No. 45744-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICKY ALLEN RIFFE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES v

I. ISSUES 1

II. STATEMENT OF THE CASE 1

A. SUBSTANTIVE FACTS 1

B. PROCEDURAL FACTS 38

III. ARGUMENT 43

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED RIFFE'S REQUEST TO PRESENT AN EXPERT WITNESS TO TESTIFY ABOUT MEMORY AND EYE WITNESS IDENTIFICATION 43

1. Standard Of Review 43

2. Invoking The Compulsory Process Clause And The Right Of Confrontation Guaranteed By Sixth Amendment Does Not Guarantee A Criminal Defendant's Proposed Testimony Is Admissible ... 44

3. The Trial Court's Did Not Abuse Its Discretion When It Ruled Dr. Reinitz Could Not Testify As An Expert In Regards To Memory Or Eye Witness Identification 47

a. Riffe's trial counsel did not establish the foundational requirements for admission of an expert opinion by a preponderance of the evidence 49

i. Trial counsel did not establish if Dr. Reinitz's was a qualifying expert 50

ii. Trial counsel did not establish by a preponderance that the proposed testimony was generally accepted in the scientific community 52

iii. Based upon the information provided to it by Riffe's trial counsel, the trial court did not abuse discretion when it concluded the proposed testimony would not be helpful to the jury 54

b. The trial court's exclusion of Dr. Reinitz was not an abuse of discretion 59

B. THERE WAS NO REQUEST FOR A MISTRIAL BY RIFFE'S TRIAL COUNSEL DURING OR FOLLOWING IRWIN BARTLETT'S TESTIMONY 61

1. Standard Of Review 61

2. There Was No Request For a Mistrial, Therefore There Was No Error 61

C. THE DEPUTY PROSECUTOR'S DID NOT COMMIT PROSECUTORIAL ERROR WHEN HE ARGUED ACCOMPLICE LIABILITY TO THE JURY 64

1. Standard Of Review 65

2. The Deputy Prosecutor Did Not Commit Error When Discussing Accomplice Liability During His Closing Argument 65

a. Accomplice liability in Riffe's case 67

b. The deputy prosecutor argued the correct accomplice liability standard 68

c. If There Was Error, It Was Not Flagrant 72

D. RIFFE DID NOT OBJECT TO THE ADMISSION OF THE COMPOSITE SKETCHES AND THEREFORE HAS WAIVED RAISING THE ISSUE FOR THE FIRST TIME ON APPEAL 73

1. Standard Of Review...74

2. The Admission Of The Composite Sketches, Without Objection From Riffe's Trial Counsel, Is Not A Manifest Constitutional Error And Therefore, It Cannot Be Raised For The First Time On Appeal 74

E. RIFFE'S TRIAL COUNSEL IMPEACHED NONNA PIERCE WITH A PRIOR INCONSISTENT STATEMENT AND THEREFORE, THERE WAS NO VIOLATION OF RICK'S RIGHT TO PRESENT A DEFENSE, RIGHT TO DUE PROCESS, OR RIGHT TO CONFRONTATION...79

1. Standard Of Review...79

2. Riffe's Trial Counsel Effectively Impeached Nonna Pierce, Therefore, There Were No Violations Of Riffe's Constitutional Rights 80

F. JOHN GREGORY RIFFE'S STATEMENT TO CATHY THOLA WAS PROPERLY ADMITTED AS AN ADOPTIVE ADMISSION 88

1. Standard Of Review..89

2. Ricky Riffe Adopted Greg's Statement That They Have Killed Before And They Could Kill Again 89

3. There Is No Violation Of The Confrontation Clause Because The Statement Is Not Hearsay But An Admission By A Party Opponent...........................91

4. Riffe Does Not Show That The Adoptive Admission Exception Is Incorrect And Harmful 92

G. ROBIN'S QUESTION TO DETECTIVE NEISER WAS PROPERLY ADMITTED BECAUSE IT WAS A QUESTION, NOT AN ASSERTION 93

1. Standard Of Review..93

2. A Question Is Not An Assertion And Therefore Not Hearsay 93

H. THE STATE ALREADY DEALT WITH THE ALLEGED ERRORS RAISED AND THERE IS NO NEED TO CONDUCT A CONSTITUTIONAL HARMLESS ERROR ANALYSIS...95

IV. CONCLUSION...98

<u>**TABLE OF AUTHORITIES**</u>

Washington Cases

In re Elmore, 162 Wn.2d 236, 172 P.3d 335 (2007) 45

In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012)......................47

In re Pers. Restraint of Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012) 44

In re Stranger Creek, 77 Wn.2d 649, 466 P.3d 508 (1970)...........92

Kane v. Smith, 56 Wn.2d 799, 355 P.2d 827 (1960)......................63

Lawson v. Boeing Co., 58 Wn. App. 261, 792 P.2d 545 (1990).....76

State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010) 44

State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006).........................61

State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984)....................48

State v. Belgrade, 110 Wn.2d 504, 755 P.2d 174 (1988) 65

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997)...........59

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007(1998) 66

State v. Camarillo, 115 Wn.2d 60, 794 P.3d 850 (1990)................17

State v. Cheatam, 150 Wn.2d 626, 814 P.3d 830 (2003) 48, 49

State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988).................48

State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003) 59, 88

State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995)................94

State v. Cotton, 75 Wn. App. 669, 879 P.2d 971 (1994), *review denied*, 126 Wn.2d 1004 (1995) 89, 90, 92

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) 70

State v. Darden, 145 Wn.2d 616, 41 P.3d 1189 (2002) 80

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) 61

State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000)......................45

State v. Edwards, 169 Wn. App. 561, 280 P.3d 1152 (2012).........74

State v. Ehrhardt, 167 Wn. App. 934, 276 P.3d 332 (2012)...........75

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) 43-44, 59, 89, 93

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)...................64

State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994)...............75

State v. Garland, 169 Wn. App. 869, 282 P.3d 1137 (2012)..........85

State v. Gilcrist, 91 Wn.2d 603, 590 P.2d 809 (1979)....................62

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006)........66, 67

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000)......................96

State v. Harris, 97 Wn. App. 865, 989 P.2d 553 (1999).................62

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)........................44

State v. Hilton, 164 Wn. App. 81, 261 P.3d 683 (2011) 49

State v. Hudlow 99 Wn.2d 1, 659 P.2d 514 (1983).......................80

State v. Hughes, 118 Wn. App. 713, 77 P.3d 681 (2003) 66

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011).......................80

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) 65

State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011) 67

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) 45, 46, 47

State v. King, 113 Wn. App. 243, 54 P.3d 1218 (2002) 92

State v. Kwan Fai Mak, 105 Wn.2d 692, 718 P.2d 407 (1986) 66

State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014).....................77

State v. Lewis, 156 Wn. App. 230, 233 P.3d 891 (2010) 66

State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287 (2011) 44

State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996)..........79

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)....74, 75

State v. McGhee, 57 Wn. App. 457, 788 P.2d 603, *review denied,* 115 Wn.2d 1013 (1990) 90

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006) 66

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) 66

State v. Nava, 177 Wn. App. 272, 311 P.3d 83 (2013) 49

State v. Nelson, 74 Wn. App. 380, 874 P.2d 170 (1994), *review denied* 125 Wn.2d 1002...85, 86

State v. Neslund, 50 Wn. App. 531, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988) 89, 92

State v. Newbern, 95 Wn. App. 277 975 P.2d 1041 (1999) 80, 81, 82, 83

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009) 63-64, 74, 75, 77

State v. Post, 118 Wn.2d 596, 837 P.2d 599 (1992)................61, 62

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) 70

State v. Rodriguez, 146 Wn.2d 260, 45 P.3d 541 (2002)...............62

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994)...................65

State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005)....................74

State v. Statler, 160 Wn. App. 622, 248 P.3d 165 (2011), *review denied,* 172 Wn.2d 1002 (2011) 45

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997).............59

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963)................62

State v. Taylor, 50 Wn. App. 481, 749 P.2d 181 (1988).................53

State v. Thorgerson, 152 Wn.2d 438, 258 P.3d 43 (2011)............65

State v. Turnispeed, 162 Wn. App. 60, 255 P.3d 843 (2011).........44

State v. Wade, 138 Wn.2d 460, 979 P.2d 850 (1999) 63

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011) 67

State v. Watt, 160 Wn.2d 626, 160 P.3d 640 (2007) 96

State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983) 62

State v. Williams, 79 Wn. App. 21, 902 P.2d 1258 (1995) 82

Sterling v. Radford, 126 Wn. 372, 218 P. 205 (1923) 81

Other State Cases

Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1 (Pa. 2008)...64

Johnson v. State of Delaware, 587 A.2d 444 (Del. 1991) 64

State v. Fauci, 282 Conn. 23, 917 A.2d 978 (2007)........................64

State v. Leutschaft, 759 N.W.2d 414 (Minn. App. 2009)), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009)..................64

Federal Cases

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) 45

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004)...93, 94

Hunt v. Smith, 856 F. Supp. 251 (D. Md. 1994)............................97

Mullen v. Blackburn, 808 F.2d 1143 (5th Cir. 1987)........................97

Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) 46, 47

Thompson v. Calderon, 109 F.3d 1358 (9th Cir. 1996)..................97

United States v. Moskowitz, 581 F.2d 14 (1978) 77

Washington Statutes

RCW 2.44.010(a)...85

RCW 9A.08.020...67, 71

RCW 9A.32.030(1)(a) 67

RCW 9A.32.050(1)(b) 68, 71

Constitutional Provisions

Washington Constitution, Article I § 22 ....77, 80

U.S. Constitution, Amendment VI 43, 46, 77, 80, 88, 91, 93

U.S. Constitution, Amendment XIV 45, 77, 80

Other Rules or Authorities

CrR 3.5 39

CrR 8.3(b) 40, 41

ER 401 80

ER 402 49

ER 403 ....80, 88, 91

ER 607 80

ER 702 ....47, 48, 49, 50, 51, 52

ER 801 ....89, 92, 94

RAP 2.5(a) 74, 75

RAP 10.10(c) 63

WPIC 10.51 ....67, 71

WPIC 27.03 68

2 Wigmore on Evidence § 1040 81

5A Karl B. Tegland, Washington Practice, Evidence § 256, (3rd ed. 1989)..81

5D Karl B. Tegland, Washington Practice, Evidence § 702.6 (2013)48

American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014)..64

National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014) 64

I. ISSUES

A. Did the trial court abuse its discretion when it denied Riffe's motion to present expert testimony in regards to memory and eye-witness identification?

B. Did the trial court err when it did not grant a mistrial that was never requested in regard to alleged misconduct on the part of the prosecutor surrounding Irwin Bartlett's testimony?

C. Did the deputy prosecutor commit prosecutorial error during his closing argument in regards to his explanation of accomplice liability?

D. Did the trial court err when it admitted exhibits 113 and 206, the composite sketches?

E. Did the trial court violate Riffe's constitutional right to confront and cross-examine witnesses against him and his due process rights in regards to his cross-examination of Nonna Pierce?

F. Did the trial court err when it admitted John Gregory Riffe's statement as an adoptive admission?

G. Did the trial court err by admitting a hearsay statement of Robin Riffe?

H. Are the errors alleged by Riffe subject to a constitutional harmless error analysis?

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS.

Ricky (Rick) Riffe, John Gregory (Greg) Riffe and Tracy Riffe were brothers and lived in the Mossyrock area of Lewis County,

Washington.[1] RP 936, 2038-40, 2194-96, 2321, 2409.[2] Mossyrock was a small town where everyone knows everyone else. RP 2194. Rick was the oldest brother and Tracy was the youngest. RP 2196-97, 2262, 2409. Rick and Greg were tight-knit brothers, inseparable at times and seemed to do everything together. RP 2040, 2701. Rick was the leader and Greg was the follower. RP 2057. People in Mossyrock knew not to mess with Rick. RP 2239-40.

In the mid 1980's Rick married Robin Riffe. RP 1773, 2043. Robin had three children, David, Michelle and Carl. RP 1789. In 1985 Rick was not working, he was injured on a logging job and was receiving L&I benefits. 2143, 8256-58. Robin worked as a waitress and bartender. RP 1827, 2060. Rick also used and sold drugs. RP 1774, 2048, 2339, 2761. Rick and Robin were poor and the children always wore hand-me-down clothing. RP 1774. Money was so tight that Robin had to sell a gold chain to Dora Flynn, a local drug dealer, in October or November of 1985 because she needed the money to pay the electricity bill. RP 2339-40.

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[1] In the Statement of the case and non-headings, the State will refer to the Defendant as Rick and his brother John Gregory as Greg because that is how many of the witnesses identify them as and to avoid confusion as to which Riffe the State is referring to. There is no disrespect intended. In section headings the State will refer to Ricky Riffe as Riffe.

[2] The verbatim report of proceedings contains 28 days of trial proceedings and other pretrial and post-trial hearings that are all sequentially numbered.

Leslie (Les) George grew up in Mossyrock and became friends with Rick in the late 1970's. RP 2038-40. Despite being a long haul truck driver, Les spent a lot of time with Rick in the mid-1980s. RP 2042, 2044-45. In October 1984 Les, with Rick present, purchased a single-shot 12 gauge shotgun from Sunbirds to put in his semi-truck for protection. RP 2064-69, 2995. Les also purchased double-ought buckshot at Rick's recommendation. RP 2072. In early 1985 Les gave Rick the shotgun to cut it down so it could be a truck gun. RP 2071-72, 2146, 2995. Rick cut the barrel of the gun down at his father-in-law's house. RP 1776-78, 2995. Rick cut the barrel off about an inch after the front of the forearm of the shotgun. RP 1778. Rick's father-in-law commented, "[t]hat the only thing good about a sawed-off shotgun was for robbing and murder" to which Rick responded by snickering and laughing. RP 1781. Rick also showed the sawed-off shotgun to Robin's son, David. RP 1902. Rick told David the gun was for Les to have while he is sleeping in the sleeper of his semi-truck "'for niggers when they knocked on the door.'" RP 1902.

About a week before December 19, 1985 Rick and Greg Riffe were out at a party. RP 938. Marty Smetzler could hear Rick talking to Greg. RP 938-39. Rick told Greg they are going to take

two elderly people and force them to go to the bank and take money out. RP 939, 959. Rick also told Greg after they get the money they are going to kill the elderly people, using a sawed-off shotgun, and dispose of the bodies. RP 939, 958-59.

In 1985 Ed and Wilhelmina Maurin lived on a 120 acre farm located at 2040 Highway 12 in Ethel, a rural area in Lewis County, Washington. RP 54-55, 148, 726. Wilhelmina, who people called Minnie,[3] was previously married to George Hadaller, who had passed away in the late 1950s, and they raised their family on the farm at 2040 Highway 12. RP 52, 147-48. Minnie had four children, Hazel, Dennis (Denny), Dale and Delbert. RP 1028. After George passed away Minnie married Ed and he moved into the residence located at 2040 Highway 12.[4] RP 52, 55.

Ed and Minnie were close to Minnie's children and had a lot of family gatherings. RP 42-43, 53-54. Ed and Minnie were in their eighties but were still active: they were active members of their local grange, had a group of friends they played cards with and went to church every Sunday. RP 54-55, 727. Minnie hosted an

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[3] The State will be referring to a number of people by their first names and nicknames to avoid confusion due to the number of people that have the same last names, there is no disrespect intended.

[4] The State will hereafter refer to the farm located at 2040 Highway 12 as the Maurin residence.

annual party for a group of ladies who belonged to her church. RP 57. The luncheon, which the husbands were also invited to, was scheduled for December 19th. RP 43, 58. Hazel went over to the Maurin residence on December 17th to help Minnie clean up and decorate the house for the party. 58-59. Hazel next spoke to Ed and Minnie on the evening of December 18, 1985 to make sure they would be okay without her help for the party. RP 61-62. This was the last time Hazel spoke to her mother. RP 62-66.

Ed and Minnie were not typically early risers; they tended to sleep until 9:00 a.m. or later. RP 93, 1335. On the morning of December 19, 1985 Denny picked up his son, Michael, for work around 5:30 a.m. and they noticed the lights on in the Maurin house. RP 88-93, 161-62. It was a cold and foggy morning. RP 90.[5] Denny commented to Michael that he wondered why the lights were on so early. RP 95, 162. Denny and Michael figured Ed or Minnie had to use the bathroom. RP 95, 162.

Later that morning, between 7:30 a.m. and 8:00 a.m., Marjorie Hadaller and her sister drove past the Maurin residence and noticed all the lights were on in the house, which was unusual for that time of the morning. RP 1333-35. Marjorie also noticed a

[5] Most of the witnesses testified that it was foggy the morning of December 19, 1985. RP 90, 214-15, 1334. The notable exception was Jason Shriver. RP 2275-76.

light colored van parked up by the shed and a man she did not recognize standing outside. RP 1335-36.

Robert Lyons, a log truck driver who knew the Maurins and passed by their residence every day, saw vehicles he did not recognize in the driveway around 8:00 a.m. RP 1039-43. It was odd for the Maurins to have company over that early. RP 1041. One of the cars was a white full sized four door sedan. RP 10242.

Lindsey Senter, a log truck driver, traveled past the Maurin residence between 8:00 a.m. and 9:00 a.m. RP 919-21. Mr. Senter saw two men walking westbound between Harms Road and the Maurin residence carrying an object about three feet long covered with a cloth. RP 921-25. Mr. Senter was suspicious because he believed the object could be a rifle. RP 925.

Nonna Pierce, who lives kitty-corner to the Maurins, saw a car pointed west with its lights on and at a weird angle near Ed and Minnie's driveway. RP 209, 216. Ms. Pierce was concerned Ed had accidently backed up into someone in the fog and may need some assistance. RP 216. Ms. Pierce could see there was a second car at the Maurin residence. RP 218. Ms. Pierce was about to walk over and check on the situation when the car pulled into Ed and

Minnie's driveway. RP 216. Ms. Pierce heard voices and figured everything was okay. RP 216.

Around 9:30 a.m., Patricia Hull, an employee of Sterling Savings, received a phone call from Ed. RP 1345-48. Ed informed Ms. Hull that he wanted to withdraw $8,500 from his bank account. RP 1347. Ms. Hull told Ed she could get him a check for that amount but Ed insisted on cash. RP 1347. Due to the amount of cash Ed was requesting, Ms. Hull asked Diane Rasmusson to go to a commercial bank for the money because Sterling did not have that much cash on hand outside of the vault. RP 1350, 1401-02.

Around 9:30 to 9:45 a.m. Merle Pickering saw a white car, possibly a Chevy 2 or a Nova, pull out of the Maurin driveway. RP 906-07, 911, 914-15. The car pulled out right in front of him and then drove out of sight. RP 907, 911.

Ed arrived at the bank in Chehalis around 10:30 a.m. but Ms. Rasmusson had not yet returned with the cash from the commercial bank. RP 1351. Ms. Hull told Ed to have a seat and asked where Minnie was, because usually Minnie conducted the banking transactions and would have coffee and cookies while at the bank. RP 1351-52, 1403. Ed explained that Minnie was not feeling well and he will go out to the car and see if Minnie would like to come

inside. RP 1351. Ms. Rasmusson returned and Ms. Hull went out to the parking lot to fetch Ed. RP 1351. While conducting the transaction Ed explained to Ms. Hull that he and Minnie were headed up north to purchase a car and they believed cash would make the transaction easier. RP 1553. Ed told Ms. Hull that the kids were helping them with the purchase. RP 1385. Ms. Hull tried to talk Ed into a check but he refused, signed the withdrawal ticket and Ms. Hull placed $8,500 in cash in a manila envelope. RP 1353, 1667, 1369.

At about 11:10 a.m. William Reisinger was working on his farm located in the 400 block of Bunker Creek Road. RP 1270, 1273. Mr. Reisinger saw a green Chrysler Newport driving down Bunker Creek. RP 1272-73. Mr. Reisinger attempted to contact the car, believing it was his mother and her boyfriend, only to find an older couple who appeared to be in their seventies in the front seat and a younger guy in the backseat. RP 1273-75. The man in the backseat, who is wearing what appeared to be a green colored trench coat, was sitting forward on the seat, leaning on both his elbows on the front seat. RP 1275, 1278. The car was going about 20 miles per hour. RP 1275. The driver looked like Ed and had a solemn look on his face. RP 1296.

Kenneth Powell was driving a skidder up Bunker Creek Road to a work site on December 19, 1985. RP 1050-52, 1055. The skidder drove about 10 miles per hour and all the cars would generally pass while traveling down the road. RP 1052, 1055. While traveling up Bunker Creek Road, Mr. Powell saw a very large, older car, he believed had four doors. RP 1056. The car was following the skidder for an unusually long time, there were opportunities to pass, the car eventually passed the skidder but at an extremely slow speed, maybe 20 miles per hour. RP 1056. Mr. Powell could see the silhouette of a person in the backseat of the car. RP 1058.

Five to 10 minutes later the same older car came back down Bunker Creek Road. RP 1059. There was an elderly couple in the front seat, the man was driving and a woman was sitting next to him. RP 1060. The man looked straight ahead, never looked up at Mr. Powell, and had a real faraway look in his face. RP 1060. The woman also looked straight ahead. RP 1060. It was as though the man was looking through Mr. Powell, as if in a trance, with a distraught look on his face. RP 161. It is possible that Mr. Powell was past Stearns road when he saw the car the second time. RP 1063.

Ed drove the car up Stearns Road, which turned into a gravel road and eventually into a private logging road. RP 484-91, 550, 554.[6] Minnie was shot with a sawed-off 12 gauge shotgun loaded with buckshot in the left shoulder and neck. RP 482-83, 1571, 4703. She was shot from inside the car while it was still in motion. RP 437-441, 483, 488, 490, 567, 588. Minnie's blood continued to drain through the open passenger side door as the car continued to drive forward. RP 709-12. Ed was hit in the head because he would not get out of the car. RP 3615, 4693-97. The blows did not kill Ed, who was in the driver's seat, and he was shot in the back, just above the back of the top of the seat, with a sawed-off 12 gauge shotgun loaded with double-ought buckshot. RP 468-69, 482, 484, 1571, 4695. Ed fell over to his right but Minnie stopped him from falling all the way over onto the seat. RP 465-66, 485-86. Ed and Minnie were pulled out of the car, dragged into the brush in two different locations on the side of the road. RP 524-25, 560-62, 566-68.

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[6] There was no independent eye witness to Ed and Minnie's murder and that these details are drawn from the forensic evidence and the defendant's statements. The State is relying heavily on the crime scene analysis from Rick Herrington and Roger Ely which can be found at RP 368-410, 433-491, 506-589. Because a description may take several pages there will be multiple citations to the record that encompass multiple pages of the verbatim report of proceedings. The State will attempt to narrowly cite record as much as possible.

Sometime around December 19, 1985 Les received a message from his trucking company that Robin was trying to get a hold of him. RP 2094. Les called Robin and spoke to her for a minute and half to two minutes. RP 2095. Robin seemed scared, kind of hysterical and the conversation ended when Rick took the phone from Robin. RP 2095. Rick asked Les why he had called. RP 2096. Les told Rick he called for no reason and Rick said, okay, and hung up on Les, which was pretty unusual. RP 2096.

Around December 19, 1985, prior to Christmas, Ralph Vickers, a cocaine dealer from Yakima, met Robin and Rick at White Pass to sell them two ounces of cocaine. RP 2815-16, 2818-21, 2998-99. Mr. Vickers sold the cocaine for $2,200, which was paid by Rick with 22 $100 bills. RP 2822-23. Rick also bought a boat in late December or early January for $500 cash. RP 2294.

Rick, Robin, and Robin's children went to Tammy Graham's house in Grays Harbor for Christmas. RP 1825, 1836. Ms. Graham was Robin's sister. RP 1826. When the family got together for Christmas everyone usually wore jeans and a sweater or a blouse, they were very informal. RP 1837. Robin would usually bring homemade gifts, cookies, candies and fudge, and the family did not usually bring a whole lot of store bought presents, even for the kids.

RP 1841. This Christmas Robin, Rick and the kids showed up dressed in nice, new clothes, although, Rick wore an old, olive drab green army coat when the guys went hunting. RP 1790, 1813-14, 1822-23, 1839, 1890. The Riffes brought almost all store-bought gifts for everyone. RP 1791-92, 1841. Rick was high and even gave Larry Vessey, Robin's brother, an eight-ball of cocaine, which was worth about $300. RP 1792, 1794-95.

Shirley Hadaller was married to Denny in 1985 and had a close relationship with Ed and Minnie. RP 41-42. Shirley received a phone call from one of the ladies who was attending Minnie's luncheon. RP 43. The woman told Shirley there was no one at the Maurin residence. RP 43. It was unusual for Ed and Minnie to miss something like the luncheon, so Shirley went to the Maurin residence to check on Ed and Minnie. RP 44. Shirley found the house locked and the Maurin car gone. RP 44-45. Shirley called Delbert who quickly arrived and entered the Maurin home through a back window. RP 45. Ed and Minnie were not in the house. RP 46. Shirley called Hazel. RP 47, 52, 65-66. Hazel contacted several people looking for Ed and Minnie but no one had seen them. RP 47, 72. When Hazel and Shirley went through the Maurin house they knew something was wrong, Minnie's purse was still at the

house and there were bank statements out for everyone to see. RP 47-48, 69-70. Ed and Minnie were very private about their finances and would not leave bank statements on the bathroom floor or scattered about the house. RP 166-67. They called the police to report Ed and Minnie as missing. RP 48.

The police responded to the Maurin residence. RP 726. It was clear there was no forced entry. RP 844. The police saw the bank statements that had been left out for all to see. RP 732, 844. Minnie's purse looked as if it was purposely hidden, with newspaper placed over it to conceal it. RP 733, 738. The police were informed that the blinds behind the Christmas tree were closed, which was not normal. RP 132. Ed's watch was still in the bedroom. RP 360. The police began looking for Ed and Minnie. RP 728-30, 851-52.

Detective Austin was contacted at 7:30 a.m. on December 20, 1985 and told the Maurin vehicle has been found in the northeast corner of the Yard Birds[7] parking lot. RP 739. Detective Austin arrived at the scene and saw the windows were iced over. RP 739. The police could not see much blood because the red blanket found inside the car covered a lot of the bloodstains. RP

[7] The verbatim report of proceedings calls the store Yardbirds, when it is actually Yard Birds.

542-43, 74. Detective Austin checked the trunk of the car for bodies, but found none. RP 744-45. There was blood throughout the front of the car and the police saw that the blood actually had run out of the passenger door and dripped down the outside of the car. RP 394, 437. Detective Austin took extra precautions not to disturb the evidence. RP 740-45. The car was processed by Detective Richard Herrington and Washington State Patrol (WSP) crime scene technician Roger Ely. RP 380-81.

After he received information about what was discovered in the car Denny began searching for Ed and Minnie's bodies. RP 170. Michael Haunreiter was driving around after work on December 24, 1985. RP 1612. Mr. Haunreiter decided due to his intoxication level that he would drive the logging roads, after driving a bit he saw what he thought was a CPR doll on the side of the road. RP 1612-13. Mr. Haunreiter saw the clothing did not look like a CPR doll and then he saw a wedding ring, realized it was a person and ran back to his truck and raced down to the first house to call the police. RP 1613-14.

Detective Herrington, Detective Austin and Detective Frank Bennett all responded to the scene, which was located on Stearns Road. RP 550. Detective Herrington proceeded out Bunker Creek

Road, turned onto Stearns Road, which turned to gravel and then about 3/10 of a mile up from that, at a fork in the road the bodies were located. RP 550-51. The detectives found some blood trails, a smaller blood trail and two larger blood trails. RP 557. When they walked up they saw Minnie's body. RP 560. Ed's body was lying in the slough, off the road, his clothes were fully soaked in blood and he had been dragged by his feet to that location. RP 561. Minnie had also been dragged, which was evidenced by how her clothes were pushed up, her undergarments were showing, and she had lost one shoe, the other shoe had already been found in the Maurin car. RP 566-68. There was a large amount of blood on Minnie's face and the right side of her clothing, which was consistent with what the detectives had discovered in the Maurin car. RP 568-69. Heading back down Stearns Road towards Bunker Creek, there was a 28-foot and 9-inch blood trail that led to a blood pool and the trail that led to Minnie's body. RP 588. The area between the two blood trails that led to Ed and Minnie's bodies was wide enough to fit the Maurin car in. RP 589, Ex. 376.

Dr. William Brady performed the autopsies on Ed and Minnie. RP 4684. Dr. Brady observed a single gunshot about one inch in diameter, midline, of Ed's upper back, about an inch and a

half below the shirt collar. RP 4690. The shotgun was fired either rubbing the back of Ed's neck or close enough to the back of Ed's neck that it rubbed the skin. RP 4690. The shotgun pellets went right into the back of Ed's neck, basically damaged everything in his neck and extended down into his upper chest. RP 4691-93.

Dr. Brady examined Minnie and found that the gunshot entered Minnie's shoulder and "'literally destroyed the entire shoulder and lateral neck.'" RP 4703. It was a horizontal gunshot that destroyed Minnie's left shoulder, neck and face. RP 4705-06.

Although Greg and Rick took great care to conceal their involvements with Ed and Minnie's deaths, numerous individuals observed them on the days leading up to and the day of the crime. Ms. Pierce returned home mid-day on December 18, 1985, she pulled into her garage, and spoke to her neighbor Bob, then went into her house. RP 223-25. As Ms. Pierce walked into her kitchen she saw a red and white Ford pickup truck pull over onto the shoulder of Highway 12 and a man get out of the truck. RP 225-26. The man was later identified by Ms. Pierce as Ricky Riffe.[8] RP 231-

[8] The substantive facts are taken from the witnesses' trial testimony. At times, this testimony varied from the witnesses' statements to police. The defense explored these differences in cross-examination. See, e.g., RP 253-57, 277, 921-22, 931. The jury, through their guilty verdict, passed upon the credibility of the witnesses' testimony. Since an appellate court must defer to a jury's credibility determinations, the State will not discuss further the "alleged discrepancies" identified in the defendant's brief. See

32, 235; Ex. 189.[9] Rick walked around in front of his truck, looked at all the houses, walked up Ms. Pierce's driveway and rang her doorbell. RP 225-26. Rick asked Ms. Pierce if her husband was home because he had run out of gas and wanted to go look out back and see if there was any gas he could use. RP 227. Ms. Pierce directed Rick to Bob's house, as she was leery about him wandering out back and was concerned he may try to rob her. RP 227-28. Rick thanked Ms. Pierce, walked back down the driveway, got into his truck and drove away. RP 228.

On December 19, 1985, Jason Shriver, a 17 year old Mossyrock resident, was headed to Tacoma with his mother to get his wisdom teeth removed. 2192-93, 2200-02. It was around 9:00 a.m. and Jason saw the Maurin's car pull onto Highway 12. RP 2202-03. The car was traveling slowly and Jason told his mom she needed to pass the car while they still are able to. RP 2203. As his mother passed the car Jason looked inside and could see Ed was driving, Rick was seated next to Ed in the front passenger seat, Minnie was directly behind Ed, and Greg was seated behind Rick. RP 2205. Greg was wearing a green army jacket, a stocking hat

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generally *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.3d 850 (1990) ("Credibility determinations are for the trier of fact and cannot be reviewed on appeal".)

[9] The State will be designating several exhibits in a supplemental designation. The State will cite to these exhibits as Ex. and the exhibit number in its briefing.

and had a close beard. RP 2207-08. Jason knew the Riffe brothers from growing up in Mossyrock and, while they were not friends, Greg would buy beer for Jason. RP 2195-96, 2210. Jason waived to Greg and Greg looked down. RP 2206. Jason did not understand why Greg was not waiving back at him and looked and waived at Greg again. RP 2206. Greg raised his finger and waived to Jason. RP 2206.

Frank Perkins was the manager of a truck stop located off of Exit 72. RP 995. On December 19, 1985 Mr. Perkins saw an older, 1968 or 1969 Chrysler Newport pull into the outside pump number 12. RP 995-96. People sometimes pulled into pump number 12 to steal gas because it was the outside pump. RP 996, 999. Mr. Perkins became concerned because there were not any other cars at the gas station so it was odd that the car would pull up to the outside pump. RP 996. Mr. Perkins was also concerned that the people in the car may have needed assistance because no one was getting out of the car. RP 997. There was an older man driving the car, an older woman in the front seat and a younger man in the back seat. RP 997. The man in the back seat was in his twenties, has a blondish beard, a dark colored stocking cap and appeared to

be wearing a military fatigue jacket or an older army jacket. RP 997-98.

Mr. Reisinger returned home about 20 to 25 minutes after he saw the green Chrysler. RP 1283. Mr. Reisinger saw the same green Chrysler but this time it was going fast around a corner and there was a younger white male driving the car. RP 1279, 1281. Mr. Reisinger estimated the car was going about 70 miles per hour and thought it was some kid racing his grandfather's car. RP 1279, 1281. The man driving had on a green coat, dark colored gloves, had thick dark hair and was wearing a stocking hat. RP 1281-82.

Deputy William Forth was at the intersection of Bunker Creek Road and Highway 6 when he saw a full-sized green Chrysler coming towards him. RP 1162-66. Deputy Forth locked eyes with the man driving the Chrysler. RP 1167-68. The man, who was white, in his twenties, had a stocking hat pulled down low, there was dark hair coming out from under the hat, and a beard that was not full grown. RP 1169-70. There was a red blanket covering the backrest of the front seat of the car. RP 1174-75. Deputy Forth thought the man may have been involved in a burglary in the area so he pulled out and got behind the Chrysler. RP 1168, 1172. The man was sitting at the stop sign for an extended period of time,

even though traffic was clear and looking back in the rearview mirror at Deputy Forth. RP 1174, 1176. Deputy Forth saw fear in the man's eyes as if he were deeply concerned that Deputy Forth was behind him. RP 1176. Deputy Forth identified the driver of the car to be Rick Riffe.[10] RP 1192-93, 1206-07; Ex. 828, 832.

Gordon Campbell was driving around Chehalis late in the morning on December 19, 1985. RP 4637-38. Mr. Campbell was on Kresky near Yard Birds Shopping Center and he saw two men in the northeast section of the parking lot wiping down a car that looked like the Maurin's vehicle. RP 4638, 4643-45. A man, who Mr. Campbell later identified as Greg, was on the passenger side of the car, wiping it down. RP 3269, 4645. Mr. Campbell pulled up near the driver's side of the car and suggested they take the car to the car wash. RP 4645-46. Greg told a man Mr. Campbell later identified as Rick, who was on the driver's side of the car, to close the car door and he did. RP 3269, 4655-56. About 45 minutes later Mr. Gordon was driving down Kresky, past Yard Birds, and saw Rick, who was wearing an olive drab coat, tightknit cap, and carrying what appeared to be a rifle, walk out onto Kresky. 4638-40,

[10] Deputy Forth also identified John Gregory Riffe as the driver in a later photo montage done with Detective Kimsey. RP 1197-1200. Deputy Forth testified that he would go with the earlier montage, done in 1991, because it is closer in time to the incident. RP 1207-08.

4657. Rick was walking towards the mall, carrying the gun in his right hand. RP 4641.

Around lunchtime Sheri Amell Potter[11] saw a man, she later identified as Rick Riffe, walking behind the containers in the Yard Birds parking lot.[12] RP 1675-76. The man was white, older than Ms. Amell who was 23, five feet, 10 inches tall, about 140 pounds, had dark hair that curls under his cap, a mustache and maybe two to three days growth beard, dark eyes, wearing a green army jacket that was completely zipped up, a dark stocking hat, blue jeans, and logging style boots with big treads on the bottom. RP 1682-83. Ms. Amell was the passenger in the car, her friend, Mary Jones was driving. RP 1676. Ms. Amell exclaimed that Rick had a gun. RP 1676. Ms. Jones replied that Rick was probably duck hunting. RP 1676. The women continued on, going up to Kresky to head back to work. RP 1676. Ms. Amell said to Ms. Jones, "'Hey, look how far he got. He's just going really fast.'" RP 1676. Rick was carrying a gun

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[11] Ms. Potter's last name was Amell in 1985 and she will be referred to as Amell in this brief. RP 1675.

[12] Ms. Amell later identified Ricky Riffe in a photo montage, Ex. 183. RP 1696, Ex. 183. After this occurred Ms. Amell saw an article that had both brothers' photos and told Detective Kimsey she must have seen the other brother, John Gregory, because in the photo in the article Ricky had blonde hair and Greg had dark hair and the man she saw had dark hair. RP 1696-1700, 175-26, 1735, 1738-39, 1742. Ms. Amell later testified that she would not have picked Greg Riffe but for hair color because the person she saw did not have acne scars, Greg does, and he looked like Ricky Riffe. RP 1745-50, Ex. 859, 860. Therefore, it is the State's position that Ms. Amell identified Ricky Riffe as the person she saw.

in his left hand. RP 1685. There was something white draped around where the trigger part of the gun was. RP 1685. The gun appeared to be shorter than a full-sized shotgun. RP 1706-07.

Brenda King saw a man she knew as John Gregory Muzzleman getting out of a goldish 1969 Chrysler Newport in the Yard Birds parking lot. RP 1947, 1951-53. John Gregory Muzzleman was actually John Gregory Riffe. RP 1997-2002; Ex. 896. Brenda believed it was between 8:00 a.m. and 8:30 a.m. on December 19, 1985. RP 1960. Greg was carrying a shotgun. RP 1951. Brenda worked at a tavern and knew Greg and Rick because they were regular customers. RP 1967-69. Brenda thought Greg looked "'scared to death'" and "'his body language told [her] something is wrong here.'" RP 1958. Greg was wearing a green army field jacket, jeans, black boots, had dark brown hair down below his ears, a full beard and was wearing a stocking cap. RP 1955.

A number of other people saw a man in his twenties with dark hair, an army jacket, a hat of some kind walking north from Yard Birds towards the Lewis County Mall carrying a rifle or shotgun wrapped or covered with a cloth or a towel. RP 1146-52, 1318-22, 1337-39, 1624, 1631-39, 1936-41. One person, Mr.

Perkins, sees a man standing on the west side of Yard Birds looking north as if he was waiting for a ride or going to hitchhike. RP 1005-06. Mr. Perkins believes this was the same man he saw at the gas station in the backseat of the green car. RP 1005. The man had a shotgun or a large bore rifle. RP 1005. Mr. Perkins later identified the man as Rick Riffe, but pointed to a photo of Greg. 1013-14, 3413-14.

Deanne Scherer was at the movie theater in the Yard Birds parking lot around 9:00 p.m. on December 19, 1985. RP 1308-09. Deanne's then boyfriend, Jeff, drove her down to pick up her paycheck. RP 1308-09, 1315-16. They left the theater and drove east towards Kresky. RP 1310. As they approached the containers headlights hit them and they were worried they were going to be hit by another vehicle. RP 1310, 1316. They turned their heads and realized the vehicle was not moving, it is just sitting there, running. RP 1311, 1316. The car was an older green sedan. RP 1311, 1316. They did not see anyone around the car. RP 1311, 1317.

Ms. Amell heard some people had been reported missing and law enforcement was requesting information so she called Ms. Jones and somehow Detective Austin was contacted. RP 1687-88. Ms. Amell and Ms. Jones met with Detective Austin to look at guns

and then they were transported to Portland where they met with a forensic artist. RP 1688-90. Ms. Amell was not satisfied by the sketch that was drawn; Ms. Amell believed the width of the face on the composite sketch was too wide. RP 1691; Ex. 113. Ms. Amell was shown a number of photo montages and was unable to recognize anyone as the person she saw with the gun by Yard Birds. RP 763-72, 1692-93; Ex. 782. Police distributed the composite sketch and ran it in the newspaper. RP 762-63.

Ms. Graham becomes aware of the Maurin homicide case in mid-January 1986. RP 1860-61. Ms. Graham and her family are at Spiffy's restaurant off Highway 12 and Interstate 5. RP 1860-61. Ms. Graham was about to walk past a large glass case but froze dead in her tracks. RP 1861. Taped up on the counter were two police sketches of two men and it had text on it that asked if you know who they are please contact Lewis County Sheriff's Office. RP 1862. Ms. Graham said to her husband, "'oh, my God, Arvid, that looks just like Rick and Greg Riffe.'" RP 1861. Ms. Graham felt like she is going to throw up. RP 1862. Ms. Graham called her parents and told them about the sketch, but did not tell Robin because she was afraid of what would happen to Robin because Rick was too temperamental. RP 1865.

Ms. Graham was not the only person who immediately recognized Rick from the composite sketch. RP 2363. Jerry Nixon grew up in Mossyrock. RP 2357. Jerry[13] knew who Rick Riffe was but did not really know him. RP 2359. Jerry did know Greg Riffe and had previously had an altercation with Greg. RP 2359. Jerry saw the composite sketch while in Mossyrock and thought, "[i]t looks just like Rick Riffe." RP 2363.

After the Maurin murders, Jerry saw Greg with a logging truck and wondered where Greg got the money to get the truck, because logging trucks were expensive. RP 2363. Jason also saw Greg with the logging truck. RP 2218-20, 2316-17. Jason had not reported to law enforcement that he had seen Rick and Greg with the Maurins because he was scared of the Riffes. RP 2217. One did not mess with the Riffes for fear of retaliation. RP 2217. There was no law enforcement presence in Mossyrock so you were on your own. RP 2217. Jason figured he should keep his enemies closer, so when he saw Greg in the logging truck he signaled Greg to honk his horn and then went over to check out the truck. RP 2219, 2291. Jason admired the truck and asked who the truck

[13] Jerry Nixon and Gary Newberry at one time had the same last name, to avoid any confusion the State will refer to Mr. Nixon and Mr. Newberry by Jerry and Gary, there is no disrespect intended.

belonged to. RP 2219. Greg said the truck belonged to him and Rick. RP 2319. Jason asked Greg where he got the money to buy the truck. RP 2319. After this incident Jason was apprehensive to be around Greg because of what was discussed at the truck. RP 2216-17.

About a week to two weeks later Jason encountered Greg again in downtown Mossyrock. RP 2231. Jason saw Greg step out of the Pioneer Tavern with Rick. RP 2233. Rick walked behind some bushes and Greg called over to Jason. RP 2233. Jason asked Greg, "who's behind the bushes?" RP 2233. Greg replied, "no one." RP 2233. Jason could not see Rick and did not want to get closer than ten feet to Greg or Rick. RP 2233. Greg said he wanted to talk to Jason. RP 2234. Greg asked, "'[d]id you say anything to anyone?'" RP 2234. Jason replied that he "didn't say anything to anybody about anything." RP 2234. Greg told Jason, "'If you say anything the same thing that happened to them will happen to you. We'll kill your mom. We'll kill your brothers. We'll kill your dad, and we'll kill you.'" RP 2234. Jason tried to defuse the situation, explained he would not say anything, if they needed help next time just call him and that Jason's mom had not seen anything. RP 2234-35. Jason was just a 17 year old kid who was

scared that these two grown men were going to kill him and his mom and Jason felt he needed to protect his mom. RP 2236.

Gary Newberry saw the confrontation between Greg and Jason. RP 2323. It appeared to Gary that Greg was threatening Jason and if it went any further Gary was going to put a stop to it because Greg was older than Jason and Gary did not like bullying. RP 2323-24. Jerry also witnessed the exchange between Greg and Jason. RP 2364-65. Jerry thought the situation did not look good because of the body language and Greg was definitely the aggressor. RP 2365-66. After the two men parted Jason walked past Jerry and Jerry asked "if everything was cool, if everything was alright?" RP 2368-69. Jason did not really respond. RP 2368-69.

After December 1985, a few weeks after the Maurin murders, Les was at Rick and Robin's house, he and Greg were about to leave when Rick and Robin came out to the truck and handed Greg a bag. RP 2101, 2115-16, 2120. The bag a brown paper bag, about nine inches across. RP 2117. Rick told Greg, "'[g]et rid of this for me'" and stated, "'[i]t is stinking up my house.'" RP 2117. Les and Greg left, drove down to the old road that went into Mayfield Lake by the bridge. RP 2117. Greg hopped out of the car and threw the bag out into the brush. RP 2119.

Les finally got his shotgun back from Rick sometime before the summer of 1986.[14] RP 2120. Rick had cut the gun down but Les had to put the speedy finish on it. RP 2122-24. Rick made Les put on the finish because Rick did not want his fingerprints on the gun. RP 2124. Les took the shotgun and put it in the closet of Glenda and Richard Zandecki, his mother and step-father's, house. RP 2124, 2421-27. Les found out that the gun was too short and not legal, he also had a feeling it had been used in the Maurin homicides, and therefore he did not want to put it in his truck. RP 2124-25, 2171. Glenda later discovered the shotgun and told Richard about it. RP 2403-04, 2421-22. Richard took the shotgun to work one morning and threw it in Mayfield Lake because it was illegal and he was not interested in having it around the house. RP 2424, 2427. Richard never discussed the shotgun with anyone and did not tell Les what he had done with it. RP 2425, 2430.

Donald Burgess was a known drug dealer in the 1980s and he hung out with Rick, Scott Gilstrap, Greg and others. RP 2767-68. Mr. Burgess heard about the police finding the bodies of the

[14] Les does at one point in cross-examination state that he got the shotgun back in Spring 1985 or Fall 1985. RP 2148-50. On redirect Les stated he did not get the gun back until after the Maurins were murdered. RP 2173. Les even told a deputy back in 1991 that he did not get the gun back until two to three months after the Maurins were murdered.

Maurins. RP 2769. A few days after he heard about the Maurins, Mr. Gilstrap showed up at Mr. Burgess' house driving Rick's Chevy pickup truck and Rick was a passenger. RP 2769-71. Mr. Burgess was not expecting Rick. RP 2769-71. Rick said, "'I think we are going to get away with it.'" RP 2772. Mr. Burgess got angry and told Mr. Gilstrap, "'Get this son of a bitch out of my house. Don't bring him back to my house ever again. I already got enough heat in my house I'm a drug dealer. I don't want him here.'" RP 2772. Mr. Burgess never saw Rick again. RP 2772.

Dora Flynn had a conversation with Robin about the Maurin homicides and Robin acted scared and freaked out. RP 2324. It appeared that the Riffe's financial situation had improved after the Maurins were murdered. RP 2343. Ms. Flynn saw Robin with 2,400 to $2,600 in cash and the money was to purchase a pound of marijuana. RP 2344. This attempted transaction occurred prior to Ms. Flynn's birthday on February 23, 1986. RP 2350, 2356. Ms. Flynn did not want to sell to Robin because she did not know Robin well, she knew Rick, and did not want to get popped by law enforcement. RP 2344-45. Ms. Flynn was concerned that Robin would rat her out if Robin was ever to get busted by the police. RP

2349. Ms. Flynn was also concerned that the money had come from the Maurin homicide. RP 2350.

Rick and Robin separated. RP 2698. Rick began dating Cathy Thola. RP 2698, 2741. Ms. Thola had a rocky relationship with Rick, they argued and had issues. RP 2711. Ms. Thola and Rick had an argument about her leaving Rick. RP 2711-12. Greg and Ms. Thola's children were present during this argument. RP 2711-12. Ms. Thola and Rick were yelling and Ms. Thola told Rick she was leaving him. RP 2712-13. Greg responded by looking at Ms. Thola, then at Rick, and stated, "'[w]e've killed once. We can kill again." RP 2713. Rick smiled, nodded, snickered and said, "Yeah." RP 2713, 2744. Ms. Thola did not take this statement as a joke, the yelling continued, Ms. Thola's children were crying and Rick took a pot of beans that was cooking on the stove and threw them up against the kitchen wall. RP 2713.

Greg and Rick move up to Alaska around 1987. RP 1531, 1538, 2715, 2744. The police were continuing to investigate the Maurin homicides. RP 813-14. There were a lot of tips in the beginning but the case stalled between 1987 and 1991. RP 813-14. In the early 1990's Detective David Neiser contacted Robin by telephone. RP 1487, 1493. Robin was in prison down in Arizona.

RP 1493. Detective Neiser explained he was a detective with the Lewis County Sheriff's Office and needed to speak with her about an old homicide that had occurred in Lewis County. RP 1493-94. Robin replied, "'You mean the one where the two old people were killed?'" RP 1494.

Detective Austin received a tip in early 1991 and they searched an area of Mayfield Lake, just west of the old road. RP 829-32. They found the remains of an old campfire and there appeared to be a piece of cloth and there was a shotgun shell lying in the grass. RP 834-35.

In February 1992 detectives decide to go up to Alaska to interview Rick, who was living in King Salmon, and Greg, who was living in Ketchikan. RP 2990. Detective Austin and Detective Doench along with Alaska State Trooper Feller met with Rick. RP 2991-92. Rick knew why they were there and voluntarily went to the police station in King Salmon to speak to the detectives and have his fingerprints, palm prints and hair samples taken. RP 2991-92. Rick said he had been living up in Alaska since summer 1990 when he "'walked away from all the bullshit'", got away from the drug scene and cleaned up his life. RP 2993, 2995. Rick admitted he purchased a boat at the end of 1985 or beginning of 1986. RP

2994. Rick also said he cut down a 12 gauge, F.I.E. brand shotgun, for Les. RP 2995. Rick said the shotgun had been purchased at Sunbird's or Yard Birds, he had the shotgun for a couple weeks and he fired it using double-ought buckshot that he got from Les. RP 2995-96. Rick also admitted to purchasing two ounces of cocaine from Mr. Vickers up at White Pass. RP 2998. According to Rick, he paid $2,000 an ounce for a total of $4,000. RP 2998. Rick also said it could have happened on December 19, 1985 but he had no way of knowing where he was that day because of the time that had passed. RP 2999-3000. Rick said he used to have a green army fatigue jacket and Greg probably had one too. RP 3002. Rick told Detective Austin he was not involved in the Maurin homicide and Greg would never be involved in anything like that in a hundred years. RP 3008. Rick came across to the detectives as "being entirely too blasé, too flat lined, too emotionless most of the time compared as to what they see in a lot of suspects." RP 3008-09.

Alaska State Trooper Doug Bachman was one of the people who contacted Greg in Ketchikan in 1992. RP 3066-69. Trooper Bachman assisted the Lewis County Sheriff's Office in serving a warrant and obtaining Greg's prints and hair. RP 3068-69. Trooper Bachman observed what he described as a lack of curiosity as to

why the police were there, Greg never asked why they were there. RP 3070. At one point Greg was challenged in regard to his answers about the Maurin murders. RP 3095. When Greg was challenged his demeanor changed. RP 3095-96. Greg was asked if he killed the Maurins. RP 3103. At first Greg said, "no." RP 3104. Then Greg said, "'I don't know. I need to think about it.'" RP 3104. Greg began to cry and terminated the interview. RP 3105.

The case stalled again. Denny decided to hire two private investigators to work on the case in the early 2000's. RP 179, 181. Denny wanted to hire someone who could work with the sheriff's office and Denny had the financial ability to pay for the investigation. RP 180. Denny felt a responsibility to get the case solved because he made a promise to his mother as she lay in her casket that he would find out who did this and he would work on it until the day he died. RP 180. Denny hired Chris Peterson and Jim McNally, who gave Denny monthly reports on their investigation. RP 181-82.

In 2005 Lewis County Sheriff's Office Detective Bruce Kimsey was selected to take over the Maurin homicide case. RP 3229. Detective Kimsey started his investigation with a fresh mind and wanted to see where the evidence took him. RP 3233.

Detective Kimsey read the entire case file, including thousands of tips. 3230, 3232, 3441. Detective Kimsey re-evaluated the evidence and sent off multiple pieces of evidence for DNA testing. RP 3236-42. Detective Kimsey believed some of the early photo montages were of poor quality and he was uncertain of the practices that were used when the witnesses viewed the montages. RP 3245-48.

In reviewing the statements in the case Detective Kimsey decided he needed to speak to Deputy Forth again and show him a photo montage. RP 349-52. Deputy Forth selected Greg in his second photo montage and Rick in his first photo montage as the person he saw driving the green car. RP 3251-52. Detective Kimsey also spoke to Ms. Amell and showed her a photo montage. RP 3252-53. Ms. Amell selected Rick from a photo that was taken back in 1981. RP 3262. Detective Kimsey re-contacted Ms. Pierce, who was very hesitant and scared to come give a statement but ultimately agreed to give Detective Kimsey a taped statement. RP 3275. Detective Kimsey showed Ms. Pierce a photo montage and she picked Rick out as the man she saw on December 18, 1985. RP 3276-77. Detective Kimsey saw that Mr. Pederson had never been shown a photo montage so he had Mr. Pederson look at a montage. RP 3283-84. Mr. Pederson went through the photos,

stopped on Greg's photo and insisted Kimsey write down, "'This is the prick I saw that day.'" RP 3285. None of the photos Detective Kimsey used in the montages were released to the press or the public. RP 3262.

Detective Kimsey requested a warrant to arrest Rick and Greg. RP 3291. Detective Kimsey found out on June 26, 2012 that John Gregory Riffe had died. RP 3291. An arrest warrant was obtained for Rick and Detective Kimsey, Detective Riordan, PI Pederson and Senior Deputy Prosecutor Hallstead went to Alaska and met up with Detective Gifford of the Alaska State Troopers. RP 3292-95. They arrived in King Salmon on July 6, 2012. RP 3295. Detective Gifford knocked on Rick's door and heard, "Who the fuck is it?" RP 3301-02. Eventually Rick invited them into the house and Detective Kimsey explained who everyone was and they were there in regards to the murders of Ed and Minnie Maurin. RP 3302-03. Rick asked, "who?" and Detective Kimsey stated it the same murder case that they came up and talked to Rick about in 1992. RP 3303. Rick replied, "'Okay.'" RP 3303. They spoke to Rick for a while about a number of things the detectives knew. RP 3304-3308. When confronted with Jason's statements Rick responded, "'I don't know. What do you want me to say?'" RP 3308. When asked why

Greg would say he did not know if he was involved in the murders, Rick replied, "I don't know. I have nothing to add to that.'" RP 3313. The phone rang at about 6:00 p.m., Rick had a conversation, never once tells the person on the other end that the police were there, finishes the conversation with, "'okay, yeah… okay, goodbye. I love you.'" RP 314-15. Rick told Detective Kimsey that he just ordered some chicken wings. RP 3315. They talked to Rick about all the other montages that he had been identified in and he responded with "I don't know" or "what do you want me to say?" RP 3316-17. Finally Detective Kimsey asked Rick why he would continue to talk to Les after he knew Les implicated Rick in the murder. RP 3318. Rick replied, "'it never came up.'" RP 3318.

Detective Gifford advised Rick he was under arrest and Rick's only reply was that he needed his cigarettes and his medications. RP 3320. Rick's demeanor became more relaxed, he appeared calm. RP 3321. At his extradition hearing Rick was laughing and talking to another inmate and he even smiled at Detective Kimsey. RP 3325-26. When Detective Kimsey went back to Alaska to bring Rick back to Washington Rick's demeanor was completely different than it had been upon their first meeting. RP 335-37. Rick was friendlier and joked with Detective Kimsey. RP

3337. Rick continued to joke with Detective Kimsey until they got back to the Lewis County Jail and when Detective Kimsey left Rick smiled and winked at Detective Kimsey. RP 3381-87.

After Rick was arrested people started contacting the Sheriff's Office about the case and coming forward as witnesses. RP 3226-95, 3305-06, 3313-14. Detective Kimsey became aware that Les' wife, Deborah George, had been communicating with Rick while Rick lived up in Alaska. RP 3389. Detective Kimsey spoke to Deborah, who seemed embarrassed, nervous and scared. RP 3391-92. Rick and Deborah had many conversations over email, webcam and Skype. RP 3353. Rick told Deborah to delete everything he wrote and she did. RP 3354. Deborah admitted she deleted the messages and when the search warrant was served she kept saying, "'they are going to blame me, he's going to blame me.'" RP 3392, 3394-95. Rick and Deborah's communications turned sexual in nature. RP 3557. At one point Deborah asked him what they did with the bloody clothes and Rick turned off the webcam but Deborah could still hear him. RP 3611. Deborah could hear Rick say they put the bloody clothes over by Mayfield Lake. RP 3611. Rick also told Deborah that Ed got hit on the head because he would not get out of the car. RP 3615. At one point

when Deborah was speaking to Detective Kimsey she responded, "'I can't tell you much, because I don't want to die. I don't want to be killed'" by Rick. RP 3607.

Irwin Bartlett, who spent time with Rick in the Lewis County Jail, also came forward as a witness. RP 2888, 2972, 3405-06. Mr. Bartlett was trying to get some leniency or consideration on his pending drug charge. RP 2900. Mr. Bartlett said Rick told him that in regards to the murder, it was a bad choice on his part and a "'jackass move.'" RP 2898. Rick also mentioned something about taking a person to a bank. RP 2899. Rick told Mr. Bartlett that he had killed two old people but the person who helped him was "no longer with us" so he did not need to worry. RP 2894-95. Rick never told Mr. Bartlett who that person was and Mr. Bartlett just assumed Rick meant his accomplice was dead. RP 2896.

B. PROCEDURAL FACTS.

On July 6, 2012 the State charged Ricky Riffe with Counts I and II: Murder in the First Degree, Counts III and IV: Kidnapping in the First Degree, Counts V and VI: Robbery in the First Degree, and Count VII: Burglary in the First Degree. CP 1-14. All counts carried special allegations of: 1) Particularly Vulnerable Victim, 2) Lack of Remorse and 3) Accomplice. CP 1-7. In addition to the

three special allegations, Counts III through VII contained the special allegation of Deliberate Cruelty and Count VII also contained the special allegation of Victim Present During Burglary. CP 3-7. The information was amended twice, neither amendment was substantive, the charges and special allegations remained the same. CP 15-22, 62-69.

The discovery provided to Rick's attorney was voluminous, approximately 20,000 pages. 3369, 4411. There were over 100 witnesses to contend with. RP 4413. There were numerous status conferences and Rick's attorney filed multiple demands for discovery. RP 4411-4538. Rick waived his right to have a CrR 3.5 hearing and stipulated that the statements were admissible. RP 4585-86.

The State was represented by Prosecutor Jonathan Meyer and Senior Deputy Prosecuting Attorney William (Will) Halstead. RP 1. During the trial Rick's attorney asked for a mistrial on four separate occasions, which the trial court denied. RP 824-28, 1487-91, 1782, 2704-06. Rick's attorney had difficulty with the cross-examination of Nonna Pierce and on several occasions was not allowed to use a police officer's summary of her statement to impeach Ms. Pierce. RP 249-52, 295, 302-04, 313-17. During Irwin

Bartlett's testimony the State attempted, unsuccessfully, to elicit that Mr. Bartlett received favorable treatment for being available to testify and, if called by the State, testifying for the State at Rick's trial. RP 2900-01. On cross-examination, defense counsel was able to elicit from Mr. Bartlett that the deal was the State would recommend 30 days if he testified and if he did not follow through the State would recommend 12 months. RP 2942-2945; Ex. 963. On redirect, the State went back over the plea offer with Mr. Bartlett, that he accepted the offer and had been made no other promises from the State. RP 2959-64. The State called David Arcuri, Mr. Bartlett's defense attorney, to explain the plea negotiations, and that Mr. Bartlett did accept the State's plea offer, which requires a 30 day recommendation by the State in exchange for truthful testimony in Rick's trial. RP 3673-74, 3676-84. Mr. Arcuri also confirmed that the deputy prosecutor on Mr. Bartlett's case was Will Halstead. RP 3675.

Rick's attorney filed a Motion to Disqualify Counsel and Motion to Dismiss Pursuant to CrR 8.3(b). CP 175-307. The crux of the motion was that Will Halstead, the deputy prosecutor for the State, allegedly committed misconduct during the direct examination of Mr. Bartlett by "knowingly asking questions to which

Mr. Bartle answered falsely and by repeatedly disregarding sustained objections." CP 180. Defense counsel's requested relief was that the charges against Rick be dismissed, or in the alternative the trial court should declare a mistrial and bar Mr. Halstead from further representation of the State. CP 180. Defense counsel also argued that Mr. Halstead committed a discovery violation by failing to submit discoverable material, yet stated in his declaration that this complaint was not regarding the alleged discovery violation. CP 179, 187. The State filed a response. CP 308-72. The State argued it cured any issue with Mr. Bartlett's testimony by calling Mr. Arcuri to testify regarding what consideration Mr. Bartlett did receive. RP 313-15. The State also pointed out that defense counsel sent an email to Mr. Halstead on November 3, 2013 and sent the same email to Prosecutor Jonathan Meyer on November 4, 2013. CP 310, 323. The email demanded a number of stipulations from the State, including stipulating to what Ms. Pierce told police and that the State would not object to testimony from the defendant's expert witness. CP 310-11, 323. In exchange for the stipulations defense counsel would not file the motion to dismiss pursuant to CrR 8.3(b). CP 311,

323. The trial court denied the motions and called defense counsel's email extortion. RP 3928, 3943-44; CP 388-93.

Defense counsel sought to have an expert on eye-witness identification and memory testify and filed a written motion and attached a report from Dr. Reinitz in support of the motion. CP 156-66. The State filed a motion in limine to prohibit the testimony of Dr. Reinitz. CP 167-174. On November 7, 2013 the trial court acknowledged it had received the motion from defense counsel and stated "it occurs to me we need to probably have an offer of proof here…" RP 3669. On November 8, 2013 the trial court discussed scheduling the motion to admit expert testimony and what accommodations needed to be made to allow defense counsel to have his expert present for an offer of proof. RP 3787-89. The trial court made it clear it was not requiring live testimony for the offer of proof, but is giving defense counsel that option. RP 3844. Defense counsel asked the trial court to entertain an offer of proof later in the day without live testimony. RP 3845. Trial court entertained the motion and denied defense counsel's request to present expert testimony in regard to eye-witness identification and memory. RP 3868-3899.

Rick was found guilty on all counts with the aggravating factors. RP 4368-74; CP 1061-69, 1070-76. The jury was polled and all agreed the verdicts given were their verdict and the verdict of the jury. RP 4375-77. Rick was sentenced to 1234 months in prison. CP 1113. Rick timely appeals his conviction. CP 1136-57

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED RIFFE'S REQUEST TO PRESENT AN EXPERT WITNESS TO TESTIFY ABOUT MEMORY AND EYE WITNESS IDENTIFICATION.

Rick argues to this Court that his right to due process, and Sixth Amendment rights to compulsory process and confrontation were violated by the trial court's denial of his request to have Dr. Reinitz testify as an expert witness. Brief of Appellant 43-56. Rick structures his argument as violations of his constitutional rights instead of focusing on the trial court's discretion to allow and limit testimony. Rick's trial attorney's offer of proof was inadequate and the trial court correctly ruled the expert testimony was inadmissible.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137

Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted).[15] Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The facts are binding on appeal "[w]here there is substantial evidence in the record supporting the challenged facts." *Hill*, 123 Wn.2d at 647. Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *Lohr*, 164 Wn. App. at 419. Findings not assigned error become verities on appeal. *Id.* at 418.

[15] Simply alleging a constitutional rights violation does not make an evidentiary ruling reviewed under a de novo standard instead of an abuse of discretion standard. *See In re Pers. Restraint of Morris,* 176 Wn.2d 157, 168, 288 P.3d 1140 (2012); *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). The State acknowledges that in *State v. Turnispeed*, 162 Wn. App. 60, 255 P.3d 843 (2011) Division 3 held that although evidentiary determinations of a trial court are reviewed under an abuse of discretion standard, when an appellant alleges a confrontation clause violation in regards to an evidentiary ruling the proper review is de novo. *Turnispeed* is incorrectly decided and contrary to the precedent.

2. Invoking The Compulsory Process Clause And The Right Of Confrontation Guaranteed By Sixth Amendment Does Not Guarantee A Criminal Defendant's Proposed Testimony Is Admissible.

The Fourteenth Amendment to the United States Constitution guarantees that the State will not deprive a person of their liberty without due process of law. The Fourteenth Amendment guarantees that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied,* 172 Wn.2d 1002 (2011), *citing State v. Davis,* 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). "[T]he right to due process provides heightened protection against government interference with certain fundamental rights." *Id.* (citations and internal quotations omitted). To satisfy the right to a fair trial, the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore,* 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (quotations omitted). A defendant is guaranteed the right to confront and cross-examine witnesses who testify against him or her and the right to

compel a witness to testify. U.S. Const. amend. VI. "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. Unlike other rights guaranteed under the Sixth Amendment, the Compulsory Process Clause requires an affirmative act by a defendant and is not automatically set into play by the initiation of an adversarial process. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). "The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct. *Taylor v. Illinois*, 484 U.S. at 410.

A defendant does not have an absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, "to assemble and submit evidence to contradict or explain the opponent's case." *Taylor v. Illinois*, 484 U.S. at 410-11.

Evidence presented by a defendant must be at the very least minimally relevant and there is no constitutional right for a defendant to present irrelevant evidence. *Jones*, 168 Wn.2d at 720.

If a defendant can show that the evidence is relevant then the burden shifts to the State to show the trial court that the evidence is so prejudicial that it will "disrupt the fairness of the fact-finding process at trial." *Id.* Invoking the right to compulsory process is not a free pass to present evidence that would be considered inadmissible under the Rules of Evidence. *Taylor v. Illinois*, 484 U.S. 414.

3. The Trial Court's Did Not Abuse Its Discretion When It Ruled Dr. Reinitz Could Not Testify As An Expert In Regards To Memory Or Eye Witness Identification.

It is within the sound discretion of the trial court to determine the admissibility of proposed expert testimony. *In re Morris*, 176 Wn.2d 157, 168, 288 P.3d 1140 (2012). The evidence rules state:

> 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.

ER 702.

For expert testimony to be admissible under ER 702, (1) the witness must qualify as an expert, "(2) the expert's theory must be 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) (citation omitted); ER 702. When the jurors, without special training or expertise, are as competent as an expert to evaluate the evidence presented, the expert's opinion is not helpful and using an expert in these situations can cause the jury to place too heavy of a reliance on the expert's testimony because of the "aura expertise." 5D K. Tegland, Wash. Prac., Evidence § 702.6, at 312-13 (2013). However, expert testimony on an issue that is counterintuitive and difficult for the average juror to understand may be admitted on the ground that it is helpful to the trier of fact. *State v. Ciskie*, 110 Wn.2d 263, 273-74, 751 P.2d 1165 (1988).

The Washington Supreme Court has tackled the issue of expert testimony regarding eye witness identification. "[W]here eyewitness identification is a key element of the State's case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. *State v. Cheatam*, 150 Wn.2d 626, 649, 814 P.3d 830 (2003). The trial court should consider the expert's proposed testimony, including the specific subjects involved in the eyewitness identification to which the testimony relates, such as whether the defendant displayed a

weapon, the effect of stress on the identification, whether the victim and the defendant are of the same race, and other factors. *Cheatam*, 150 Wn.2d at 649. This approach corresponds with admissibility of expert testimony and the rules for admissibility of relevant evidence in general. *Id.;* ER 402; ER 702.

a. Riffe's trial counsel did not establish the foundational requirements for admission of an expert opinion by a preponderance of the evidence.

The proponent of evidence must establish its relevance, materiality and the elements of a required foundation, by a preponderance of the evidence. *State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013) (citations omitted); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). The critical inquiry here is did Rick's trial counsel establish by a preponderance that Dr. Reinitz and his proposed testimony met the requirements of ER 702? The short answer is no. Trial counsel declined the trial court's offer to afford trial counsel time to elicit live testimony from Dr. Reinitz for an offer of proof. 3842-45, 3867-76, 3885. Instead trial counsel elected to argue from his brief that he submitted to the trial court as part of the defense's motion in support of admitting expert testimony regarding eyewitness testimony and memory. RP 3868-96; CP 156-66.

The information provided was woefully inadequate for the trial judge to make an informed decision regarding, 1) whether Dr. Reinitz was qualified to give an expert opinion regarding eyewitness testimony and memory perception, 2) whether the subject matter and scientific theory the defense was proposing Dr. Reinitz testify about was generally accepted in scientific community, 3) how the information was beyond the common sense of the jurors given the particular facts and circumstances of Rick's trial, 4) how the information would be helpful to the jury and 5) how Dr. Reinitz's proposed testimony would not be considered an improper comment on the veracity of another witness. ER 702; CP 383-87. The State's objection to Dr. Reinitz's proposed testimony was that it would not be relevant and it was not beyond the common sense of the jurors due to the facts of this case. RP 3876-85; CP 167-74.

i. Trial counsel did not establish if Dr. Reinitz's was a qualifying expert.

The trial court gave trial counsel an opportunity to explain the science of eyewitness testimony and memory, Dr. Reinitz's credentials, and how this testimony would be presented to the jury. RP 3867-68. Rick now asserts that the trial court erred when it found that Dr. Reinitz was not a qualified expert. Brief of Appellant

46. Trial counsel only submitted a summary, without any specific citations, of Dr. Reinitz's qualifications. RP 3868-69; CP 156-66. Trial counsel did not provide a curriculum vitae, a list (complete or representative) of Dr. Reinitz's published peer reviewed articles, what journals Dr. Reinitz has edited, what type of research grants he has reviewed, or who he has testified for as an expert in memory and perception. ER 702 Trial counsel could only tell the trial court that Dr. Reinitz has testified twice in Pierce County Superior Court, twice in Thurston County Superior Court, and recently in the United States District Court for the Western District of Washington. RP 3885-86. Trial counsel did not state what Dr. Reinitz testified about in those court cases. *Id.*

In the attached "report" Dr. Reinitz states that his "experience is described more fully in my CV." CP 164. Without Dr. Reinitz's curriculum vitae or live testimony the trial court could not determine if Dr. Reinitz was in fact a qualified expert because there was nothing verifiable in the information trial counsel supplied to the trial court. *See* RP 3885-86; CP 156-66. Trial court lacked the necessary information to make an informed ruling and even told trial counsel such, "I don't know that if he's been accepted as a witness in these other Courts, that he's accepted as a witness in

these other Courts on the same principle that you are arguing here." RP 3888.

ii. Trial counsel did not establish by a preponderance that the proposed testimony was generally accepted in the scientific community.

Rick argues the trial court erred when it held that Dr. Reinitz's proposed testimony was not generally accepted in the scientific community. Brief of Appellant 46-48. Rick's opening brief states, "[i]t is unclear why the trial judge came to this conclusion." *Id.* at 46-47. Appellant counsel does an excellent job providing a number of cases where the courts have discussed that similar expert testimony is generally accepted in the scientific community. *Id.* at 47-48. The problem is that trial counsel did not submit similar authority to support this position to the trial court in his briefing or his offer of proof before the trial court. *See* RP 3870-76; 156-66. Apparently trial counsel purposely only attached to his motion and memorandum two pages of a seven page report drafted by Dr. Reinitz. RP 3883. Dr. Reinitz's report does state,

> I note for the record that all information that I discuss is generally accepted in the field of Psychology (see, e.g., Kassin, Ellsworth, & Smith, 1989; Kassin, Tubb, Hosch, & Memon, 2001; Schmechel, O'Toole, Easterly & Loftus, 2006). The information has been gathered over the past century primarily using

> controlled laboratory research as a means of identifying basic scientific laws.

CP 166. Dr. Reinitz also stated the results of the research studies have been published in peer-reviewed articles in journals in the fields of Neuroscience, Biology, Psychology and Computer Science. CP 166. These statements could all be true, but how is the trial court to know? A list presumably of authors or studies and the years that those articles/books/journals were published or studies completed is not sufficient. There is no independent information the trial court could reference to confirm that these principles are generally provided by Rick's trial counsel in the written motion or the offer of proof.

Perhaps if Rick's trial counsel had cited to the published cases in Washington State and across the country that have accepted expert testimony on eyewitness identification the trial court would not have made conclusion of law 2.5.[16] CP 386. The trial court did not hold, as Rick asserts it did, that the scientific findings regarding the limits of eyewitness identification is not generally accepted. Brief of Appellant 46; CP 386. The trial court actually held, "[t]he defendant, in this case, has failed to show that

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[16] Appellate counsel has listed several cases, one from Washington State, *State v. Taylor*, 50 Wn. App. 481, 749 P.2d 181 (1988), one New Jersey case and several federal cases to illustrate this point on pages 47 and 48 of the opening brief.

the proposed testimony of Dr. Mark Reinitz is generally accepted in the scientific community." CP 386 (Conclusion of Law 2.5). There is a stark difference. Given the information, or lack thereof, Rick's trial counsel provided the trial court in regards to the proposed testimony's general scientific acceptance; the trial court did not abuse its discretion in rendering this conclusion, and in fact reached the only conclusion available.

iii. Based upon the information provided to it by Riffe's trial counsel, the trial court did not abuse discretion when it concluded the proposed testimony would not be helpful to the jury.

Rick asserts that "[t]he trial judge was simply incorrect when he held that this testimony would not be helpful to the trier of fact." Brief of Appellant 48. Once again, appellate counsel does an excellent job of summarizing a number of studies and published works that discuss the dangers of eyewitness identification, how they are allegedly the leading cause of wrongful convictions and how the average juror just does not understand the weaknesses of eyewitness identification. Brief of Appellant 48-54. While the State is not conceding that with this information the trial court would have found that the proposed testimony would have been helpful to the trier of fact, the reality is none of this information was provided to

the trial court. See *Id.*; RP 3868-3899; CP 156-66. It is imperative this Court only evaluate whether Rick's trial counsel overcame his burden to show the trial court the proposed testimony would be useful and if the trial court abused its discretion when it determined, based upon the information it had at the time, that the proposed testimony would not be helpful to jury. To expect a trial court to know this information or just sua sponte make these findings without proper citation to a source for evaluation of these claims would be contrary to the adversarial system where it is incumbent of a party to present an argument and evidence to support one's argument.

At the time of the presentation of this motion the State had called 90 witnesses, some of whom testified on more than one occasion. *See* RP 20-3868, 4628-4720. Out of those witnesses, seven strangers identified Rick or Greg. RP 602-23 (Nonna Pierce), 990-1037 (Frank Perkins), 1112-34 (Nels Pederson), 1190-1206 (William Forth), 1674-1752 (Sheri Amell), 4636-57 (Gordon Campbell), 2448-84 (Jeff McKenzie). Four people who knew Greg and Rick made identifications. RP 1943-70, 1982-2020 (Brenda King), 2205-10 (Jason Shriver), 2321-25 (Gary Newberry), 2359-69 (Jerry Nixon). Seven people saw a man or men dressed in a green

army jacket, hat, and various other similar characteristics but did not identify anyone in a photo montage. RP 918-35 (Lindsey Senter), 1145-58 (Virginia Cummings), 1318-32 (James Heminger), 1337-42 (Marjorie Hadaller), 1428-44 (Ruth Lascurain), 1623-47 (Beverly Gestrine), 1936-41 (Yvonne Miller). Finally, Steven King recognized the man he saw wearing an army green coat, blue jeans, stocking cap, carrying a gun and walking by Yard Birds as a person he had previously seen at the Wilson Tavern where Brenda King had worked. RP 2021-29.

The kidnappings, robbery and murders took place in December 1985, almost 28 years before the trial occurred. Some of the witnesses did not come forward or make identifications until after they had seen something about the case in the media. RP 1013-14, 3327-35, 3413-14. Others, after being presented a montage by Detective Kimsey, many years later, identified Rick or Greg for the first time. RP 3249-52, 3283-85, 3403-05. Sheri Amell helped create a composite sketch, was shown multiple montages for which she picked no one and later picked out Rick, then Greg, and then again explained why Rick was the person she believes she saw. RP 1690-1700, 3252-62. The issues that came with the identifications in this case, due to its age and the circumstances

surrounding the case were obvious to any lay person without special training or experience.

According to the trial court and the State in its response to Riffe's motion to admit expert testimony the jury panel discussed the issue of memories during voir dire, at length, and all agreed that it was common sense that people remember things differently, time affects memory and some memories are more accurate than others.[17] RP 3877; CP 384. Throughout the trial these issues were dealt with in direct examination, such as Sheri Amell and William Forth, who both identified both brothers as the person they saw, when each only saw one person. RP 1161-1208 1691-1700, 1745-1750. Throughout the trial Rick's trial counsel vigorously cross-examined all of the State's eyewitnesses who identified Rick or Greg. *See, e.g.* RP 246-95, 604-12, 1016-26, 1209-1233, 1704-1744.

Furthermore it is justifiable why the trial court would believe Dr. Reinitz's testimony would not be helpful to the jury when, for example, trial counsel stated in his offer of proof,

> Dr. Reinitz will explain that all of that is actually counter-intuitive, and that memory for example can actually become more accurate with time contrary to

[17] Riffe did not request to have voir dire transcribed to fully explore this issue; therefore, the State assumes that the transcript of voir dire would support the trial court's finding.

> what people think. It can naturally also become less accurate, which he says is intuitive and consistent with what most people think, but actually most of those factors come into play that time doesn't necessarily affect memory, other influences do.

RP 3872. The doctor will discuss how memory may become more accurate or may become less accurate. How is that helpful? That type of testimony adds nothing to the jury's understanding of the evidence. It is common sense that different factors that are used to retrieve memory, in other words how a person is asked to retrieve a memory through questions, affect the accuracy of a person's memory. RP 3872. It is also common sense that how diligent a person is about maintaining a memory affects its accuracy because everyone knows that many memories have a tendency to fade with time. RP 3872. It is common sense that the accuracy of a memory is dependent on the initial perception of that memory, the environmental factors that surround the capture of the memory. RP 3872.

The trial court posed a number of questions and concerns to Rick's trial counsel about Dr. Reinitz's proposed testimony. 3892-95. Trial counsel had ample opportunity to bring in Dr. Reinitz and attempt to allay the trial court's concerns and gain a more favorable ruling. Trial counsel did not even request a continuance to call Dr.

Reinitz when it became apparent that the trial court was not satisfied with the offer of proof as given. Absent a better explanation, which perhaps Dr. Reinitz could have given through his testimony during an offer of proof, as to why the testimony would be helpful to the jury in their evaluation of the evidence, Rick's trial counsel did not meet his burden to show by a preponderance that the testimony met the requirement that it be helpful to the jury. The trial court did not abuse its discretion.

b. The trial court's exclusion of Dr. Reinitz was not an abuse of discretion.

The trial court's determination that an expert witness will not be allowed to testify is reviewed under an abuse of discretion standard. *Finch*, 137 Wn.2d at 810. "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

For the reasons argued above, the trial court did not abuse its discretion when it excluded Dr. Reinitz's testimony. It was not manifestly unreasonable, given the limited information Rick's trial counsel provided to the trial court in his offer of proof, for the trial court to exclude the testimony. It was not untenable for the trial court to hold that Dr. Reinitz has not been proven to be an expert in the field of his proposed testimony because it was only provided self-serving statements and unverifiable information in regards to his expertise. RP 3885-86; CP 156-66, 384-86. The complete lack of citations to similar cases where the proposed testimony has been admitted and the lack of any citation to a study, journal article, thesis, or book that was verifiable for the trial court sufficiently supported the trial court's reasonable holding that it was without adequate information to find the proposed testimony was generally accepted in the scientific community. RP 3870-76; CP 156-66, 384-86. Finally, the trial court's conclusion that the proposed testimony would not be helpful to the trier of fact was not manifestly unreasonable or based upon untenable grounds.

B. THERE WAS NO REQUEST FOR A MISTRIAL BY RIFFE'S TRIAL COUNSEL DURING OR FOLLOWING IRWIN BARTLETT'S TESTIMONY.

Rick argues the trial court improperly denied his motion for a mistrial following Irwin Bartlett's testimony. Brief of Appellant 56-59. Trial counsel did not request a mistrial, therefore there was no denial, and Rick cannot raise error in regards to a mistrial that was never requested.

1. Standard of review

The decision to grant or deny a mistrial is within the sound discretion of the trial court and is reversible only for abuse of that discretion. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006).

2. There Was No Request For a Mistrial, Therefore There Was No Error.

Trial irregularities are irregularities that occur during a criminal trial that implicate the defendant's due process rights to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984). In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. *State v. Post*, 118 Wn.2d 596, 620, 837 P.2d 599 (1992). A mistrial should be granted only when '"nothing

the trial court could have said or done would have remedied the harm done to the defendant.'" *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (quoting *State v. Swenson*, 62 Wn.2d 259, 280, 382 P.2d 614 (1963)). The trial court has wide discretion to cure trial irregularities. *Post*, 118 Wn.2d at 620. Great deference is given to the trial court because it is in the best position to discern prejudice. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Ultimately, this Court will reverse the trial court only if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Id. The trial judge is in the best position to evaluate the dynamics of the trial and to determine the prejudicial effect, if any, of a particular remark upon the jury. *State v. Harris*, 97 Wn. App. 865, 869, 989 P.2d 553 (1999).

Nowhere in this section of the argument does appellate counsel cite to the transcript for the location of the motion for a mistrial or the trial court's decision. *See* Brief of Appellant 56-59. To further confuse the issue appellate counsel also references findings

of fact and conclusions of law, again with no citation to the record. Brief of Appellant 58. There were no findings of fact and conclusion of law entered for the denial of the motion for a mistrial. *See* CP. Rick's trial counsel stated, during Mr. Bartlett's time on the stand, that it did not want a mistrial and asked that the State lead Mr. Bartlett around issues such as the pending rape charge Rick was facing. RP 2890. The last time trial counsel requested a mistrial in this case was during Cathy Thola's testimony regarding the violence in the home. RP 2703-06.

It is an appellant's job to demonstrate error, which has not been done in this case. *See Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960) (requiring the appellant to show he is entitled to relief); *accord State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999) (placing the same burden on the criminal appellant); *see also* RAP 10.10(c) (noting that even a pro se statement of additional grounds must "inform the court of the nature and occurrence of alleged errors...[T]he appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds."). This is not a manifest error affecting a constitutional right that can be raised for the first time on appeal. *See State v. O'Hara*, 167 Wn.2d 91, 217

P.3d 756 (2009). Further any "error" was addressed and cured by the State when it called Mr. Bartlett's attorney to testify, putting into evidence the nature of Mr. Bartlett's plea agreement. *Johnson v. State of Delaware*, 587 A.2d 444, 446-47 (Del. 1991); RP 3673-3716. Rick has not met his burden to show an error even occurred. This Court should affirm Rick's convictions.

C. THE DEPUTY PROSECUTOR'S DID NOT COMMIT PROSECUTORIAL ERROR WHEN HE ARGUED ACCOMPLICE LIABILITY TO THE JURY.

Rick claims the deputy prosecutor committed prosecutorial error (misconduct) [18] in his closing argument when arguing accomplice liability. Rick's argument is without merit. The deputy

[18] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007)*; State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

prosecutor did not commit prosecutorial error in his closing argument. If any error occurred it is harmless, as there was no objection and a curative instruction would have fixed the alleged error.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor Did Not Commit Error When Discussing Accomplice Liability During His Closing Argument.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury." *State v. Thorgerson,* 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial error, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the

prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

A prosecutor commits prosecutorial error when he or she shifts the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor may commit error during closing argument by minimizing or misstating the law regarding the burden of proof. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011).

a. Accomplice liability in Riffe's case.

For a person to be an accomplice to a crime they must solicit, command, request, or encourage another to commit *the* crime, or aid or agree to another person in planning or committing the crime. RCW 9A.08.020; WPIC 10.51; CP 1007. Rick was charged with Murder in the First Degree, which required the State to prove that with premeditated intent he, acting alone or as an accomplice, caused the death of Ed and Minnie. RCW 9A.32.030(1)(a); CP 62-63. The State also requested, and was granted, a lesser included jury instruction for Murder in the Second Degree, also known as felony murder. RP 3949, 3954; CP 1008-12. To prove a person has committed Murder in the Second Degree the State was required to prove Rick committed "Kidnapping in the First

Degree and/or Robbery in the First Degree and/or Burglary in the First Degree and in the course of and in furtherance of such crime or in immediate flight from such a crime he or an accomplice causes the death of a person other than one of the participants." CP 1010; RCW 9A.32.050(1)(b); WPIC 27.03.

b. The deputy prosecutor argued the correct accomplice liability standard.

Rick argues the deputy prosecutor erred when he explained accomplice liability during his closing argument, thereby minimizing the burden of the proof required to hold Rick accountable under an accomplice liability standard. Brief of Appellant 60-63. Rick argues this error was flagrant and repeated. *Id.* 61-62. Rick supports this contention by citing a single statement from a 207 page long argument. *Id.* 61-63. There were no repeated misstatements of the law and no prosecutorial error.

First, the deputy prosecutor did not misstate the law on accomplice liability. The only statement cited by Rick in his brief as objectionable was in the beginning of the State's closing argument.

> Now, during voir dire we talked about some of these concepts. This was six weeks ago. 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 drive-by 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.
>
> So getting to the facts of this case, the reason I bring this up is because in 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 Rick the defendant or John the dead would-be defendant, when do they both become accomplices? I'll point it out for you.

RP 4027-28. Rick's complaint is based upon the bank robbery scenario, or as he argues the "in for a dime in for a dollar" notion of

accomplice liability, citing to *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) and *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000). Rick argues the deputy prosecutor repeatedly and flagrantly argued that the State need only show one of the brothers committed the murder and no one needed to determine who was the primary and who was the accomplice as long as Rick and Greg committed any act in concert, they would both be guilty of murder. Brief of Appellant 61. This is a grossly inaccurate portrayal of the State's closing argument.

For whatever reason Rick's appellate counsel chose to only cite to one instance of this alleged misconduct. The State does acknowledge appellate counsel cited to more of the State's closing argument in the Statement of the Case. Brief of Appellant 40-43. In the Statement of the Case appellate counsel cherry picks seven different statements by the deputy prosecutor, many which are of snippets of arguments and without the context that surrounded the argument. *Id.* These seven statements are encompassed on nine pages of the 207 pages of closing and rebuttal closing arguments. RP 4014-170, 4287-339.

The deputy prosecutor's closing was preceded by 24 days of trial and the reading of the jury instructions, which contain the

appropriate jury instruction for accomplice liability. RP 3979-80; CP 1007 (WPIC 10.51). The deputy prosecutor told the jury the correct standard for accomplice liability. RP 4025-27. The bank example is an example of Murder in the Second Degree, under an accomplice liability theory and the other two examples are examples of accomplice liability generally. RCW 9A.08.020; RCW 9A.32.050(1)(b); RP 4025-27. To argue that the deputy prosecutor repeatedly made improper statements orally and in his power point without citing to them leads the State to wonder where exactly all this flagrant misconduct is. *See* Brief of Appellant 61-63.

The State's theory of this case was always that Rick and Greg had planned and executed these heinous crimes together and it was Ricky who was the actual trigger man. *See* 4044, 4133, 4166-67, 4290, 4292, 4314-15. From the brothers discussing their precarious money situation with Les George, to talking about killing someone after forcing them to go to the bank, to walking down highway 12 together, being in the Maurin vehicle together, and discarding and wiping down the Maurin vehicle together, Rick and Greg committed these crimes together. 921-25, 938-39, 2200-10, 2075-77, 4643-48, 4655-56. This is what the deputy prosecutor weaved throughout his closing argument. It is disingenuous to take

snippets of a large argument out of context. Did the deputy prosecutor state that the two brothers became accomplices in the murder when they were seen by Jason Shriver? RP 4058. Yes, he does, but it is in the context of a larger argument, which was at that point, there is no going back, they discussed at the party the plan they had hatched, they have been seen by someone who knows them both and now the Maurins are definitely going to die. RP 4058-59. There is no prosecutorial error.

3. If There Was Error, It Was Not Flagrant.

While not conceding error, if the deputy prosecutor misstated the law on accomplice liability in regards to Murder in the First Degree, there was no objection, and the misstatement was followed by two correct statements regarding accomplice liability, therefore, Rick has not met his burden to show the deputy acted flagrantly or that he was prejudiced in any way. Rick incorrectly asserts that there was no evidence that Greg acted with premeditation or that Rick knew Greg planned to kill the Maurins, and therefore any misstatements by the deputy prosecutor regarding the necessity for Rick to be an accomplice to Murder in the Frist Degree was prejudicial. Brief of Appellant 61-62. The evidence, as argued above, was that Rick planned in advance of that morning to kill the

Maurins, but both brothers acted together to kidnap, rob, and then kill Ed and Minnie. They had been seen by Jason, they could leave no witnesses, forced Ed to drive up that logging road, knowing they were going to kill him and Minnie, and when Ed refused to get out of the car Rick struck him in the head before shooting him. RP 2895, 2898, 3615. The deputy prosecutor's statements are not flagrant and ill-intentioned and within the context of the entire record Rick cannot show he was prejudiced by any alleged misstatement, therefore, there is no prosecutorial error and Rick's convictions should be affirmed.

D. RIFFE DID NOT OBJECT TO THE ADMISSION OF THE COMPOSITE SKETCHES AND THEREFORE HAS WAIVED RAISING THE ISSUE FOR THE FIRST TIME ON APPEAL.

Rick raises the issue, for the first time on appeal, that the two composite sketches, exhibits 113 and 206, were improperly admitted into evidence. Brief of Appellant 63-67. Rick argues that composites should never be admissible as they are suggestive, hearsay and violate the confrontation clause. Brief of Appellant 64-66. Rick fails to acknowledge that he did not object to the admission of the composite sketches and does not explain how this issue is reviewable for the first time on appeal. Rick waived this claim by his failure to object and this Court should decline to

entertain his argument regarding the inadmissibility of the composite sketches. *See State v. Smith,* 155 Wn.2d 496, 501, 120 P.3d 559 (2005) (failure to raise hearsay objection below waives it on appeal).

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. The Admission Of The Composite Sketches, Without Objection From Riffe's Trial Counsel, Is Not A Manifest Constitutional Error And Therefore, It Cannot Be Raised For The First Time On Appeal.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *O'Hara*, 167 Wn.2d at 97-98; *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is

manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted)*. No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Failure to object to the admissibility of evidence at trial precludes appellate review unless the error is a manifest error affecting a constitutional right. *State v. Ehrhardt,* 167 Wn. App. 934, 941, 276 P.3d 332 (2012), citing *State v. Florczak*, 76 Wn. App. 55, 72, 882 P.2d 199 (1994). Rick fails to acknowledge he did not

object to the evidence, let alone that he must meet this standard to raise the issue for the first time on appeal. Brief of Appellant 63-67. Rick argues this Court should adopt New York's standard that composite sketches are never admissible with the exception for impeachment.[19] Brief of Appellant 64-65. Rick argues the sketches were created by Ms. Amell and Ms. Jones and at a minimum Rick's right to confrontation was violated when the composite sketches were entered because without both women to testify the composite is based upon hearsay. Brief of Appellant 66.

There was no objection raised when the composite sketches were admitted into evidence. RP 1691, 1695; Ex. 113, 206. When the State initially sought to admit Exhibit 113 through Glade Austin there was an objection tendered by Rick's trial counsel. RP 758-59. At that point trial counsel did raise a hearsay objection, stating the sketch artist and Ms. Amell should need to be required to testify to satisfy any hearsay objection. RP 759-60. After some discussion regarding the matter trial counsel states, "We are - - it is basically I think a proforma [sic] type objection we're making. I believe Sheri

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[19] To support this argument Appellate counsel discusses the two composites in Rick's case, stating they look nothing alike and explaining how the sketches were created. Once again there are no citations to the trial record to support these statements with the exception of giving the exhibit numbers for the composite sketches, 113 and 206. This failure to accurately cite to the record "places an unacceptable burden on opposing counsel and on this court." *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990).

Amell is going to testify later. We need to make our objection that this exhibit can only be admitted, if the witness later testifies at trial." RP 761. This initial objection was waived when trial counsel stated, "[n]o objection" when the State later sought to have Exhibits 113 and 206 admitted into evidence. RP 1691, 1695.

This is not an alleged error affecting a constitutional right because Rick was able to confront and cross-examine Ms. Amell. *See* U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. Furthermore, the sketch itself is not a statement and the proper authentication and foundation were laid for its admissibility. *United States v. Moskowitz*, 581 F.2d 14, 20-21 (1978); RP 756-58, 794-96, 1690-95. The inquiry should end here.

If, arguendo, this court does find that the alleged error does affect a constitutional right, the error is not manifest. There must be practical and identifiable consequences at trial and the error must actually have affected Rick's right at trial. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); *O'Hara* 167 Wn.2d at 99. Rick cannot meet that standard here. Rick argues that a number of different people saw the composite sketch Ms. Amell did after it was distributed by the police and those people testified that it reminded them of Rick, Greg or both, because as Linda Zandeki

testified, Greg and Rick "both looked a lot alike." Brief of Appellant 67, citing RP 2405. This argument is not sufficient to show that the alleged error affected Rick's right at trial. All of these witnesses could have testified that they had seen a composite sketch and it reminded them of the brothers, even if the sketch had not been admitted. It was a trial tactic for Rick's trial counsel to use the sketches to his advantage. See RP 1721-26. On cross-examination Ms. Amell acknowledged she was dissatisfied with both sketches and the first one, 113, looked more like the persons she saw but with some striking differences, and 206 was similar as the face was not as wide, but it still was not correct. RP 1721-26. Trial counsel could argue if neither of the sketches is correct then any identification off of the sketch could be seen as problematic. There was no evidence that someone who had witnessed Greg or Rick during the commission of these crimes saw the composite sketch, contacted police and then positively identified either brother. *See* RP. The alleged error is not manifest and the issue cannot be raised for the first time on appeal. Because this issue cannot be raised for the first time on appeal this Court should decline Rick's invitation to rule that all composite sketches to be inadmissible hearsay.

E. RIFFE'S TRIAL COUNSEL IMPEACHED NONNA PIERCE WITH A PRIOR INCONSISTENT STATEMENT AND THEREFORE, THERE WAS NO VIOLATION OF RICK'S RIGHT TO PRESENT A DEFENSE, RIGHT TO DUE PROCESS, OR RIGHT TO CONFRONTATION.

Rick claims that his right to due process, to present a defense and his right to confrontation were violated when the trial court prevented him from impeaching Nonna Pierce with a prior inconsistent statement and preventing him from admitting two documents containing the alleged prior inconsistent statements. Brief of Appellant 67-70. Trial counsel extensively cross-examined Ms. Pierce. While trial counsel did seek to admit a transcript of one of Ms. Pierce's statements and a police report written by Detective Bennet, the trial court, in its discretion, ruled both were not admissible. Trial counsel was able, on the second attempt, to impeach Ms. Pierce using the transcript of the recorded statement she gave to Detective Kimsey. Rick's claims therefore, fail.

1. Standard Of Review

A trial court's ruling regarding the scope of cross-examination will not be reversed absent a manifest abuse of discretion. *State v. McDaniel*, 83 Wn. App. 179, 184, 920 P.2d 1218 (1996) (citation omitted). This court reviews alleged violations

of the confrontation clause de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted).

2. Riffe's Trial Counsel Effectively Impeached Nonna Pierce, Therefore, There Were No Violations Of Riffe's Constitutional Rights.

A person accused of a crime has the right to confront and cross-examine his or her accuser. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. A defendant, however, does not have an absolute right to unlimited cross-examination. *State v. Darden*, 145 Wn.2d 616, 620, 41 P.3d 1189 (2002). It is within the sound discretion of the trial court to make determinations that limit the scope of cross-examination, particularly if the sought after evidence is speculative, vague or argumentative. *Id.* at 620-621. Cross-examination is also limited to relevant evidence. *Id.* at 621, *citing* ER 401; ER 403; *State v. Hudlow* 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

"The credibility of a witness may be attacked by any party, including the party calling the witness." ER 607. "In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony." *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). "[A] witness's in-court testimony need not directly contradict the

witness's prior statement." *Id.* at 294, *citing* 5A Karl B. Tegland, Washington Practice, Evidence Section 256, at 307 (3rd ed. 1989).

> Rather, inconsistency is to be determined, not by individual words or phrases alone, but the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the expressions appear to have been produced by inconsistent beliefs?

Id., quoting *Sterling v. Radford*, 126 Wn. 372, 218 P. 205 (1923) (quoting 2 Wigmore on Evidence, sec. 1040, p. 1208).

To be received as a prior inconsistent statement, the contradiction need not be in explicit terms. It is enough if the "proffered testimony, taken as a whole, either by what is says or by what it omits to say" affords some indication that the fact was different from the testimony of the witness whom it sought to contradict. *Id.*

"[T]he purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times" and "[f]rom this, the jury may disbelieve the witness's trial testimony." *Id.* at 293. A jury is better able to determine the weight and value to give a witness's trial testimony "if it knows that the witness expressed contrary views while the event was still fresh in the witness's memory and before the passage of time created opportunities for outside influence to

distort the statement." *Id.* at 295. The prior inconsistent statement, used in this matter, to cast doubt on a witness's credibility is not hearsay because it is not being offered to prove the matter asserted. *State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995).

"If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach," but "even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling." *Newbern*, 95 Wn. App. at 293 (internal citations omitted).

In *Newbern*, the State impeached a witness with her tape-recorded statement to a police detective, after previously impeaching her with non-taped statements made to that detective. *Id.* at 282. Over the defendant's objection at trial, the detective testified about an initial interview with the witness at Madigan Army Medical Center and "also produced a tape recording of the Harborview Medical Hospital interview, which the trial court admitted into evidence over Newbern's hearsay objection." *Id.* The trial court noted:

> Well, while the chronology of this statement is, in my opinion, somewhat consistent, very consistent, actually, with the chronology that Lakenya Jones and other witnesses have testified to, the entire tone and thrust of this statement is totally contradictory to what she attempted to portray at trial. It gives the exact opposite impression, in my opinion, and, in its totality, is simply an inconsistent version of what the jury has heard on the witness stand.

Id. at 282-83. On appeal, the defendant argued that "the trial court erred when it admitted Jones's Harborview interview because many of the statements she made at the hospital were consistent with her trial testimony and she admitted at trial that others were untrue." *Newbern*, 95 Wn. App. at 294. The witness, who had been shot by the defendant, said that she "had not been truthful" in her tape-recorded statement. This Court noted that "Jones testified at trial that the shooting was accidental" and that "the 'whole impression or effect' of the details she described at trial supported this allegation." It held that because "this testimony was directly contrary to the critical portions of the statements that she made to Bomkamp," "the trial court did not abuse its discretion when it admitted Jones's prior statements for impeachment purposes." *Id.* at 295.

Rick's trial counsel attempted to cross-examine and impeach Ms. Pierce using two different documents. RP 249-295, 602-12, 617-18. The first document was Identification 700, a copy

of a police report authored by Detective Frank Bennett. RP 249; ID 700.[20] The second document was the transcription of the recorded statement Ms. Pierce gave Detective Kimsey in June 2012. RP 257; ID 726.[21] The State objected to either document being admitted into evidence and further objected to the use of Identification 700 because it was not Ms. Pierce's statement, but a report by Detective Bennett of what he recalls Ms. Pierce stating. RP 249-52, 295; ID 700, 726. The trial court ruled that neither document was admissible nor would trial counsel be permitted to use Detective Bennett's report for impeachment purposes. RP 250-52, 289, 295.

In explaining his ruling regarding Detective Bennett's report, the trial court stated "It has to be her statement. This is not her statement. This is the detective's statement of what she said to him." RP 250; ID 700. Rick argues to this court that the trial court's statement is absolutely incorrect, that the report written by Detective Bennett is Ms. Pierce's statement for purposes of impeachment. Brief of Appellant 68-69. To support his argument

[20] Appellant cites to Exhibit 700, but 700 was never admitted nor was it designated by appellate counsel. To clarify the record the State will be designating Identification 700.

[21] Identification 726 is a replacement copy of Identification 698 which was inadvertently lost. Appellate counsel designated Identification 698, but the State will refer to the Identification as it was transmitted to the Court as ID 726.

Rick cites to two cases, neither of which actually support his argument. In *Garland* the Court of Appeals ruled that because there is a specific set of precedent which states that statements made by a defense attorney during an omnibus hearing and during opening argument are attributable to the defendant as "quasi admissions", those statements could be used, if the defendant testified, as prior inconsistent statement for impeachment purposes. *State v. Garland*, 169 Wn. App. 869, 886-87, 282 P.3d 1137 (2012). The reasoning behind this rule is in part that a defendant is present when these statements are being made and has the ability to speak up if the statements are incorrect. *Garland*, 169 Wn. App. at 887. In addition, the attorney is an agent of the client. RCW 2.44.010(a); *Garland*, 169 Wn. App. at 887. Using this rationale, Detective Bennett's report would not be considered Ms. Pierce's statement, as there is no similar relationship between Ms. Pierce and Detective Bennett and there was no evidence that she was present when he typed up his report or had an opportunity to review and revise the report to accurately reflect her statements to the detective.

The other case Rick cites to is *Nelson*, where Division One held that a statement, in which the officer wrote down what the

witness told her to write, in a non-coercive environment, and the witness read over the statement and then signed the statement, was the witness's statement. *State v. Nelson*, 74 Wn. App. 380, 389-90, 874 P.2d 170 (1994), *review denied* 125 Wn.2d 1002. This set of facts is distinct from a police report, such as the one written by Detective Bennett, written by an officer about his or her perception of what a witness states. Neither of the cases supports the premise that Detective Bennett's report can be considered Ms. Pierce's statement for impeachment purposes, let alone admission as an exhibit. Trial counsel was free to call Detective Bennett to impeach any testimony Ms. Pierce gave that was contrary to the statement she gave him. *See* RP 252. Trial counsel elected not to call Detective Bennett as a witness. *See* RP 3947.

In regards to the statement Ms. Pierce gave Detective Kimsey in June 2012, trial counsel was able to use this statement to impeach Ms. Pierce. RP 256-295, 602-12, 617-18. The State will agree that the first go-around with cross-examination Ms. Pierce was difficult and rather hostile towards Rick's trial counsel when he attempted to question Ms. Pierce about possible inconsistencies between her testimony and her statement to Detective Kimsey. RP 256-95. In part, trial counsel was not being particularly clear in his

questions, and in part, as noted by the trial court, Ms. Pierce did not appear to be a fan of Mr. Crowley. RP 268, 273. Trial counsel was able to get Ms. Pierce to admit she told Detective Kimsey that the person she picked in the photo montage was most consistent to the person she saw on her front porch. RP 277. After a frustrating cross-examination trial counsel was permitted to call Ms. Pierce three days later and re-cross-exam her. RP 602-12, 617-18. This second attempt at cross-examination fared much better and trial counsel was able to bring out several inconsistencies in Ms. Pierce's testimony. RP 602-12, 617-18. Trial counsel was able to show that some of Ms. Pierce's testimony was contrary to the recorded statement she gave Detective Kimsey, thereby successfully impeaching Ms. Pierce. RP 602-12, 617-18.

The purpose of impeachment is to show the jury that a person is changing their story, that perhaps they should not be believed. It is about credibility. The substance of the statement is actually immaterial because the prior statements are not admitted as substantive evidence. The trial court did not abuse its discretion when it ruled that Detective Bennett's police report was not Ms. Pierce's statement. The trial court's rulings that Detective Bennett's report and Ms. Pierce's June 2012 statement were not admissible

as exhibits were not based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d at 686. The trial court is within its right to limit cross-examination and its limitation in this case did not violate Rick's right to confrontation as guaranteed by the Sixth Amendment, his right to due process or his right to present a defense. Rick's trial counsel was able to fully cross-examine Ms. Pierce and did in fact impeach her in regards to her inconsistent testimony. This Court should affirm the convictions.

F. JOHN GREGORY RIFFE'S STATEMENT TO CATHY THOLA WAS PROPERLY ADMITTED AS AN ADOPTIVE ADMISSION.

Rick argues that he did not adopt his brother, Greg's, statement to Cathy Thola and therefore the statement was impermissibly admitted into evidence by the trial court. Brief of Appellant 70-73. Rick asks this Court to go one step beyond finding his statement was improperly admitted and reject the concept of tacit admissions. Brief of Appellant 74-75. Rick asserts that the admission of the statement was in violation of ER 403 and violated his Sixth Amendment right to confrontation. Brief of Appellant 76-78. All of Rick's claims fail as the adoptive admission was properly admitted, therefore the statement is not hearsay and there is no

confrontation issue. Rick does not meet his burden to show the adoptive admission exception is incorrect and harmful.

1. Standard Of Review.

This Court reviews admissibility of evidence determinations by the trial court under an abuse of discretion standard. *Finch*, 137 Wn.2d at 810.

2. Ricky Riffe Adopted Greg's Statement That They Have Killed Before And They Could Kill Again.

An out of court statement offered to prove the truth of the matter stated is hearsay. ER 801(c). But a statement offered against a party opponent is not hearsay. ER 801(d)(2). This includes "a statement of which the party has manifested an adoption or belief in its truth." ER 801(d)(2)(ii). A party can manifest an adoption of a statement by words, gestures, or complete silence. *State v. Cotton*, 75 Wn. App. 669, 689, 879 P.2d 971 (1994), *review denied*, 126 Wn.2d 1004 (1995).

A party's silence manifests an adoption of the statement if he, 1) heard the incriminatory statement, 2) was able to physically and mentally respond, and 3) the circumstances indicate that he reasonably would have responded had he not intended to acquiesce in the statement. *State v. Neslund*, 50 Wn. App. 531, 551, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988). A

defendant's conduct is a circumstance for the jury to consider when deciding if it is not likely to be the conduct of one who was conscious of his innocence or tends to show an indirect admission of guilt. *Cotton*, 75 Wn. App. at 689-90; *State v. McGhee*, 57 Wn. App. 457, 461-62, 788 P.2d 603, *review denied,* 115 Wn.2d 1013 (1990) (internal quotations and citations omitted).

Rick and Ms. Thola were arguing with Greg and Ms. Thola's children were present during this fight. RP 2711-12, 2742-43. It was a heated argument with yelling and Ms. Thola told Rick she was going to leave him. RP 2711-12, 2742-43. Greg responded by looking at Ms. Thola, then looking at Rick and saying, "'We've killed once. We can kill again.'" RP 2713, 2743. Rick looked at Greg, smiled, snickered, nodded, and said, "yeah." RP 2713, 2744. According to Ms. Thola and her daughter, Angela Moore, it was clear this was not a joke. RP 2713, 2744. Rick then took a pot of beans that was cooking on the stove and threw them against a kitchen wall. RP 2713.

Rick's adoption of Greg's statement was not a silent adoptive admission. Rick snickered, he smiled, he nodded, and he said "yeah." That is an adoption by words and gestures. *Cotton*, 75 Wn. App. at 689. The trial court correctly ruled that statement was

"an admission by a party opponent acquiesced in and accepted and adopted by silence on the part of Mr. [Rick] Riffe." RP 2709. The trial court noted silence because in the offer of proof the State did not say that Rick stated anything affirmative. RP 2708-09. That piece of testimony came from Ms. Moore when she testified later. RP 2743-44. The trial court's ruling was made on tenable grounds and therefore not an abuse of discretion.

Rick takes his argument one step further and states that the statement was not admissible under ER 403 because it is more prejudicial than probative. Brief of Appellant 76-77. Rick argues this is because there was ambiguity in the statement and the response. The State supposes if there were allegations that Rick and Greg had possibly killed other people it is possible this statement could be seen as ambiguous. But Greg's statement to Ms. Thola was made about a year after the Maurin's were killed, and Rick's response, as argued above, was not ambiguous. RP 2696-98, 2711-74, 2740-44 There is no violation of ER 403.

3. There Is No Violation Of The Confrontation Clause Because The Statement Is Not Hearsay But An Admission By A Party Opponent.

Rick argues the admission of Greg's statement violated the confrontation clause of the Sixth Amendment. Brief of Appellant 77-

78. Rick ignores that Greg's statement is treated as his own, and therefore an admission by a party opponent which is an exception to hearsay. ER 801(d)(2)(ii). Much like a coconspirator's statement, "no additional indicia of reliability are required to satisfy constitutional concerns." *State v. King*, 113 Wn. App. 243, 54 P.3d 1218 (2002) (internal quotations and citations omitted). No further inquiry is needed.

4. Riffe Does Not Show That The Adoptive Admission Exception Is Incorrect And Harmful.

Controlling precedent in Washington State allows for the admission of statements of third parties that are adoptive admissions of the defendant. *Cotton*, 75 Wn. App. 669; *Neslund*, 50 Wn. App. 531. The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 652-53, 466 P.3d 508 (1970). Rick cites to one case and two law review articles for the proposition that the adoptive admission rule should be rejected. Brief of Appellant 74-75. This is not a clear showing that the established precedent is harmful and incorrect. This Court should reject the invitation to close the door on the admissibility of adoptive admissions. This Court should affirm Rick's convictions.

G. ROBIN'S QUESTION TO DETECTIVE NEISER WAS PROPERLY ADMITTED BECAUSE IT WAS A QUESTION, NOT AN ASSERTION.

Rick argues that Robin's question, "You mean the one where the two old people were killed?", was improperly admitted hearsay. Brief of Appellant 79-80.[22] Robin's question to Detective Neiser was not a statement and therefore it is not hearsay. The question was properly admitted by the trial court.

1. Standard Of Review.

Admission of evidence is reviewed by this Court under an abuse of discretion of standard. *Finch*, 137 Wn.2d at 810.

2. A Question Is Not An Assertion And Therefore Not Hearsay.

A criminal defendant has the right to confront witnesses against him or her. U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). This does not bar an unavailable witness' out of court statements outright. *Crawford*, 541 U.S. at 42. An out of court statement may be admitted at trial if it has an indicia of reliability, which means it "falls within a firmly rooted hearsay exception or

[22] Once again appellate counsel fails to cite to the record or even quote the statement she is arguing was not admissible. The State supposes from her argument and from the portion of the State's closing argument that is actually cited to the record that the quotation the State has included above is the actual question/statement Rick is arguing should have been excluded. The question can be found on RP 1464.

bears particularized guarantees of trustworthiness." *Id.* (internal quotations and citations omitted).

For an out of court statement to be hearsay it must be a statement and offered for the truth of the matter asserted. ER 801(c). A statement is defined as, "an oral or written assertion or [ ] nonverbal conduct of a person if it is intended to be an assertion." ER 801(a). A question or an inquiry is not an assertion and therefore not a statement. *State v. Collins*, 76 Wn. App. 496, 498, 886 P.2d 243 (1995).

> Assertion is not defined by the rule, but the advisory committee's note to subdivision (a) of Fed. R. Evid. 801, to which the Washington rule defers, provides that nothing is an assertion unless intended to be one. Therefore, because an inquiry is not assertive, it is not a statement as defined by the hearsay rule and cannot be hearsay.

Collins, 76 Wn. App. at 498 (internal quotations and citations omitted).

Detective Neiser explained that he called Robin and told her his name, where he was from, and that he wanted to talk to about a homicide that occurred in Lewis County. RP 1464. Robin's response was a question, she asked, "You mean the one where the two old people were killed?" RP 1464. This response is clearly an inquiry and not an assertion. The State argued such to the trial

court, that this was not a statement and therefore not hearsay and trial court adopted the State's reasoning when it ruled that Robin's response was admissible. RP 1449-51. There is no violation of the confrontation clause, Robin's response is not testimonial hearsay, and the trial court's reason was based upon tenable grounds and therefore was not an abuse of discretion. Rick's convictions should be affirmed.

H. THE STATE ALREADY DEALT WITH THE ALLEGED ERRORS RAISED AND THERE IS NO NEED TO CONDUCT A CONSTITUTIONAL HARMLESS ERROR ANALYSIS.

In his last section of briefing Rick argues a number of Constitutional errors, all of which the State denies and answered above. The State's assertion is that these claims, which appellate counsel merely summarizes here and claims constitutional error, were properly dealt with in the preceding sections of this briefing. These were evidentiary matters, there was no error and certainly none that rise to the constitutional violation of Rick's constitutional rights. Therefore, there is no need for a constitutional harmless beyond a reasonable doubt analysis. This appears to be a catch-all argument counsel is placing at the end of the briefing. If this Court does determine any of the evidentiary errors are actually violations of Rick's constitutional rights (which the State is maintaining they

are not) the State would be more than happy to provide harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 643, 160 P.3d 640 (2007).

For the State to take the time to do a harmless error analysis on each of the alleged violations, many of which appellate counsel casually reference would require the preparation of unnecessary alternative type arguments. Brief of Appellant 81 (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). Given the massive record in this case this task would require the State to write another 15 to 20 pages of briefing in a brief that is already 98 pages long. This is unnecessary and excessive briefing wastes this Court's time and the States.

If this is in fact a cumulative error argument it is without merit. The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). When a defendant/petitioner fails to demonstrate

prejudice arising from any single error, he is not entitled to relief under a cumulative error analysis. *Thompson v. Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996). Alleged errors that are individually insufficient to require relief do not become meritorious simply by aggregating them into one claim. "The fact that many claims of . . . error are pressed does not alter fundamental math – a string of zeros still adds up to zero." *Hunt v. Smith*, 856 F. Supp. 251, 258 (D. Md. 1994); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) ("Twenty times zero equals zero.").

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IV. CONCLUSION

The trial court did not abuse its discretion when it excluded the testimony of Dr. Reinitz. Nor did it abuse its discretion when it allowed the adoptive admission, Robin Riffe's question, and the composite sketches to be admitted. There was no request for a mistrial and Riffe was able to fully impeach Ms. Pierce. The deputy prosecutor did not commit prosecutorial error. Finally, there are no violations of Riffe's constitutional rights. Therefore, this Court should affirm Riffe's conviction.

RESPECTFULLY submitted this 6th day of November, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

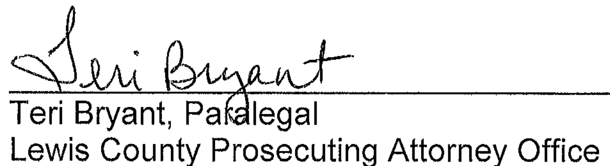
by:________________________________
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RICKY A. RIFFE, Appellant.	No. 45744-0-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 6, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Suzanne Elliott, attorney for appellant, at the following email address: Suzanne-elliott@msn.com .

DATED this 6th day of November, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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