this theory during the 25 days of trial. It continuously suggested that it really didn’t matter if witnesses had seen Ricky or John Gregory. The two brothers were “interchangeable.”

D. THE TRIAL COURT ERRED IN ADMITTING EXHIBITS 113 AND EXHIBIT 206, TWO COMPOSITE SKETCHES

In *State v. Copeland*, 130 Wn.2d 244, 286, 922 P.2d 1304 (1996), the trial court admitted a composite sketch for “illustrative

purposes.” The Court held that any error in the prosecutor’s use of probabilities based on number of combinations of faces that could be made from items in an identification kit was harmless, where the composite picture did look like the defendant, the jury could easily see that it did, and the witness identified the defendant at trial to a “99 percent” certainty. But apart from that case, the Washington appellate courts have never squarely addressed the admission of composite sketches as substantive evidence over a defendant’s hearsay and foundation objections.

1. This Court should bar the admission of composite sketches altogether.

New York courts have taken a strong position and long held that “A composite sketch is not admissible because of the potential suggestiveness of having a police artist interpret and possibly influence the perceptions of the witness.” *People v. Ross*, 186 A.D.2d 1006, 588 N.Y.S.2d 463, *leave to appeal denied*, 81 N.Y.2d 766, 610 N.E.2d 402, 594 N.Y.S.2d 729 (1992). More recently, New York’s highest court had the opportunity to further elaborate the State’s per se bar of composite sketches.

Police composite sketches are critical investigative tools. They winnow the class of suspects from the infinite down to a lesser number of people – still a great many – who resemble the sketch. If a witness has good observational

skills and a retentive memory, along with the ability to work in concert with the artist or computer-image technician, there is a better chance that the sketch will resemble the offender and provide a useful lead. But a witness is not a camera and a sketch artist is not a photographer. A composite sketch merely reflects the police artist's interpretation of someone else's description, based on the artist's synthesis of an infinite variety of facial features and configurations. Moreover, creating a composite sketch carries the "potential suggestiveness of having a police artist interpret and possibly influence the perceptions of the witness."

In light of these difficulties, courts and juries have no way to determine reliably whether a witness helped generate a depiction that mirrors the offender or one that in reality looks nothing like the offender. Nevertheless, when a sketch forms the basis for an arrest, one thing is certain: if the sketch is right it will resemble the person accused, and if the sketch is wrong it will resemble the person accused. Indeed, the accused – innocent or guilty – is supposed to look like the sketch.

People v. Maldonado, 97 N.Y.2d 522, 526-27, 769 N.E.2d 1281, 743 N.Y.S.2d 389 (2002) (footnotes and internal citations omitted).

The two sketches in this case demonstrate the truth of this statement and the compelling reason to adopt this approach. Both Exhibit 113 and 206 are of the same person. Yet, they look nothing alike. Appellant has attached both sketches to this brief. The sketches were created using a combination of the out-of-court statements by Amell and Jones and the imagination of the artist. Moreover, Amell stated during her testimony that she was not satisfied with either sketch

as being truly representative of the person she saw. It is hard to imagine a set of exhibits so tainted by suggestion and interpretation.

2. Even if this Court does not adopt the New York approach, both sketches were hearsay and their admission violated the confrontation clause.

At the very least, Amell and Jones had to be available for cross-examination regarding the production of the sketches. Amell was present, but Jones was dead. Both witnesses were necessary to authenticate the drawings. In *United States v. Moskowitz*, 581 F.2d 14, *cert. denied*, 439 U.S. 871, 99 S.Ct. 204, 58 L.Ed.2d 184 (1978), two bank employees collaborated with a sketch artist to create a composite sketch of a bank robber. *Id.* at 20. Both the trial court and the Second Circuit Court of Appeals recognized the joint composite sketch as “their handiwork.” *Id.* at 21. The court found that the sketch was properly admitted because both bank employees “were subject to cross examination” and “the sketch was authenticated by extensive testimony.” *Id.*

And the requisites of the Confrontation Clause require that both witnesses who participated in the construction of the composite sketch be subjected to cross-examination. The “statement” that both sketches embody includes information from both Amell and Jones. In fact, Amell stated that Jones was the primary contributor to the second sketch.

Because only Amell testified at trial, Riffe was denied his constitutional right to cross examine the witness Jones.

And the introduction of these sketches was prejudicial. Tammy Graham, Robin Riffe's sister, testified that in January 1986 she saw the composites in a restaurant. RP 1826-27, 1861-62. She thought that they depicted two different people. RP 1862. She said she thought they were pictures of Ricky and John Gregory Riffe. Jerry Nixon said that shortly after the homicides, he saw the composites. The prosecutor asked: "When you first saw a composite did anyone come to mind?" Nixon answered: "Yeah. It looked just like Ricky Riffe." RP 2363. Linda Zandski testified that she had seen the composites and it "reminded" her of the Riffes. RP 2405. She said the brothers "both looked a lot alike." RP 2405.

E. THE TRIAL COURT VIOLATED RIFFE'S RIGHT TO PRESENT A DEFENSE, RIGHT TO DUE PROCESS AND RIGHT TO CONFRONTATION WHEN IT PREVENTED DEFENSE COUNSEL FROM IMPEACHING PIERCE WITH HER PRIOR INCONSISTENT STATEMENT

The trial court denied Riffe his state and federal constitutional rights to a fair trial, to due process, to present a defense and to cross-examination as grounds for the admission of the physical document containing the complainant's prior written inconsistent. A witness may be impeached as to their credibility by a prior inconsistent statement.

State v. Classen, 143 Wn. App. 45, 59, 176 P.3d 582, *review denied*, 164 Wn.2d 1016, 195 P.3d 88 (2008).

Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true.

State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008) (citation omitted). And as ER 613(b) states:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

The trial court's conclusion that Pierce's 1985 statement was not admissible for impeachment because it was not "her statement" is clearly incorrect. In *State v. Garland*, 169 Wn. App. 869, 887, 282 P.3d 1137, 1146 (2012), this court held that the opening statement made by defense counsel in a criminal trial is admissible to impeach the defendant in that same trial if the defendant offers testimony which contradicts the statements made in opening argument. If an attorney's opening statement can be deemed a statement of the defendant, certainly Pierce's statement to a police officer – even though not recorded or written in her own hand – is her statement. *State v. Nelson*, 74 Wn. App. 380, 389, 874 P.2d 170, 176, *review denied*, 125 Wn.2d 1002, 886 P.2d

1134 (1994) (Mere fact that witness did not write the statement herself does not, by itself, render it unreliable).

Moreover, the trial court erred in failing to admit Pierce's 2012 statement and the 1985 police report. The Supreme Court has held that an actual written statement of a witness that contradicts his trial testimony should be admitted as evidence even if that witness concedes that he gave such a prior inconsistent statement. *Gordon v. United States*, 344 U.S. 414, 420-421, 73 S.Ct. 369, 97 L.Ed. 447 (1953). The Court said:

an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the documents' impeaching weight and significance. Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. Except the testimony of this witness be believed, this conviction probably could not have been had.

Id.

Similarly, it has been observed that:

[e]ven when the witness admits having made the other [inconsistent] statements, this does not prevent the opponent from offering it in evidence by his own witness, for he may prefer to have it clearly brought out and emphasized, and it would be unfair to restrict him to the unemphatic mode or proving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact.

3A Wigmore On Evidence, Sec. 1037, at 1044-1045 (James H. Chadbourn ed., 1970).

Here, given Pierce's obvious efforts to subvert cross-examination, the trial court should have admitted her prior statements, which was entirely inconsistent with her trial testimony. Pierce's trial testimony was not sufficiently contradicted in cross-examination. Thus, the State was free to argue that the uncontradicted evidence was that the day before the Maurin murders, Ricky Riffe was casing the neighborhood.

F. THE TRIAL COURT ERRED IN ADMITTING JOHN GREGORY RIFFE'S STATEMENT AS AN "ADOPTIVE ADMISSION"

1. There was no "adoptive admission."

The rules of evidence prohibit the admission of hearsay. ER 802. Hearsay is inadmissible because the witness repeating it has no personal knowledge of the truth of the matter asserted. *See State v. Babich*, 68

Wn. App. 438, 447, 842 P.2d 1053, *review denied*, 121 Wn.2d 1015, 854 P.2d 42 (1993).

The theory of the hearsay rule ... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.

State v. Ryan, 103 Wn.2d 165, 175, 691 P.2d 197 (1984) (quoting 5 J. Wigmore, Evidence § 1420, at 251 (chadbourn rev. 1974)).

The Rules define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). A statement is not hearsay if it is one in which “the party has manifested an adoption or belief in its truth.” ER 801(d)(2)(ii).

Although it is possible for a party to manifest adoption of a statement by silence, silence is “inherently equivocal,” and therefore evidence of a statement and its silent response “must be received with caution.” *State v. Neslund*, 50 Wn. App. 531, 551, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988). “Evidence of ‘tacit’ or ‘adoptive’ admissions is replete with possibilities for misunderstanding, and the cases repeatedly emphasize the need for careful control of this otherwise hearsay testimony.” *Holmes v. United States*, 580 A.2d 1259, 1263 (D.C. 1990) (internal citation omitted). The rule is that another person’s out-

of-court declaration is inadmissible hearsay unless a reasonable jury could conclude that the defendant “unambiguously assented” to the statement. *Id.* (emphasis in original). Where hearsay accusations are sought to be introduced as evidence against a defendant in a criminal proceeding on grounds that the hearsay was “adopted” by the defendant as an admission of his guilt, the trial court must first determine that the asserted adoptive admission be manifested by conduct or statements which are unequivocal, positive, and definite in nature, clearly showing that in fact the defendant intended to adopt the hearsay statements as his own. *Village of New Hope v. Duplessie*, 304 Minn. 417, 231 N.W.2d 548, 553, 87 A.L.R.3d 698 (Minn. 1975).

Duplessie is very similar to the facts here. There, the defendant’s friend made statements in the presence of the defendant implicating him in an attempted theft. *Duplessie*, 231 N.W.2d at 418-19. The defendant nodded and laughed in response. *Id.* at 419. The trial court admitted the out-of-court statements and the defendant’s response, but the appellate court reversed, stating, “the instant case is an example of an alleged adoptive admission which is equivocal.” *Id.* at 421. Noting that a head nod could constitute an adoptive admission under certain circumstances, the court held the meaning of the head nod under the circumstances in

that case did not “meet the requisite degree of definiteness and certainty.” *Id.* at 425 n.9.

In *Holmes*, the defendant was charged with assault after allegedly shooting someone. *Holmes*, 580 A.2d at 1260. The trial court admitted into evidence a recorded conversation between the defendant and an acquaintance. The acquaintance said, “you hit him in the head man, but he ain’t die.” The defendant responded, “Huh, he did.” The acquaintance then said, “No, he didn’t die,” and the defendant responded, “Oh, he didn’t?” *Id.* at 1262.

The appellate court reversed, noting, “[t]here are great possibilities of error in relying on oral utterances which are supposed to have been heard, understood, and acknowledged by the defendant.” *Id.* at 1263. The court held that “as a matter of law ... no reasonable jury could find that Holmes unambiguously assented to [the acquaintance’s] incriminating statements.” *Id.* at 1264.

Similarly, in this case there is was no adoptive admission. The statement by John Gregory was too ambiguous to suggest he and his brother murdered the Maurins. Thola clearly had a difficult relationship with Ricky and thus had a motive 27 years later to read something into the comment. And, Ricky’s smile and nod, if they occurred, were simply not an acknowledgment that he murdered the Maurins.

2. This Court should reject the concept of “tacit admission.”

This Court should consider going further and rejecting the “tacit admission” exemption altogether. Pennsylvania has done so in light of the unreliability of such evidence. *Commonwealth v. Dravec*, 424 Pa. 582, 227 A.2d 904 (1967). The Pennsylvania Supreme Court declared the tacit admission rule “too broad, widesweeping, and elusive for precise interpretation, particularly where a man’s liberty and his good name are at stake.” *Id.* at 585.

A law review article similarly refuted the foundation for the tacit admission exemption:

The common sense psychology behind the adoptive admission rule assumes that, when confronted with an untrue statement, a listener will speak up to refute it. This approach ignores the fact that many people, especially women and people of color, may react in a very different way – with silence or equivocation – because of their race, class, gender, ethnicity, or a combination of these factors.

Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 Sw. U. L. Rev. 337, 338-39 (1999).

Another law review author condemned the exemption more broadly, stating, “the principle that the innocent deny accusations is another... fallacious generalization elevated to a binding proposition despite the lack of a valid basis for it in either empirical data or human

experience.” Charles W. Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional – A Doctrine Ripe for Abandonment*, 14 Ga. L. Rev. 27, 33 (1979-80). Thus,

. . . the Tacit Admission Rule in its entirety, including those applications that are constitutionally permissible, should be abandoned as based upon an unreliable principle: that the guilty remain silent when confronted with an accusation, while the innocent cry out.

Id. at 43.

The *Dravec* court similarly concluded that the tacit admission exemption “is founded on a wholly false premise.” *Dravec*, 424 Pa. at 586. “It rests on the spongy maxim, so many times proved unrealistic, that silence gives consent.” *Id.* The court, thus, overruled its own earlier case adopting the exemption. *Id.* at 592. This Court should do the same, and should hold that ER 801(d)(2)(ii) applies only to express admissions.

Who determines whether a statement is one which “naturally” calls for a denial? What is natural for one person may not be natural for another. There are persons possessed of such dignity and pride that they would treat with silent contempt a dishonest accusation. Are they to be punished for refusing to dignify with a denial what they regard as wholly false and reprehensible?

Id.

3. The evidence was more judicial than probative.

ER 403 prohibits evidence that is substantially more prejudicial than probative. Even if Thola's testimony about John Gregory Riffe's statement were not prohibited by ER 802, it is inadmissible under ER 403. The statement was substantially more prejudicial than probative given the ambiguity of both the statement and response, as discussed above. *United States v. Rodriguez-Cabrera*, 35 F.Supp.2d 181 (D. Puerto Rico 1999), is instructive. There, an FBI agent went to the defendant's office and advised him he was under arrest. *Id.* at 184. The defendant said, "what is this about?" The agent replied that it was "about the money," and the defendant nodded. *Id.*

This exchange was excluded from the defendant's subsequent trial for various financial crimes. The court held the admission of the head nod in response to the statement that it was "about the money" would violate ER 403 because "its meaning is entirely too ambiguous." *Id.* at 185. Although the agent understood the nod to mean that the defendant knew of the extortion money to which he referred, there were "many equally plausible explanations for [the defendant's] nod." *Id.*

Simply put, the meaning of the nod is ambiguous and is not sufficiently reliable to be admitted into evidence as a statement by Defendant. There is no question that the prejudice that would result from admission of the nod substantially outweighs probative value.

Id. (citing Fed. R. Evid. 403).

The same is true in this case.

4. The admission of John Gregory Riffe's statement violated the confrontation clause.

The Sixth Amendment provides, "the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend VI. "The right to confront one's accusers is a concept that dates back to Roman times." *Crawford v. Washington*, 541 U.S. 36, 43, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The "ultimate goal" of the Confrontation Clause is "to ensure reliability of evidence," which can best be assessed "by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

Article I, section 22 of the Washington Constitution states, "the accused shall have the right ... to meet the witnesses against him face to face." Const. art. I, § 22. This provision is even more protective than its federal counterpart. *State v. Pugh*, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (article I, section 22 right to confront witnesses "face to face" broader than Sixth Amendment); *see also State v. Martin*, 171 Wn.2d 521, 528, 252 P.3d 872 (2011) (article I, section 22 provides greater protection than Sixth Amendment against accusations that defendant tailored testimony to trial evidence); *State v. Rafay*, 167 Wn.2d 644,

650, 222 P.3d 86 (2009) (article I, section 22, unlike Sixth Amendment, provides right to self-representation on appeal).

The admission of John Gregory's statement through Thola violated the Sixth Amendment and article I, section 22 because Ricky Riffe was unable to cross-examine his brother. This inability to confront one's accuser is the classic problem the Confrontation Clause seeks to remedy. *See Crawford*, 541 U.S. at 43.

The State may argue that there is no confrontation problem because Ricky "adopted" John Gregory's statement and has no right to confront himself. *See United States v. Lafferty*, 387 F.Supp.2d 500, 510-11 (2005), *reversed and remanded*, 503 F.3d 293 (2007). But this begs the question. Ricky must have the opportunity to cross-examine John Gregory in order for the judge or jury to be able to determine whether Ricky made an adoptive admission in the first place. It is unclear what John Gregory's statement meant given the ambiguous context, and cross-examining him would help shed light on the meaning of the statement and the meaning of Ricky's response. Given the very weak evidence of identification in this case, this was an extremely damaging piece of evidence – yet it was the one statement for which Ricky was denied the right to confrontation.

G. THE TRIAL COURT ERRED IN ADMITTING ROBIN RIFFE'S HEARSAY RESPONSE TO A POLICE OFFICER'S STATEMENT THAT HE WANTED TO TALK TO HER ABOUT AN "OLD HOMICIDE" CASE. THE ADMISSION OF THAT STATEMENT VIOLATED RIFFE'S RIGHT TO CROSS-EXAMINE A WITNESS AGAINST HIM.

The trial court admitted Robin's statement because, according to the trial judge, a question is not hearsay. The trial judge did not express explain this rationale. In addition, he did not explain why the admission of this statement did not violate Riffe's right to confront and cross examine the witness against him.

In one Washington State case the court held that a question, "Did you take the bastard home?" was not hearsay. But it was not because the statement was in the form of a question. Rather, the court held this statement was not offered to prove the truth of the matter asserted. *State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774, 780 (1985).

But there was no such limitation here. The prosecutor asked the jury to draw factual inferences from Robin's statement. He argued in closing that this statement was proof that Robin Riffe knew the Maurins were "murdered" and that she, as Ricky's ex-wife, knew that and remembered it because Ricky was guilty. The prosecutor argued in closing:

So from '86 to '91 there's really nothing happening in this case. The detectives are working, but there's no solid

suspects, until 1991 rolls around. What happens in '91? Detective Dave Neiser and another detective get a tip, hey, you guys might want to contact Robin. She may be able to give you some information, so they do. Detective Neiser finds where she's at or the Sheriff's Office does, and they discover she's in prison in Arizona. They call her and Detective Neiser says, hey, we want to talk to you about an old homicide case, and she cuts him off and says, "You mean the two old people who were killed?" This is five years after the murders *and she knows exactly what he's talking about.*

RP 4136 (emphasis added).

Moreover, the prosecutor's argument treats this statement as "testimonial." In *Crawford v. Washington*, supra, the Supreme Court did "not think it [was] conceivable" that the Confrontation Clause could be interpreted to allow "a note-taking policeman [to] recite the unsworn hearsay testimony of the declarant." 547 U.S. at 826 (emphasis omitted). In other words, *Crawford* was concerned with ensuring that out-of-court testimonial statements, taken ex parte and without trial-like protections, were not used as evidence before the jury if the speaker could not be cross-examined. Permitting a police officer to summarize or outline an out-of-court statement in no way corrects for the affront to the purpose of the Clause, as it was explained in *Crawford*. The Confrontation Clause provides a procedural check on "[t]he involvement of government officers in the production of testimonial evidence." *Crawford*, 541 U.S. at 53.

H. THE SIGNIFICANT ERRORS IN THIS CASE REQUIRE REVERSAL

Constitutional errors are reviewed de novo. *Bellevue School District v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Although evidentiary rulings and denials of continuances are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person his or her constitutional rights. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); *see also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). Where the appellant makes a constitutional argument regarding the exclusion of evidence or the denial of continuance, review is de novo. *Id.*

The constitutional errors in this case include the exclusion of Dr. Reinitz's testimony, the prosecutor's *Brady* and *Napue* violations and improper closing arguments, and the confrontation clause violations.

Constitutional errors are presumed prejudicial, and the prosecution bears the burden of establishing harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption, the State must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the

final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The State must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *Burke*, 163 Wn.2d at 222.


The State will be unable to demonstrate that that significant constitutional errors in no way affected the outcome of trial. As repeated noted above, the evidence was stale, weak and subjective. Thus, the constitutional errors were pivotal in denying Riffe a fair trial.

**V.
CONCLUSION**

For the reasons stated above, this Court must reverse all of Riffe's convictions and remand for a new trial.

DATED this 30th day of July, 2014.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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