

NO. 93858-0

THE SUPREME COURT OF  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,  
Respondent

v.

MICHAEL ORREN GORSKI,  
Appellant/Petitioner.

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ANSWER TO PETITION FOR REVIEW  
BY YAKIMA COUNTY

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## **A. INTRODUCTION.**

This matter was tried to a jury in Superior court as one half of a joint trial with co-defendant Frank Eugene Brugnone, trial was to the bench. Brugnone also has a petition for review before this court, 93736-2. Both parties were found guilty and sentenced. They both timely filed direct appeals of their convictions. The Court of Appeals Division III upheld the convictions in a ruling filed on September 13, 2016.

## **ISSUES PRESENTED BY PETITION**

A. Whether the trial court abused its discretion by allowing Cecil Toney to be coached over defense counsel's objection and give altered testimony under the guise of ER 612, which prejudiced Mr. Gorski and requires a new trial.

B. Whether the remaining evidence was insufficient to sustain the conviction for murder in the second degree as either a principal or an accomplice.

C. Whether the requisite inquiry into ability to pay discretionary costs under State v. Blazina and discretionary costs of medical care and incarceration under State v. Leonard applies to defendants who had retained counsel at trial but were found indigent for purposes of pursuing appeal.

## **ANSWER TO ISSUES PRESENTED BY PETITION**

1. Nothing in the Court of Appeals ruling regarding the testimony of Mr. Toney is subject to review under RAP 13.4. As is set out in detail by the Court of Appeals ruling, there was no error and even if there was it was not preserved.
2. The totality of the evidence presented to the jury in this trial, even Mr. Toney's testimony, is more than sufficient to uphold this conviction.

3. The Court of Appeals had discretion to deny review of this issue. It chose to deny review, that was a proper use of the discretionary powers of that court. Further, the State has offered to waive the disputed costs.

Gorski petitions this court requesting review of the ruling by the Court of Appeals Division III denying the issues he raised on appeal.

He raises three issues as set forth above. The Court of Appeals ruled as follows on the allegations raised by Gorski;

- 1) Mr. Gorski initially argues it was error for prosecutor to refresh Toney's memory on redirect examination after Toney had changed his testimony on cross-examination concerning the time frame when he had seen the two men at the apartment complex. The claim of error was not preserved and also is without merit.

- 2) Mr. Gorski likewise challenges the sufficiency of the evidence to support the conviction, arguing that he left the apartment complex near 7:30 p.m. and could not have committed the crime. The jury was free to conclude otherwise.

- 3) Mr. Gorski's final contention is a claim that the court erred in imposing LFOs without first determining his ability to pay them. We decline to consider this issue, which was not presented to the trial court.

## **B. STATEMENT OF THE CASE**

The State has set out the entire statement of the case, approximately twenty-five pages of facts and testimony from the trial court, that was set forth in the State's brief filed in the direct appeal in Appendix A. Further, the State has as needed set forth specific sections of the record in the body of this Answer.

### **C. ARGUMENT**

As with a direct appeal, acceptance of review of a case after review by the Court of Appeals is governed by RAP 13.4(b). This rule sets forth the manner and mechanism for review of a decision by the Court of Appeals terminating review.

Gorski claims that the ruling of the Court of Appeals runs afoul of sections (1) and (3). However, the ruling in Gorski's case does not meet any of the criterion set forth in RAP 13.4(b) Considerations Governing Acceptance of Review;

This case does not **1)** Conflict with any decision by this court; **2)** This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court; **3)** The ruling does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has been applied for years **4)** The issues raise in this petition for review do not involve an issue of substantial public interest that this court should determine.

#### **Testimony of Cecil Toney.**

As was stated by the Court of Appeals regarding this allegation:

Mr. Gorski initially argues it was error for prosecutor to refresh Toney's memory on redirect examination after Toney had changed his testimony on cross-examination concerning the time frame when he had seen the two men at the apartment complex. The

claim of error was not preserved and also is without merit.

As the court points out in its opinion;

Moreover, the redirect examination was utterly harmless. Even after seeing his original remarks, Mr. Toney stuck with his answer to defense counsel that the incident occurred between 12:00 and 12:30 a.m. The re-examination did not change the witness's testimony in the least.

There was no error at all. This issue is without merit. (Slip at 8)

The alleged coaching resulted in absolutely nothing. Judge Korsmo's ruling addresses the error in Gorski's claim. As can be seen from Mr. Toney's testimony at the very end of his testimony, after all of the back and forth and questioning about whether he has observed the defendants at 11:00 or 12:00 his last statement regarding what time he observed the defendant was;

Q. By the way, looking again to line seven on that same page, you say again that you saw these two gentlemen between 12:00 and 12:30; is that true?

A. Yes, between 12:00 and 12:30, I believe. RP 843.

Initially throughout Gorski has claimed that this witness was "coached." This choice of wording is inflammatory and used just for that purpose. It is clear throughout this witness's testimony and the discussion of his testimony amongst the parties that the effort by the state was to refresh the witness's recollection not to "coach" him. This term implies



that the State was attempting to insert false information into this trial which is completely unfounded and is an egregious claim against the deputy prosecuting attorney who tried this case. There is nothing in the record which would suggest that this allegation was raised in the trial court.

If anything the alleged coaching would have been seen as adding doubt to this witness's testimony. Gorski's continued assertion that Toney "adopted that time frame as his testimony" completely ignores the record and as acknowledged by the Court of Appeals in its ruling.

Gorski's claim that "[t]he remaining evidence was not overwhelming" is ludicrous. The State set forth nearly twenty-five pages of facts in its opening brief in the direct appeal of this case. The State has appended those facts to this Answer in Appendix A.

B. Sufficiency of the evidence.

The claim that the facts do not support Gorski's conviction is without basis. This claim does not implicate either constitution. If the determination of the facts by a jury implicated a defendant's constitutional rights, then it would follow that each and every case should be reviewed by this court, clearly this is not the meaning of RAP 13.4.

This was a challenge to the sufficiency of the evidence therefore, the Court of Appeals when it reviewed the case it viewed the evidence in a

light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

Because Gorski is claiming insufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), aff'd, 136 Wn.2d 939, 969 P.2d 90 (1998).

As was pointed out in the Court of Appeals ruling,

As also noted in the earlier discussion, the case

against Mr. Gorski was quite strong. Despite his protestation that he was not at the scene, DNA from his glasses and cigarette butts put him there, and he was seen leaving the apartment complex soon after the victim's screams alerted the neighbors. Ms. Clift's body showed several defensive wounds and Mr. Gorski's DNA was recovered from her fingernails. Like Mr. Brugnone, he lied to the police about his presence at the crime scene.

While Mr. Gorski's testimony conflicted with the State's theory of the case, the jury accepted the latter instead of the former. The evidence amply supported the determination that Gorski was the last person to see Ms. Clift alive and was undoubtedly the killer. It was sufficient.

(Slip Opinion at 8-9)

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Here the jury chose not to believe the story that Gorski presented them. They instead considered the overwhelming facts presented and found Gorski guilty.

Even if the court were to exclude the testimony of Mr. Toney the remaining facts were overwhelming.

The DNA evidence found at the scene and physically on the victim was on its own nearly overwhelming. In his testimony Gorski's did little

to nothing to explain how his DNA was found embedded underneath the fingernails of a dead woman. A woman he testified he had never met before until he grudgingly gave her a ride home from a liquor store, coincidentally on the day she was murdered. He testified that his DNA was found on the decedent because after being in her apartment for about twenty minutes she just starts kissing Gorski after which they began to mutually start to touch. Gorski testified that he stopped the victim after they started this mutual touching but the next thing he knew the victim was “crawling, mauling, kissing, hugging, pulling” at him. He stated it was not mutual. 2/7/13 RP 1608, 1660 Gorski said the victim unbuttoned his shirt and after a few minutes he grabbed his two bottles and just walked out her apartment. 2/7/13 RP 1608-9

Gorski’s own testimony was such that it would appear to have readily assisted the State in its proof of this crime. When Gorski took the stand he was familiar with the case against him and had a reason for everything in the victim’s apartment; his glasses - well he always took them off when he sat down, the cigarette butts - well he had asked for an ashtray but she had none so he put them in some top and they must have been dumped, the victim’s DNA on one of the cigarette butts - this non-smoking victim took it from him as she had done this his bottle of alcohol. Gorski even attempted to counter the deceased’s daughter’s testimony that

her mother did not smoke, stating that he too thought that she was not a smoker because she was not as comfortable with the cigarette she took and smoked. This gave a reason for why an obvious non-smoker would even take his cigarette in the first place. Apparently “it just happened” which allowed for, explained why, the DNA from Gorski and the victim on the same item. Gorski had no, nor was there, a reasonable explanation for the number of cigarettes found if he was there for only twenty minutes before his fled in disgust from an apartment that he said appeared to be occupied by a hoarder and which smelled bad.

Obviously, the jury did not buy Gorski’s story, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Credibility determinations are for the trier of fact and are not subject to review.

The facts presented to the jury were without a doubt sufficient to meet the test set forth in, State v. Bucknell, 183 P.3d 1078, 1080 (WA 2008);

In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence,

and one type is no more valuable than the other. State v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). (Emphasis mine.)

The Court of Appeals applied the correct standards when it reviewed this case. None of the rulings by that court conflict with the edicts of either constitution as Gorski claims. The Court of Appeals review determined that the trial court had properly evaluated the evidence and the jury correctly found him guilty as charged.

The court of appeals decision does not need to be reviewed by this court under any portion of RAP 13.4. The court was emphatic in its ruling that there was sufficient evidence to convict both Gorski and Brugnone, the co-defendant.

This court should not accept review of this case. The actions of the trial court concerning Mr. Toney's testimony were correct and as importantly even if there was an error the remaining "untainted" evidence overwhelmingly supported the conviction of this defendant. Gorski has not demonstrated that the rulings of the Court of Appeals satisfies any portion of RAP 13.4.

### **C. Legal financial obligations.**

Generally, an appellate court in this state will not consider a matter raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 826, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue, then the defendant bears the burden to show the error was manifest. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is “manifest” if the defendant shows that he was actually prejudiced by it. State v. Kirkman, 159 Wn.2d 918, 926-7, 155 P.3d 125 (2007). Here, the error is not manifest because Gorski was not actually prejudiced when the fee was imposed.

The courts of appeal in this state, post State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), have steadfastly reviewed each case and made determinations regarding review on an individualized basis. Numerous cases from all three divisions of the Court of Appeals have both reversed and remanded cases, many have denied review and there have been numerous other methods used by these courts to address this issue.

In this instance the court after a complete review of the record determined to exercise its discretion;

In these circumstances, where there is no more than \$250 that possibly may be at issue, and where Mr. Gorski did not claim indigency until after sentencing, we exercise the discretion granted us under *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015), and decline to consider this claim initially on appeal.

See, *State v. Clark*, 195 Wn. App. 868, 873-77, 381 P.3d 198 (2016) (holding that RAP 2.5(a)(2) does not require appellate courts to consider unpreserved LFO challenges).

Courts have held that statutes imposing mandatory financial obligations are not unconstitutional on their face. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (crime victims penalty assessment); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (crime victims penalty assessment, DNA collection fee); *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (2013) (restitution, crime victims penalty assessment, DNA collection fee). Constitutional principles are only implicated if the State seeks to enforce the debt at a time when the defendant through no fault of his own is unable to comply. *Curry*, 118 Wn.2d at 917.

Yakima County has had to litigate innumerable cases where this “error” was alleged. In most of the cases where there was an issue that could result in the matter being remanded or cases where remand has been ordered this county has determined that it is far more cost effective to just



file an agreed ex parte order eliminating the questioned costs. This eliminates the substantial cost involved in transporting a defendant from prison, appointing new counsel, often for both sides, conducting court hearings and being subject to the probability the “resentencing” will be appealed due to the fact that it is an appealable event.

Therefore, with regard to the obligations that were imposed for incarceration and medical expenses, the State has contacted counsel for Gorski and the State has offered to amend the Judgment and Sentence to strike both those costs as well as the \$250.00 jury demand fee. This offer would necessitate only an ex parte order signed and filed in the Superior court, no action would be required of this court.

The State still stands behind the legal analysis of the Court of Appeals and its discretionary ruling in this case. However, the proffered action would negate this issue thereby rendering it moot.

#### **D. CONCLUSION**

The Court of Appeals properly analyzed the facts that were presented to that court pertaining to Gorski as well as his co-defendant Brugnone’s involvement in this homicide. Based on the information before the Court of Appeals a ruling was issued that does was such that there is no basis under RAP 13.4 for further review by this court. Nothing that Petitioner has presented this court comports with any section of RAP

13.4, this court should deny review of the decision of the Court of Appeals.

Respectfully submitted this 26<sup>th</sup> day of December 2016,

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# Appendix A

On July 11, 2011, Gorski and Brugnone were charged with one count of second-degree murder, acting as a principal or an accomplice in the 1997 murder of Carolyn Clift. CP 1. The two defendants were joined at the time of charging. The defendants made separate motions to sever all such motions were denied. 8/10/12 RP 56–69; 10/29/12 RP 103–127; 11/2/12 RP 128. Gorski’s case was tried to a jury and Mr. Brugnone’s waived his case was simultaneously tried to the court. 1/17/13 RP 165.

When arrested on July 13, 2011 Brugnone gave an extensive statement to the police when he was questioned. The interview was recorded with both an audio/video as well as another digital recording was made at the time of the interview. (RP 1/24/13 200-1, 203-4, 212, 221, 247, 2/6/13 1500-6) A final “clean” copy of this was admitted for the court review. The court had previously heard and seen then entire audio/video recording and the parties agreed that during the trial the court would take notice of the previous presentation and that a complete copy of the transcript of the interview would be placed into the record for the courts consideration when determining Brugnone’s guilt or innocence. (2/6/13 RP 1500-06)

Brugnone initially told the police that he had not been to the victim's home but by the end of the approximately four hour interview he admitted that he and Gorski had been to the victim's home on the night of the murder and that he had witnesses Gorski stab the victim. He further admitted that he had left the apartment and gone to his truck after telling the victim "Mike will take care of you." As the interview progressed he admitted to having had sex with victim on one prior occasion and that Gorski he believed had had sex with the victim on two prior occasions. (Ex. 129)

The court and the parties had initially agreed that there would be a redacted version of Brugnone's statement admitted at the joint trial but eventually after a final motion by both defendants' the court agreed to leave the trial joined but would bifurcate portion of the trial where State presented of the statement made by Brugnone. 8/10/12 RP 56-69; 10/29/12 RP 124; 11/2/12 RP 132-33; 1/24/13 RP 184-86; 1/25/13 RP 264-66, 272-74, 282; 2/4/13 RP 1065, 1133-39; 1141-42; 2/5/13 1265-74, 1281-1304; 2/6/13 RP 1485-86. This bifurcation resulted in only the court hearing testimony about Mr. Brugnone's statement to police. 2/6/13 RP 1489-1522; 2/11/13 RP 1828-1923.

Testimony.

At 11:19 pm on August 28, 1997, a resident of the Selah

Square Apartments called police to say she heard a scream and thought it was her neighbor, Carolyn Clift. Ms. Clift was known to local police officers; they had previously received calls about her and considered her “a little mentally challenged.” 1/29/13 RP 438–40, 448–50.

Responding officers arrived within minutes and entered the apartment. 1/29/13 RP 443, 450, 468–69. They found Ms. Clift lying dead on the floor. 1/29/13 RP 443–44, 453, 481.

Dr. Selove performed the autopsy on the victim. He determined that the victim had four stab wounds that entered her body through three wound entrances; one at the lower region of the left ribcage, another on the lower left chest, and one between her shoulder blades that had two wound paths inside her body that came through the same stab wound. 1/30/13 RP 590. Dr. Selove testified that this wound would have caused paralysis and that the victim would not have been able to stand after having received that wound, that the victim would no longer have any motion or movement from her hips, her pelvis, her legs. She’s paralyzed at that moment. 1/30/13 RP 603, 676 The wound to the back was unusual, requiring “a tremendous amount of force” to cut through the vertebrae. The doctor, a forensic pathologist, testified that he had never seen a wound like this that had gone through the bone. He stated that it would take the most force, he

stated the knife may have been pounded into the back to penetrate as far as it did. 1/30/13 RP 585, 591–94. During the autopsy he indicated that something may have been used to force the knife into the vertebrae. 1/30/13 RP 661 He testified that something like a hammer may have been used and the hammer found in the apartment kitchen was of appropriate size, weight and mass to cause such a deep wound. 1/30/13 RP 660–62. He also described defensive cut wounds on the left hand and minor bruising on her face, neck, and elbow. 1/30/13 RP 606-07. Dr. Selove testified that the lividity that he observed in a photograph that he was shown and asked to presume that the picture was taken at 2:00 a.m. that what he observed would indicate that he could “give an approximate opinion about the minimum amount of time that has passed since death before the photo (was) taken. ...that death was not five minutes or probably not one hour ago but was probably a couple of hours ago or longer.” 1/30/13 RP 647-8 The pathologist estimated the time of death was probably 11:00 pm or earlier. 1/30/13 RP 647–648.

As part of the investigation officers interviewed neighbors in the apartment complex. One of those was Ms. Carolee Appleton who in her initial statement said she did not see anyone going in or out of the apartment on the night of the homicide. 2/1/13 RP 948, 972–733.

During a later interview in September of 1998 Ms. Appleton told an officer that a month prior to the homicide she had seen two “kids” arrive in a blue pickup truck. 2/1/13 RP 954-57, 961-62, 981–82, 988, 994, 996, 1003, 1006, 1008. At that time Mr. Brugnone owned and drove an older blue Ford pickup truck that had a loud exhaust. State Ex’s. 43, 112, 113, 126, 2/4/13 RP 1152-4, 1162; 2/6/13 RP 1311-13, 1316, 02/07/13 RP 1551 Codefendant Gorski on cross-examination agreed that Brugnone had a blue truck at the time but claimed that it never ran. 2/7/13 1640

Ms. Appleton testified that one of the occupants, the passenger, got out of the blue truck with the “souped up engine” and after approaching the victim who was with Ms. Appleton outside at a table, went into Ms. Clift’s apartment. 2/1/13 RP 982. She testified that the one who had gone to the victim’s apartment had a tall bottle of booze with a bag wrapped around it. 2/1/13 RP 952-3

On cross examination counsel for Gorski elicited testimony from this witness that she had actually seen the two men on three separate occasions. Twice before the murder and on the day of the murder. 2/1/13 RP 977-8 She once again confirmed that she had seen these two men come to the apartments in newer large blue pickup. 2/1/13 RP 981-2 And on cross-examination for Brugnone’s lawyer



this witness stated “He was yelling at the other guy, get that started. We've got to get out of here. He said, what did you do? Something like that, in that order.” 2/1/13 RP 1013

On redirect it was brought out that in a statement made shortly after the murder Ms. Appleton had stated to an officer that the voice on the night of the homicide was the same as a voice she has heard previously and that she had overheard the two men say something like “did you do it” and the response was “yeah, let’s get out of here.” 2/1/13 RP 1010-11

On September 17, 1998, Ms. Appleton gave a third statement. 2/1/13 RP 987. She again reported that she did not see anyone on the night of the homicide, and again, that she had seen a person three weeks prior to the murder: a man driving a blue pickup truck dropped his friend off at the apartment. 2/1/13 RP 987–88. She described the individual who entered the apartment at that time as late 20s to 30 years old, with a butch type haircut. 2/1/13 RP 990, 1035. When he was leaving, she heard him say to the driver of the truck, “C’mon let’s get out of here.” 2/7/13 RP 1562. She believed she heard the same male voice on the night of the homicide. 2/1/13 RP 992, 1035. She further testified that on the afternoon of the homicide, between 5:30 and 6:30 pm, she sat with Ms. Clift and another tenant at a picnic

table. 2/1/13 RP 951.

Additionally, Ms. Appleton testified that on that same day, she heard the sound of someone running and she thought she heard a man knock lightly on Ms. Clift's door between 1:30 and 2:30 am; he did not enter the apartment. 2/1/13 RP 961-3; 997. She heard him say, "It's taking too long. Come on. Hurry." 2/1/13 RP 962-63. She described him as "the buddy...he owned the truck." The owner of the truck ran back to his truck, the same blue truck as earlier. 2/1/13 961-2 After the owner of the truck went back to his truck, Lila went to the victim's apartment door and she yelled Carol, Carolyn. Do you need help? I can hear you screaming." Then Lila walked away. 2/1/13 964 The next thing that Ms. Appleton saw was the other man came running out of the apartment with a towel shielding his face. She testified that it was the same person who had gone up to the victim's apartment earlier. He was wearing the same jeans, and shirt. 2/1/13 RP 964, 998. She testified that he was running that he was in a hurry and he was yelling to the kid in the truck get it started get it started. 2/1/13 964-5

Virginia Maxine Jones testified that her neighbor Lila Powell called her about 9:30 pm saying she heard screams from the victim's apartment. 1/31/13 856-8 Ms. Jones went to the victim's apartment

and called out for her. When she did not get an answer, the two went into Ms. Powell's apartment. 1/31/13 RP 846-9, 848, 855-56, 867. Ms. Jones saw a man run by the door, with his head down, and something shielding his face. He was wearing an unbuttoned shirt, blue jeans, and was between 5'10" and 6' tall. 1/31/13 RP 849-51. He ran into Ms. Clift's apartment, turned around, and went back out. 1/31/13 RP 861-62. She testified that "he went right by the door, run into Carolyn's (victim) apartment, turn around and come right back out." 1/31/12 RP 850, 861-3) She testified that he ran around the building and then she heard the sound of a motor starting 1/31/13 RP 851, 863-4 She testified that this person was 5'10" to 6" and was wearing blue jeans 1/31/13 RP 852, 860-2 She testified she heard the motor of a car start. She saw a car, not a truck. She speculated there was another person in the car, but never saw anyone. 1/31/13 RP 863-64, 876-7

Investigating officers collected a variety of items from inside Ms. Clift's apartment, including Marlboro cigarette butts that were located inside near the front door and a pair of eyeglasses that were under a remote control found in the living room. 1/29/13 RP 566-67. Officers did not recover a knife.

Officers contacted Mr. Gorski on September 2, 1997, and on September 4, 1997, he gave a taped interview. He also gave an un-

taped interview on September 17, 1997. 1/31/13 RP 725–26. Mr. Gorski told police he had been at his former girlfriend Meghan Nunley’s home until 10:30 or 11:00 pm the evening in question and then went home. At the time, he lived with Mr. Brugnone and Mr. Brugnone’s wife. 1/30/13 RP 728–31; 1/31/13 RP 730; 2/1/13 RP 924.

On the evening of the murder, between 5:00 and 6:00 pm, Ms. Clift had gone to the local liquor store and purchased a bottle of whiskey. 1/30/13 RP 688, 690. She told the clerk she was excited because a boyfriend who had been in military was coming over for dinner. 1/30/13 RP 689, 701. Gorski entered and made a purchase. 1/30/13 RP 690–91. Ms. Clift and Mr. Gorski did not acknowledge one another in the store, but after they left, the clerk saw Ms. Clift talking to Mr. Gorski near his car. Although the clerk did not see the victim enter Gorski’s car the victim was no visible after that car left the parking lot. 1/30/13 RP 692–94.

Meghan Nunley, a former girlfriend of Mr. Gorski, testified she saw Gorski the afternoon of the murder at the Wagon Wheel. 2/1/13 RP 923–24, 928. She knew the victim and both of the defendant’s. 2/1/13 RP 923-4 She had known the defendants for between fifteen and twenty years and that she had dated Gorski. 2/1/13 RP 922-4 She testified that she knew that the victim as well as defendants Gorski and

Brugnone went to the Wagon Wheel 2/1/13 RP 922, 924-5 She testified that she and Gorski lived with Brugnone. 2/1/13 RP 924 She testified that there were times when Gorski and Brugnone would call the victim “the crazy lady.” 2/1/13 RP 925-6 She testified that she “vaguely” remembered that Brugnone had asked her for an alibi and that she had refused to give him one. 2/1/13 RP 828 She testified that Gorski had a hairy chest and that he smoked Marlboro cigarettes and that he drank gin. 2/1/13 RP 927 She testified that she has seen Gorski on the date of the murder and that she had invited him to her home. She stated that he eventually came over to her home but it was much later in the evening and later than she had expected. She stated that they had consumed some gin and that Gorski only stayed for 30 to 45 minutes. 2/1/13 RP 928-31 She testified that he left at 10:00 p.m. 2/1/13 RP 931

On cross-examination she testified that Brugnone and Gorski were friends and that they hung out together. (RP 935) During this portion of her testimony Gorski’s attorney elicited testimony Gorski had told her that the reason that he was late to her home was because he had met a lady at the liquor store and given her a ride home. 2/1/13 RP 941 She once again stated that Gorski had left about 10:00 to 10:30 p.m. She also once again confirmed that she had been asked by

Brugnone for an alibi, she could not remember any details about that the alibi that Brugnone had asked her for. 2/1/13 RP 944

Cecil Toney learned of the murder two days after it occurred. 1/31/13 RP 773–74, 777–79, 806; 2/1/13 RP 927–28. Mr. Toney read an article in the local paper indicating that the murder had not been solve, this was ten years after the 1997 murder, Toney gave information to police regarding the unsolved homicide.

The existence of this article was confirmed by Office Gray. 02/6/13 1326-7.

In his 2007 and 2011 interviews, Toney reported that while taking a friend to the Selah Square Apartments the night before the murder, he saw Gorski and Brugnone duck down as his headlights shone on them as they stood in the parking lot between two cars. 1/31/13 RP 782–83, 800; 2/6/13 RP 1326. He testified that he made a statement to his passenger “what are those two idiots doing?” 1/31/13 RP 782, 798-9, 800-2 Toney testified that he observed Brugnone and Gorski for half a minute. 1/13/31 RP 804-5 He testified that he found the fact that the two defendants ducked down between the cars suspicious. 1/31/13 RP 805-7, 815-6 Upon further questioning Toney stated that the period of time he observed the two defendants was between 11:00 PM and midnight. 1/13/31 RP 836

Mr. Toney testified during his live testimony that his sighting of Mr. Gorski and Mr. Brugnone in the parking lot occurred on the night of the murder rather than the night before as he had earlier told police. 1/31/13 RP 800, 840–41. He stated he told police he saw them between 12:00 and 12:30 am and the transcript of his interview verifies this. 1/31/13 RP 791, 843. On cross-examination, Toney changed his earlier testimony that he saw them between 11:00 pm and midnight, and testified he actually saw them between 12:00 and 12:30 am. 1/31/13 RP 780, 800.

Defense counsel objected to the State's proposal to have the witness review a police summary of his February 22, 2007, interview with Detective Chris Gray and then be re-questioned about the timeframe. 1/31/13 RP 816– 24. The trial court heard argument while the jury was out regarding whether Mr. Toney could be allowed to review the report generated by Det. Gray. The State acknowledged and the court agreed Toney's testimony clearly gave the time as between 12:00 and 12:30 a.m. 1/31/13 RP 822. After review Mr. Toney acknowledged the summary indicated he'd told police the time frame had to be between 11:00 pm and midnight. 1/31/13 RP 834–43. On final cross-examination by counsel for Brugnone Mr. Toney is asked to review yet another written statement. Mr. Banda asks one

more time “you say again that you saw these two gentlemen between 12:00 and 12:30 is that true? Mr. Toney’s response is “Yes, between 12:00 and 12:30, I believe.” 1/31/13 RP 834.

Erica Graham, supervising forensic scientist with the DNA section with the Washington State Patrol crime laboratory located in Cheney, Washington. She tested two Marlboro cigarette butts. She had reference profiles for Carolyn Clift, Dennis Cayhill, Richard Embody, Taylor Dalton and Michael Gorski. 2/4/13 RP 1186 On one of the cigarette butts she found that the major contributor was Michael Gorski and the minor contributor was the victim Carolyn Clift. 2/4/13 RP 1185-6 “The statistical weight for the major component of item number one would be 1 in 2.3 quadrillion. So the estimated probability of selecting an unrelated individual at random from the U. S. population with that same profile would be 1 in 2.3 quadrillion.” Ms. Graham testified that “Dennis Cayhill, Richard Embody and Taylor Dalton were excluded as a source of this DNA profile.” 2/4/13 RP 1190 The same result was found for the second cigarette butt found inside the victims apartment. 2/4/13 RP 1191 Ms. Graham went back at a later date and using a more sensitive testing method was able to develop a profile off of the glasses that were found within the apartment of the victim. The profile “...from the eyeglasses matched



the previously developed DNA profile of Michael Gorski.” The profile was determined to be 1 in 4 trillion. 2/4/13RP 1195-6 Frank Brugnone, Dennis Cayhill, Richard Embody, Taylor Dalton were all excluded as contributors to that profile. 2/4/13 RP 1196 Next Ms. Graham testified that she retested material that was found underneath the fingernails of the victim with a different method of DNA testing. She testified “I was able to develop a profile from the other left-hand fingernail sample. I compared that to the other YSTR profiles I developed from the reference. It matched the YSTR profile of Michael Gorski.” 2/4/13 RP 1202 “So the profile that was developed from the left fingernails had been observed twice in the database. That converts into a frequency of approximately 1 in 1300 male individuals in the U. S. population.” 2/4/13(RP 1203, 1227 The new testing exclude all other individuals whose samples had been submitted to the lab. The same testing was done on the material from under the victim’s right fingernails and that resulted in “...the YSTR profile I developed from the right-hand fingernails was a mixture. It had a major component on it. That major component matched the YSTR profile I developed for Michael Gorski.” The same statistical result was found 2/4/13RP 1204, The hammer found in the dish rack was also tested but contained only trace amounts of DNA, which were not matched to

anyone. 2/4/13 RP 1192–93.

James Lamson testified that he was at the Wagon Wheel and saw both the victim and the defendant there on the day of the homicide. 1/31/13 RP 887-9, 892-4 He stated that he and his wife left at midnight and that both the victim and Brugnone were gone before he and his wife left. He testified that he observed the victim leave by herself. 1/31/13 RP 889, 894

Wade Richard Franklin Kennedy testified he knew both defendants as well as being acquainted with that victim. 1/31/13 RP 989 Mr. Kennedy has observed the defendants at the Pastime Tavern once or twice a week and he had seen the victim at this same tavern occasionally. 1/31/13 RP 900-1 Mr. Kennedy later ran into the two defendant's at another tavern and approached them asking "listen; there's been a murder in Selah. Where in the hell have you two been?" 1/31/13 RP 902 Mr. Kennedy identified both defendants in the courtroom. 1/31/13 RP 902 Brugnone's response to that comment was "You should not have said that." 1/31/13 RP 909 Mr. Kennedy later explained that he meant it in jest but it was apparent to him that Brugnone was upset by the statement. Mr. Kennedy apologized to Brugnone about upsetting him stating "I'm sorry Mike. Were you close with the lady?" To which Brugnone stated "I don't give a fuck

about her.” Brugnone had gotten up suddenly from the table after the statement was made. 1/31/13 RP 910-11 It was also Mr. Kennedy’s opinion that the victim “she was a vulnerable women.(sic)”

Det. Brumley testified that during the interview with Gorski at the Whatcom County Sheriff’s Office, Gorski denied knowing the victim. (2/6/13 RP 1424) The detective also observed from two pictures of Gorski that he had changed his eye glasses. The Detective then went back to the evidence list from the victim’s apartment from the date of the murder and found that there had been a pair of eyeglasses that were seized. (2/6/13 RP 1428) When compared the glasses that were depicted in a Department of Licensing photograph from 1998, exhibit 46, it appeared that the glasses were seized where the same as those taken into evidence from the crime scene. (2/6/13 RP 1428)

Det. Brumley also obtained automobile titles from the Department of Licensing that indicated that Brugnone was the owner of a “76 Ford pickup” (2/6/13 RP 1433-4)

(The entire transcripts of Brugnone’s statements are contained in State’s exhibit 129 as well as Brugnone CP 21-57, Gorski CP 35-72)

On July 13, 2011, officers placed Mr. Brugnone under arrest.

(2/6/13 RP 1491-92). Mr. Brugnone initially told officers he had no recollection of being at Ms. Clift's apartment in August 1997. (State Ex. 129 p. 4,14;25;35). He stated that he had been to Ms. Clift's apartment in July 1997, for a one-night stand with her. (State Ex. 129 p. 33). He believed that Mr. Gorski had had at least two sexual encounters with Ms. Clift. (State Ex. 129 p. 50). On the evening of the August 28,1997, he and Mr. Gorski had been drinking at the Wagon Wheel. Mr. Gorski and Ms. Clift danced. (2/1/13 RP 887-88). Ms. Clift left the tavern. Mr. Gorski asked him to take him to her home. (State Ex. 129 p. 68). When they arrived at the apartment, Ms. Clift greeted them with hugs. (State Ex. 129 p. 68). Gorski and Brugnone went into the apartment and Gorski and Ms. Clift were whispering and kissing and "doin it all while they were kissin there..." (State Ex. 129 p. 68, Gorski CP 32, 42). Mr. Gorski removed Ms. Clift's robe. (State Ex. 129 p.68, Gorski CP 32)

In Brugnone's initial statement he stated that about 15-20 minutes he went home. In the second full statement he did not state how long he was in the victim's apartment he states that all of a sudden things started to happen between Gorski and the victim and that Gorski was pushing and shoving Ms. Clift into Brugnone. (State Ex. 129 p. 68). Mr. Brugnone pushed her back and away from him.

(State Ex. 129 p. 68; 79).

He saw Mr. Gorski push, hit, or stab Ms. Clift in her back; he wasn't sure if he saw him use a rod or a knife, describing it as "a big, big long thing, long knife but I couldn't tell exactly what it looked like or what the handle looked like or anything, it was just a big long thing." (State Ex. 129 p.68-70, 87, Gorski CP 64). As Ms. Clift went to her knees, Brugnone tried to catch her, but she fell to the floor.

(State Ex. 129 p. 70, 82, Gorski CP 59). He got down on the floor to see if she was injured and saw blood. (State Ex. 129 p. 82-83, Gorski CP 59-60).

"I come over and ask her you alright, she's kinda, well now she's kinda screaming and groaning and I went asks are you alright. She says I don't know I think so. I said well, Mike will take care of you. I said I'm leaving." (State Ex. 129 p. 82). He also stated "...I looked around and I seen blood and I said well Mike will take care of you, I'm leavin....I'm thinkin oh shit I'm outta, I'm getting outta here Mike. I'm leavin and as I'm goin by here he's saying wait for me. I said well I 'm not waitin long, I'm getting outta here." (Gorski CP 60-1)

He told police that she grabbed him by his shoulder as he stood up. (State Ex. 129 p. 72). Frightened, Mr. Brugnone told Mr. Gorski he

was leaving, saying, "I said I'm outta here Mike you did this, you, I'm outta here." (State Ex. 129 p.71; 72; 74). He reported he "didn't know what he had done. I didn't know if he killed her or what you know at that time. I know he'd hurt her." (State Ex. 129 p. 74). Brugnone stated to Gorski "I'm leavin, I don't know what's going on Mike, I said you take care of this." (CP 40-1)

Mr. Brugnone did not see Mr. Gorski stab her a second time, however, as he was leaving, he thought he saw Mr. Gorski move toward her and do something to her side. (State Ex.129 p.70, 72, 83, and 98). He never saw a hammer. (State Ex.129 p. 94). He did agree that based on the statement of Gorski that he had stabbed the victim more than one time. (Gorski CP 49)

Brugnone left the apartment and sat in his car waiting Gorski. (State Ex. 129 p. 73-74). Gorski came out to the car, told Mr. Brugnone not to leave, and went back into the apartment. (State Ex.129 p. 75). Brugnone waited another four or five minutes Gorski returned and got into the truck and then he drove the two of them home. (State Ex.129 p. 76, Gorski CP 32). On the way home Brugnone says that there was discussion "Oh, ya, what'd I do, ah I stabbed her you know I don't' if I I hurt her or I don't know if I killed her, this stuff. I said I don't know how many times I stabbed her and

I'm not anything, I'm just listening cause I don't know that the hell they're going to do to me." (Gorski CP 63) Brugnone also stated that there was blood on both of Gorski's hands and that the washed it off when they returned home. (Gorski CP 65)

When asked about when Mr. Toney's headlights lit them up in the parking lot Brugnone stated "I don't know who it was comin around there but..." he was then asked if they ducked down as Mr. Toney had stated and his response was "I prob, I might have, ya. I probably did ya cause I was scared. I didn't... Ah, cause of what he'd done, I, I didn't know what he'd done. I didn't know if he killed her or what you know at that time. I know he'd hurt her." (Gorski CP 37)

Brugnone stated that "when it come out" that the victim was dead Gorski had told him that he had had killed her.

Gorski testified that as of August of 1997 he had not seen the victim before. RP 2/7/13 1584-5 On direct he confirmed that he drank gin and smoked Marlboro cigarettes. 2/7/13 RP 1589 He states that he went to the Wagon Wheel and ran into Megan Nunley Forenpohar the ex-wife of Mr. Toney and a woman whom Gorski had dated and lived with previously. He testified that he and Ms. Nunley agreed to go to her home and that was the reason that he had gone to the liquor store. 2/7/13 RP 1588-90, 1643-5 He stated that it was while he was

at the liquor store that he met the victim. 2/7/13 RP 1591-2, 1644-49  
He maintained that this was the first time he had met the victim.  
2/7/13 RP 1591 He testified that the victim asked him for a ride home  
and that he told her no, but the victim was very persistent and so he  
gave her a ride. 2/7/13 RP 1593-4, 1649 He testified that he was  
smoking and as he drove the victim grabbed the cigarette that he was  
smoking and asked if she could have it and because she already had  
the cigarette in his hand he let her have it. 2/7/13 RP 1595, 1649-52  
He testified that he did not just drop her off but actually went into her  
apartment. The main reason was that as the victim left the vehicle she  
reached back and took his bottle of gin and said let's go have a drink.  
RP 1595-6, 1653-5) He testified that he would take a few minutes and  
then "get the devil out of there." So he went into the victim's  
apartment. 2/7/13 RP 1596-98, 1655

Once he was inside the apartment he stated that it was a  
complete mess and in particular the kitchen "...there was stuff a foot,  
two feet tall over the counter and the dish rack, inside the sink." He  
also did not notice "the plate that apparently was a meal for  
somebody." Gorski was sure that that was not there. 2/7/13 RP 1602-3  
He testified that even though the victim had taken his cigarette he did  
not believe that the victim was a smoker. And that just by chance he



had set his cigarettes down. (It is noteworthy that Gorski said it was a hoarder's home and very messy and smelled bad and there were no clean glasses, and yet he basically in the next breath says that he sat down on the couch to have a drink and a cigarette. 2/7/13 RP 1659) He next took off his glasses they did not watch any TV and yet the glasses were found under the remote control. The then proceeded to either drink out of a glass or just straight from the bottle the he had purchased. 2/7/13 RP 1605-6 He testified that it was his routine to take his glasses off as he sat down and that he didn't have his glasses for a while because he had left them at the victim's apartment. 2/7/13 (RP 1663-4 After about twenty minutes the victim just starts kissing Gorski and they proceeded to mutually start to touch. Gorski testified that he stopped the victim but the next thing he knew she was "crawling, mauling, kissing, hugging, pulling" at him. He stated it was not mutual. 2/7/13 RP 1608, 1660 He testified that the victim unbuttoned his shirt and after a few minutes he grabbed his two bottles and just walked out. 2/7/13 RP 1608-9 He stated that he left at 7:30-40 p.m. 2/7/13 RP 1657

He testified that when he left there was no one who was angry and that he then went to Meghan's home. 2/7/13 RP 1611) He testified that he had been to the apartment complex about a year earlier

because he was dating a lady who lived there, this person had no name and had lived in the same section of the apartments as the victim.

2/7/13 RP 1611, 1652-3 He testified that he was at Meghan's place by about 8. 2/7/13 RP 1610 He stayed at Meghan's home until 10:00-10:30 and then went home to his and Brugnone's home. He testified that he was at Meghan's home from about 8:00 p.m. until 10:00-30. 2/7/13 RP 1610, 1613-14 Gorski did not even realize he had forgotten his glasses and did not ever go back for them. His testimony was the glasses were just "reading glasses." 2/7/13 RP 1615-16 He testified that at some time later he became aware that the Carol has been murdered. When he realized that the woman he has seen had been murdered his reaction was "wow" and that he would just stay out of the matter that would affect his job, family or anything. 2/7/13 (RP 1616-17 He was worried that his daughter would know that he had been "out "womanizing...out drinking." 2/7/13 RP 1619

When approached by Officer Garcia he only told the officer that he had taken the victim home. He did not tell the rest of what occurred that night; For fear of my wife, who works at the Yakima Herald, finding out, talking with my daughter and me not being allowed to see my daughter anymore. I didn't know where the other three kids were at. I'm selling furniture. If I get in the paper I'm going

to lose my job. I'm not going to have any contact with my daughter, and I'm going to be back at square one, no job, no daughter, living at Frank's.

Gorski admitted that when Officer Garcia pressed him on whether he had been in the victim's apartment he stuck with his lie because he felt that he was in a Catch 22 and that he should tell the truth but if he did he would be seen as a liar that he felt he "was locked into me having to stick with my lie..." When contacted again by the police Gorski determined it was best to stick with hi lie. 2/7/13 RP 1621-22

On cross examination the State elicited from Gorski that Brugnone owned a blue truck, Gorski stated that the truck had never run while he was living with Brugnone. He admitted that he frequented the Wagon Wheel but denied ever seeing the victim at that location. 2/7/13 RP 1641 He also expanded the time period that he could have been at the victim's apartment to as early as 4:00 p.m. 2/7/13 RP 1656 He also testified that he did not want to be there but "I was just in disgust at how dirty it was." But even though he was disgusted he did not leave and discussed having a drink. 2/7/13 RP 1659 When questioned about his cigarettes and the fact that he had stated to an officer that he purchased his cigarettes from the Little

Brown Smoke Shack, a tribal location. 2/7/13 RP 731, 1664-5, 1049-50

Regarding his knowledge of the murder of Carolyn Clift and his lies and failure to act he stated that he told Officer Garcia that he did not know the victim because he thought her name was Sharon, not Carolyn but conversation with the officer refreshed his recollection 2/7/13 RP 1668-9 He affirmed that once he told the initial lie about not going to the victim's apartment he stuck with that lie until the day he took the stand and testified. 2/7/13 RP 1669-70 He stated; I didn't feel like I was going to be a prime suspect. I felt by not saying I wasn't there, that I didn't go in the house with her that they can go ahead and catch who they needed to catch. Therefore, I wouldn't have problems with my daughter or my ex-wife at the Yakima Herald, and I didn't have to worry about losing my job. 2/7/13 RP 1672

DECLARATION OF SERVICE

I, David B. Trefry state that on December 26, 2016, I emailed a copy of the State's Answer, by agreement of the parties to Mrs. Susan Gasch at [gaschlaw@msn.com](mailto:gaschlaw@msn.com)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26<sup>th</sup> day of December, 2016 Spokane, Washington.

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