NO. 47726-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLABON BERNIARD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Larkin

No. 10-1-01904-1

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2010, the Pierce County Prosecuting Attorney (State) filed an Information charging the defendant, Clabon Berniard, with murder, robbery, assault and burglary arising from a home-invasion robbery in Edgewood, Washington. CP 1-3. The defendant was convicted.

He successfully appealed and the case was remanded for a new trial. *See* ***State v. Berniard***, 182 Wn. App. 106, 327 P. 3d 1290 (2014).

When the case was returned in 2015, the State charged the defendant with one count of murder in the first degree, two counts of robbery in the first degree, two counts of assault in the second degree, and one count of burglary in the first degree. CP 221-225. The State also alleged firearm enhancements and sentence aggravating factors of deliberate cruelty and degree of sophistication. *Id.* The case was assigned to Hon. Thomas Larkin for trial. 1 RP 3.

The defendant filed a motion to suppress evidence under CrR 3.6, challenging the search warrant. CP 96-111. He also moved to exclude in-court identification by voice or appearance. CP 80-95. The defendant moved to exclude a KOMO TV video interview of the Berniard family. 5 RP 87. The State filed a motion to admit statements of a co-conspirator (CP 112-116), which the defendant opposed. CP 186-190.

The court suppressed the phone records at issue. 8 RP 228. The State moved the court to reconsider its ruling regarding the phone records. 9 RP 250, 11 RP 640, CP 198-208. The court did reverse itself and found the phone records admissible. 11 RP 735.

After hearing all the evidence, the jury found the defendant guilty as charged. CP 291-296. The jury found firearm enhancements on all counts. CP 297-299, 306-308. The jury found that the defendant acted with deliberate cruelty on all counts but murder. CP 300-305. The jury

found that the crimes required planning or sophistication on all counts but Count III. *Id.*

The court sentenced the defendant to 1172 months in prison. CP 331. This included 312 months in firearm enhancements, and 312 months of exceptional sentence. *Id.*, CP 345. The defendant filed a timely notice of appeal. CP 351.

2. Facts

The general facts of this case will be familiar to the Court from the previous appeal. *See* ***Berniard***, 182 Wn. App. at 111-112.

On April 28, 2010, James and Charlene Sanders lived at their home in Edgewood, Washington with Mr. Sanders' fourteen-year-old son, J.S., and Mrs. Sanders' eleven-year-old son, C.K. 9 RP 417. Mr. and Mrs. Sanders had put a diamond ring of hers for sale on Craigslist. 9 RP 419. Mr. Sanders was expecting a woman to come look at the ring that night. 9 RP 421. The woman had called earlier to say that she was on her way. 9 RP 423. While Mr. and Mrs. Sanders waited for the potential buyer to show up, the family watched a movie in the upstairs family room. 9 RP 421. Mr. Sanders watched out the window. 9 RP 423. Approximately 9:00 p.m., Mr. Sanders saw a car arrive and went downstairs to greet the person. 9 RP 423.

Mr. Sanders called Mrs. Sanders downstairs because the persons who had arrived had a question about the ring. *Id.* When she got downstairs, Mrs. Sanders saw a man and a woman looking at the ring. 9

RP 425. The Asian- looking man and the Hispanic-looking woman were later identified as Yoshihiro Higashi and Amanda Knight. 12 RP 898, 900. Higashi asked Knight if she wanted the ring and she said yes. 9 RP 426. Higashi then pulled out a wad of cash and said, "How about this?" *Id.* He then said, "How about this?" and pulled out a gun. *Id.*

Both Mr. and Mrs. Sanders told them to take whatever they wanted and they kept repeating that to Higashi and Knight. 9 RP 427. Mrs. Sanders wanted the robbers to just take everything and go. *Id.* Instead, Higashi zip tied Mr. Sanders and Knight zip tied Mrs. Sanders. 9 RP 428. Their hands were tied behind their backs. 9 RP 428. While she was bound on the floor her wedding ring was ripped off of her hand. 12 RP 848. Mr. Sanders' wedding ring was also stolen. *Id.*

Mrs. Sanders saw other persons rush into the house at that time. 9 RP 430. Two masked men went upstairs to get the two boys. 9 RP 335, 11 RP 748. The two men had guns and told the boys to go downstairs. 9 RP 335, 11 RP 748, 749. The men had bandanas covering half of their faces. 9 RP 336, 11 RP 748,749. The two boys were brought to the kitchen and told to lay face down with their hands behind their backs. 9 RP 340, 11 RP 751.

One of the men who brought the boys downstairs demanded to know where the safe was. 12 RP 826. He screamed that the intruders were going to kill the parents and kill the boys. *Id.* The robber making the threats (later identified as the defendant 12 RP 831, 869) held a gun to the

back of Mrs. Sanders' head. 11 RP 754. He then threatened her and kicked her in the head. 9 RP 343, 11 RP 754. He told her that he was going to count down from 3, and pull the trigger if she did not tell him where the safe was. 9 RP 345.

Mrs. Sanders told them that the safe was located in the garage.12 RP 826. Mrs. Sanders then saw Higashi and another man pick up her husband and head toward the garage. 12 RP 833.

Mr. Sanders and J.S. began to fight the intruders. 9 RP 346, 11 RP 755, 757, 12 RP 834. Mr. Sanders began to punch the defendant. 11 RP 755. J.S. jumped on the defendant and tried to choke him. 11 RP 757. The defendant hit J.S. on the head with the gun multiple times. 11 RP 758, 834. Higashi and the defendant dragged Mr. Sanders into the living room. 11 RP 758. There, Mr. Sanders was shot 3-4 times. 11 RP 759.

The intruders then ran out of the house, jumped in a car and left. 9 RP 348, 11 RP 759, 12 RP 840. Mrs. Sanders ran to the phone and called 911. 12 RP 842.

Sherriff's deputies soon arrived. 9 RP 271, 321. They found Mr. Sanders on the floor. 9 RP 324. He had no pulse and was not breathing. *Id.* Medical aid arrived and determined that Mr. Sanders was dead. 9 RP 295.

C. ARGUMENT.

1. THE CELL TOWER RECORDS WERE ADMISSIBLE.

a. The Court of Appeals may affirm the trial court on any legal basis supported by the record.

A trial court may be affirmed where it makes the right decision for the wrong reason. An appellate court may affirm the decision of a lower court of a lower court on any legal basis supported by the record. *See* ***State v. Norlin***, 134 Wn. 2d 570, 582, 951 P. 2d 1131 (1998); ***Hoover v. Warner***, 189 Wn. App. 509, 526, 358 P. 3d 1174 (2015). Here, the trial court reversed its initial decision to suppress the cell tower data out of fairness to the State because the State or law enforcement could have filed a better-worded affidavit for search warrant after the case was remanded, but the data had been deleted by the phone company. 11 RP 702, 735.

The court's ruling was essentially a finding of "inevitable discovery" or the "good faith" exception to the warrant requirement. Inevitable discovery is an acceptable exception under federal law. *See* ***Nix v. Williams***, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). However, the concept of inevitable discovery is invalid in Washington. *See* ***State v. Winterstein***, 167 Wn. 2d 620, 635, 220P. 3d 1226 (2009). Likewise, "good faith" is an exception under federal law, but not

Washington law. *Cf.* ***United States v. Leon***, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), with ***State v. Afana***, 169 Wn.2d 169, 179–180, 233 P.3d 879 (2010).

b. Probable cause supported issuance of the search warrant.

"Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." ***State v. Maddox***, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. ***State v. Fisher***, 96 Wn.2d 962, 639 P.2d 743 (1982). The appellate court reviews a judge's determination that a warrant should issue for abuse of discretion. ***State v. Neth***, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing ***Maddox***, 152 Wn.2d at 509); ***State v. Cole***, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A trial court's legal conclusion as to whether an affidavit establishes probable cause is reviewed de novo. *See*, ***Neth***, *supra* ***In re Detention of Petersen***, 145 Wn.2d 789, 799, 42 P.3d 952 (2002).

When reviewing probable cause at either a suppression hearing or on appeal, both the trial and the appellate courts are limited to a review of the facts contained within the four corners of the search warrant declaration itself to support probable cause. ***Neth***, 165 Wn.2d at 182.

Great deference is afforded the issuing magistrate. ***Neth***, at 182 (citing ***State v. Young***, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)).The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. ***State v. Yokley***, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). Doubts are to be resolved in favor of the warrant. ***State v. Jackson***, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (quoting, with approval from ***United States v. Ventresca***, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965)).

In reviewing the four corners of the search warrant itself, probable cause to search is established if the affidavit in support of the warrant sets forth sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. ***State v. Maxwell***, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. ***State v. Cole***, 128 Wn.2d at 286.

Probable cause for a search warrant also requires two nexuses: first, a nexus between criminal activity and the item to be seized; and second, a nexus between the item to be seized and the place to be searched. ***State v. Thein***, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Where each nexus is established, the warrant is valid. *Id.*

Here, police requested a search warrant to obtain subscriber and account information, billing and payment information, secondary account holder and email address information, IP log information, all toll or calling records for the period 1 Jan 2010 to 6/30/2010, and tower information for the period of 4/25/10 to 5/01/10 for four phone numbers: T-Mobile phone 253-203-8579, T-Mobile phone 206-397-6360, Sprint Nextel phone 504-272-9688, and Sprint Nextel phone 253-376-2737. CP 103.

Prior to requesting the warrant, these four phone numbers had been identified as belonging to individuals associated with the murder and robbery investigated under Pierce County Sheriff's Department incident number 101181331 or as appearing in records relevant to the investigation. T-Mobile phone number 253-203-8579 was later associated with co-defendant Amanda Knight, and at the time of the warrant had been seen in records law enforcement personnel had examined pursuant to the investigation. 16 RP 1539. T-Mobile phone number 206-397-6360 was associated with co-defendant Kiyoshi Higashi. 16 RP 1540. Sprint Nextel

phone number 504-272-9688[1] was later associated with "Terry Brown" and defendant Clabon Berniard. The Sprint Nextel phone number 253-376-2737 was associated with the deceased victim. A phone associated with T-Mobile phone number 206-397-6360 was found in the car codefendants Knight, Higashi, and Reese were driving in prior to their arrest in Daly City, California. When these three suspects were arrested in California, they had their cell phones with them.

Information available to law enforcement prior to the execution of the search warrant indicated that the codefendants were communicating with each other by phone prior to and after the events that took place at approximately 9:20-9:30pm on April 28, 2010. CP 105, 106. The witnesses reported at least three people were involved. CP 105. Police later recovered three cell phones when Higashi, Knight and Reese were arrested in California. CP 106-107.

From the information provided in the affidavit, the issuing magistrate knew that crimes, a home-invasion robbery and murder, had been committed and that four persons were suspected of committing the crime. The magistrate knew that the persons used cell phones to communicate with each other and the victim. The magistrate also knew that three persons were arrested, with probable cause to believe that they were involved in the crimes. The magistrate knew that these persons had

[1] For brevity, this cell phone will be referred to as the "504 number" or phone.

four cell phones with them. The magistrate could conclude that these cell phones and associated phone company records contained information that police could use in connecting these suspects to the crime, and perhaps lead police to the identity and location of other suspects.

c. The defendant had no standing to challenge discovery of the phone or cell tower records.

Constitutional rights are personal rights. They may only be asserted by the person whose rights have been violated; they cannot be vicariously asserted. ***State v. Francisco***, 107 Wn. App. 247, 252, 26 P.3d 1008 (2001)(privacy rights under Article 1 §7). The same is true under the United States Constitution. *See* ***Wasson v. Sonoma Junior College***, 203 F. 3d 659 (9th Circ. 2000)(college instructor could not assert 1st Amendment protection regarding written materials where she denied writing them; although investigation by college showed that she did.) "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." ***Rakas v. Illinois***, 439 U.S. 128, 133, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); ***Brown v. U.S.***, 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(defendants had no standing to challenge faulty search warrant regarding separate co-conspirator's property where stolen goods were held); ***U.S. v. Nadler***, 698 F. 2d 995 (9th Circ. 1983)(co-defendants charged with counterfeiting had no standing to challenge search of printing shop where other co-defendants were printing counterfeit money).

To have standing, a defendant must demonstrate a personal privacy interest in the place or item searched. ***State v. Hinton***, 179 Wn. 2d 862, 878, 319 P. 3d 9 (2014). It is the defendant's burden to prove his standing to challenge a search. *See* ***State v. Evans***, 159 Wn.2d 402, 409, 150 P.3d 105 (2007)(where defendant denied ownership of a briefcase in his truck, but objected to police searching it).

In order to claim that a particular search violated one's rights, a person must have an expectation of privacy in the thing to be search. The defendant must show that (1) he or she had an actual (subjective) expectation of privacy by seeking to preserve something as private and (2) society recognizes that expectation as reasonable. ***Evans***, 159 Wn.2d at 409; *see, also* ***State v. Stone***, 56 Wn. App. 153, 157, 782 P.2d 1092 (1989). An individual must make the same showing under the 4th Amendment. *See* ***Smith v. Maryland***, 442 U.S. 735, 739, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); ***Katz v. United States***, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967)(Harlan, J., concurring).

In ***State v. Stone***, the defendant was a homeowner's guest. The court found that the defendant had no legitimate expectation of privacy in the homeowner's unpublished telephone listing, and therefore had no standing to assert that the search warrant issued to obtain the address corresponding to the telephone number violated his 4th Amendment rights. ***Stone***, 56 Wn. App. at 157.

If the defendant's evidence and the State's evidence leaves the court "unable to conclude" as to whether the defendant has a valid privacy interest in the place searched or the item seized, the Fourth Amendment analysis cannot proceed further and the defendant has not proven standing to challenge the search. ***State v. Picard***, 90 Wn. App. 890, 896-897, 954 P.2d 336 (1998).

Here, the defendant challenged a search warrant for the call records, subscriber information, and cell tower information related to several phone numbers. The defendant has no standing to challenge the search or examination of the cell phones, or the phone records, belonging to his codefendants. Also, the defendant did not demonstrate that he had a privacy or possessory interest in the phone number at issue, the 504 number.

The 504 number is associated with a temporary, disposable phone. 16 RP 1592, 1593. The defendant was not listed as the subscriber on the 504 phone. It was Terry Brown. Because it was a pre-paid phone, the phone records were in the possession of the phone company, not the defendant. Absent proof of ownership, the defendant himself would not be able to access the records. Given these circumstances, the defendant cannot demonstrate that he has a privacy interest in the records for the phone numbers and lacks standing to challenge the search. The defendant must carry his burden even if the State's theory is that this number is

associated with him. ***United States v. Singleton***, 987 F.2d 1444 (9th Cir. 1993).

At trial, the defendant cited ***State v. Hinton***, 179 Wn.2d 862, 319 P.3d 9 (2014) to argue that the defendant has standing to challenge the search at issue in this case. 7 RP 182. ***Hinton*** presented different facts and issues than the present case. There, police officers seized the phone of an arrestee and proceeded to open it and reply to incoming text messages from the defendant without obtaining consent or a warrant. *Id.*, at 865. The court found that the defendant had a privacy interest in the content of the text messages and therefore found the warrantless search unconstitutional. *Id.*, at 877.

In a similar case, ***State v. Roden***, 179 Wn. 2d 893, 321 P. 3d 1183 (2014), the police officer manipulated the defendant's phone in order to retrieve a text message. This was also an invasion of the defendant's private affairs. *Id.*, at 896.

In arguing that the defendant had standing to challenge the discovery of the cell tower records, defense counsel summarized the State's position that the defendant cannot challenge "his own phone records." 7 RP 179. He also argued that the defendant had a possessory interest in the phone. 7 RP 180. But, the defendant never claimed ownership or even possession of the 504 phone. As pointed out above, he himself would not be able to access the records. The defendant did not testify at the suppression hearing, nor did he submit a sworn statement

claiming the 504 phone was his. He never admitted that he was "Terry Brown." The State connected the defendant with the phone after the search warrant, based in part on the call records and statements of the co-defendants.

Unlike opened or unopened text-messages, such as in ***Hinton*** and ***Roden***, that can be analogized to letters or other private correspondence, the defendant in this case did not show he had a privacy interest in a list of calls and locations associated with a temporary phone with an unknown subscriber. Other evidence that links the defendant to the use of this phone number and temporary phone does not establish standing to challenge the search of these records.

U.S. v. Skinner, 690 F. 3d 772 (6th Cir. 2012) presents issues very similar to the present case. Skinner was part of a drug trafficking ring transporting drugs and money between Mexico and Tennessee. *Id.*, at 776. The ring used "pay as you go" phones to communicate, and to try to avoid detection. Through the investigation, federal agents discovered a cell phone number associated with a person transporting the money and drugs. 690 F. 3d 776. That person turned out to be Skinner. *Id.* The agent tracked Skinner by constantly "pinging" his phone on mapped cell towers. *Id.* The trial court ruled that Skinner lacked standing to assert a Fourth Amendment protected interest because the cell phone was not subscribed to him and was used as part of a criminal scheme. The magistrate judge further opined that because the cell phone was utilized on public

thoroughfares and was "bought by a drug supplier and provided to ... Skinner as part and parcel of his drug trafficking enterprise," Skinner did not have a legitimate expectation of privacy in the phone. *Id.*

The Court of Appeals held that:

> ...Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone. If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools.

690 F. 3d at 777.

In the present case, as in ***Skinner***, both the defendant and Amanda Knight used Tracfones, which are prepaid cell phones. This type of cell phone does not require the user's name or address because there is no billing. 16 RP 1593, 17 RP 1711. The phone and service are paid for in advance. The phone later connected with the defendant was listed as purchased by "Terry Brown", with no address. 16 RP 1593-1594. The phone used to contact the Sanders' was also a Tracfone. 17 RP 1749-1752. It had no name or identifying information. It was solely used to contact the victim. It is likely that the defendant and Knight used these phones to avoid being traced or identified. Knight had her own personal phone, but it was not used during the crime. 16 RP 1540.

Also, as in ***Skinner***, here the phone records for the 504 phone only reported the locations and times that the anonymous phones activated cell

towers. The telephone company information did not report content, or even identify the users. As pointed out in ***United States v. Jones***, - U.S.-, 132 S. Ct. 945, 963, 181 L. Ed. 2d 911 (2012) (Alito, J., concurring), the user of such a device must accept that the device emits a signal in open air in order to function. As in ***United States v. Knotts***, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983), ***Jones***, and ***Skinner***, even if the police knew that the phone belonged to the defendant, the cell tower information obtained provided no more of the defendant's movements than could have been observed by any member of the public.

Unlike ***Skinner***, the cell towers in the present case were not used to "follow" the defendant in real time. The cell phone tower information was used by investigators after the crimes had been committed, trying to learn who committed the crimes, when, and what direction the suspects came from.

The use of an anonymous cell phone can be analogized to anonymously sending a prepaid letter or package through the mail or a package service. While there would certainly be an expectation of privacy in the contents of the item, the sender would have no expectation of privacy in the label information or the present location of the item. Once the "communication" enters the system of transit open to the eyes of the carrier, the sender has no expectation of privacy of what route it takes or who sees it as it is passed along. The carrier might track the package or

letter for some reason, such as an audit or efficiency study, without the sender's permission or knowledge.

The user of an anonymous prepaid cell phone has even less expectation of privacy. Those signals are going through the air, activating or reflecting off of an antenna. 17 RP 1700-1702.

Modern cell phone transmissions and their paths of "delivery" are different than a land line, which used to be the most common means of telephone communication. In ***Smith v. Maryland***, 442 U.S. 735, *supra*, federal agents attached a pen register, a device recording the calls sent and received by the defendant's telephone. The United States Supreme Court held that the defendant had no expectation of privacy in telephone company records.

The Washington Supreme Court came to a different conclusion, based upon independent State constitutional grounds, in ***State v. Gunwall***, 106 Wn. 2d 54, 69-70, 720 P. 2d 808 (1986). The Court held that the defendant's telephone records of tolls and long-distance calls were part of his "private affairs" protected under Article 1, § 7. In ***Hinton*** and ***Roden***, the Washington Supreme Court held that the content of text messages were also protected under Article 1, § 7. In ***Hinton***, a police officer read a message that appeared on a person's cell phone while the officer was by that phone. In ***Roden***, the police officer manipulated the defendant's phone in order to retrieve a text message. All of the above cases deal with content or information stored regarding a known subscriber.

Federal courts have decided a number of cases involving the expectation of privacy not in content, but the capture of signals emitted by a device. In ***United States v. Pineda-Moreno***, 591 F. 3d 1212 (9th Circ. 2010)(vacated and remanded for further consideration in light of ***Jones***, *infra,* 132 S. Ct. 1533), law enforcement officers came onto the defendant's property and placed a GPS[2] tracking device on his car. However, under similar circumstances in ***United States v. Jones***, - U.S.-, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), the Supreme Court held that placement of such a device violated the 4th Amendment, not because of the tracking device itself, but because the officers entered the defendant's property in order to place the device. ***Jones*** is an interesting contrast to ***United States v. Knotts***, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983). There, the Supreme Court held that the tracking device essentially "augmented" the observations police could make on public roads physically following the car. *Id.*, at 282.

In ***Knotts***, the government did not intrude on the driver's or the defendant's privacy or private affairs because the defendant bought the drum as a "package" which included the tracking device. In the present case, the police did not intrude into the functioning or content of the device. The device itself functions in a way that can be tracked like

[2] Global Positioning Satellite.

footprints or tire tracks. The police can "follow" it, but do not know whose footprints or what car it is.

The same may be said of the present case. The electronic signals emitted from the cell phone augment or replace what police or members of the public could observe as the phone or the defendant travelled public roads. Police did not know who owned or possessed the 504 phone. The search warrant permitted them to follow the cell phone "foot prints" or "tire tracks" to the person possessing the phone.

In their concurring opinions in ***Jones***, Justices Alito and Sotamayor point out evolving issues regarding the expectation of privacy in the modern world of GPS and cell phones. Justice Alito points out that surveillance cameras have become "ubiquitous" in modern society; and that transponders can track a vehicle's movement on toll roads. 132 S. Ct. at 963. He recognizes that many people purchase vehicles that have GPS locating devices built in so that the driver may summon roadside assistance; that millions of people now own "smart phones" which have built-in GPS location and tracking of the bearer. *Id.*

Justice Sotomayor recognized that in today's "digital age", "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." 132 S. Ct. at 957. "People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and

medications they purchase to online retailers." *Id.* She points out that in terms of privacy from the government, all this is not necessarily a good thing. But that the Court has yet to extend the 4th amendment to such activity: "whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy." *Id.*

Here, anonymous cell phones were used, as in ***Skinner***, to shield the users from detection, and to provide plausible deniability. This Court should join the ***Skinner*** court in rejecting a claim of privacy in these circumstances. While such defendants may hope for, or even expect privacy by using such means, that expectation is not one which society does or should recognize as reasonable. The courts should not condone this modern means of criminals covering their "tracks".

d. <u>If error to admit the phone records, it was harmless.</u>

If the court erred in admitting the defendant's phone records, it would be an error of constitutional magnitude because it involves Article 1 §1. *See* ***State v. Keodara***, 191 Wn. App. 305 317, 364 P. 3d 777 (2015). An error of constitutional magnitude can be harmless if the State can show beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *Id.*

Here, the defendant's phone records were used as circumstantial evidence that the defendant was present during the crimes. But this was

not the only evidence that proved that he was a participant. Besides the phone records, Mrs. Sanders identified the defendant as one of the home invaders. 12 RP 831-832. The defendant's sister, Lacy, told a KOMO TV reporter that the defendant had admitted his involvement to family members. Exh. 286. She testified that the defendant confessed that he committed a crime where he "brought some kids downstairs". 15 RP 1462-1463, 1465. JS, one of the victims, described the larger of the masked robbers. 11 RP 749-750, 757-758. Although JS could not identify the defendant, that description matched the defendant. This evidence shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.

2. HIGASHI'S STATEMENT TO JENNA FORD WAS ADMISSIBLE.

a. Statement of a co-conspirator.

Under Rule 801(d)(2)(v), a statement is not hearsay if it is offered against a party and is a statement made by a "co-conspirator of a party during the course and in furtherance of the conspiracy." The State must show that (1) a conspiracy existed, (2) that the coconspirator and the defendant against whom the statement is to be offered were members of the conspiracy, and (3) that the statement was made during the course of and in furtherance of the conspiracy. *See, e.g.* ***State v. Guloy***, 104 Wn.2d 412, 705 P.2d 1182 (1985).

Higashi's statement was made during the conspiracy. The mission and purpose of the conspiracy was to rob the victims, steal their property, and divide the loot. 13 RP 1039. At the time Higashi made his statements to Jenna Ford, the parties had not divided or sold the items taken in the home invasion. Also, Higashi, Knight, and Reese went to Ford for help evading detection and in fleeing the area.

In ***State v. Sanchez-Guillen***, 135 Wn. App. 636, 145 P. 3d 406 (2006), the defendant killed a Chelan County sheriff's deputy. He fled to Ms. Belen–Guillen, his mother. He confessed to her. Later that evening, the defendant and his mother, visited Concepciòn Hernandez Refugio, a family friend. Sanchez–Guillen asked him for help fleeing the area. Ms. Belen–Guillen told Mr. Hernandez Refugio that her son shot the deputy. Belen–Guillen's statement to Hernandez Refugio was held admissible as a statement of co-conspirator. *Id.*, at 641.

In ***State v. Baruso***, 72 Wn. App. 603, 865 P. 2d 512 (1993), the defendant was president of the Seattle cannery workers union. *Id.*, at 607. He was part of a conspiracy to control the union and associated illegal gambling interests through force and intimidation. This was carried out by members of a Filipino gang called the Tulisan. *Id.*, at 606. Baruso was involved in a conspiracy with Tony Dictado[3] to murder Gene Viernes and Silme Domingo, two reformers in the union. Baruso argued that the

[3] *See* ***State v. Dictado***, 102 Wn.2d 277, 687 P.2d 172 (1984).

conspiracy ended when the murders were accomplished. The State argued the conspiracy was actually a broader gambling conspiracy, and the killings were evidence that the Tulisan would use deadly force and threats to accomplish its goals. *Id.*, at 612.

At Baruso's trial, Robert San Pablo related statements made by a member of the murder conspiracy, Boy Peli, another Tulisan member, after the killings in June 1981. ***Baruso***, 72 Wn. App. at 608. San Pablo testified that Boy Peli had conveyed threats from Dictado toward San Pablo in an effort to coerce a cut of gambling proceeds for Dictado. *Id.* Boy Peli also told San Pablo that James Ramil and Benjamin Guloy[4] were responsible for the murders of Viernes and Domingo and that Baruso had solicited Dictado to accomplish the murders for the sum of $5,000. *Id.* San Pablo also stated that Boy Peli spoke about going to Baruso's house and examining a gun which had a silencer on it. He also discussed Boy Peli's statements that Baruso did not pay the $5,000. *Id.*

The conspiracy had not ended because the participants had yet to receive their cut of the "protection money" paid to the gang. The murders were just part of the ongoing "enforcement" and intimidation associated with the gambling interests. *Id.*, at 612.

The statements admitted in the present case were in furtherance of the conspiracy. Courts generally interpret the "in furtherance" requirement

[4] *See* ***State v. Guloy***, 104 Wn.2d 412, 705 P.2d 1182 (1985).

broadly. ***Baruso***, 72 Wn. App. at 615. In ***State v. Rice***, 120 Wn. 2d 549, 844 P. 2d 416 (1993), Rice and codefendant Russell McNeil were driving around on the evening of January 7, 1988. Rice said he knew of a house they could rob. *Id.*, at 554. Rice and McNeil went to the door, and using a ruse, were admitted by the resident, Mrs. Nickoloff. *Id.* After using the phone and the restroom, McNeil attacked Mrs. Nickoloff in the kitchen. *Id.* Rice attacked Mr. Nickoloff in the living room. McNeil stabbed Mrs. Nickoloff repeatedly in the back, but stated that he did not stab her in the chest. Rice stabbed Mr. Nickoloff several times, but noticed that he was still breathing so he continued until he was sure that Mr. Nickoloff was dead. They stole two television sets, which they sold later that evening. *Id.*, at 555.

While in jail after the crime, McNeil wrote a letter to his girlfriend, confessing his participation and Rice's statements to McNeil before they went to the victims' home. 120 Wn. 2d at 563. It was admitted in Rice's trial as a co-conspirator statement "during the course and in furtherance of the conspiracy" under ER 801(d)(2)(v). The Supreme Court affirmed the trial court's ruling. *Id.*, at 564.[5]

Here, Jenna Ford was more than a sympathetic ear for Higashi, unlike McNeil's girlfriend in ***Rice***. She helped them destroy evidence and

[5] The Supreme Court also ruled that Rice's statement was not hearsay because it was not "offered in evidence to prove the truth of the matter asserted" under ER 801(c). It was admitted to show premeditation, not that Rice stabbed and robbed the victims. *Id.*, at 564.

avoid detection. As Ms. Belen-Guillen did in ***Sanchez-Guillen***, she became a part of the original conspiracy, or, at least participated in a conspiracy to destroy evidence and rendered criminal assistance. *See* RCW 9A.76.050. The conspiracy supporting the court's ruling on the evidence need not be integral to the crime charged. ***Sanchez-Guillen***, 135 Wn. App. at 642. Higashi, Knight and Reese went to Ford's house after the crime. 12 RP 1029. Ford participated in a discussion regarding destroying evidence: cleaning the car, destroying any paperwork, and changing out of the clothes worn during the crime. 13 RP 1057. Ford advised Knight to change her appearance. *Id.*

Higashi's statements to Ford were made before the loot had been divided and soon after the crime as three of the co-conspirators were trying to flee the area. Higashi and the others sought assistance to get away and to cover their tracks. Therefore, as detailed above, the statement was properly admitted under ER 801(d)(2)(v).

There is no confrontation issue regarding Higashi's statement. It was non-testimonial under ***Crawford v. Washington***, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) because it was not made to a police officer or in anticipation of litigation. *See* ***State v. Wilcoxon***, -Wn. 2d-, -P.3d – (2016)(2016 WL 1255476); *see also* ***Rice***, 120 Wn. 2d at 569 (pre-***Crawford*** analysis).

b. Higashi's statement was against penal interest.

ER 804(b)(3) provides an exception to the rule against hearsay for those statements that are contrary to the declarant's penal interests:

> (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statements unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate trustworthiness of the statement.

Three basic requirements must be met before such statements can be admitted. First, the declarant must be unavailable. Second, the declarant's statement must so far tend to subject him to criminal liability that a reasonable person would not have made the statement unless he believed it to be true. Third, the statement must be accompanied by corroborating circumstances that indicate its trustworthiness. *See* ***State v. St. Pierre***, 111 Wn.2d 105, 759 P.2d 383 (1988).

Here, Higashi was unavailable because he could still invoke 5th Amendment protection and he refused to cooperate. He had just participated in a home invasion robbery. Two of his co participants were with him. They were asking for Ford's help and advice in getting away. All of their statements implicated them in a robbery and murder. Higashi's statements to Ford were also admissible as a statement against interest.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE KOMO TV VIDEO.

a. A living room interview with a television news reporter and television cameraman is not a private conversation within the meaning of RCW 9.73.030.

The Privacy Act "puts a high value on the privacy of communications." ***State v. Christensen***, 153 Wn.2d 186, 200, 102 P.3d 789 (2004). Generally, recordings made in violation of the Privacy Act are inadmissible in a criminal proceeding. RCW 9.73.050. A trial court's interpretation of a statute is a question of law that appellate courts review de novo. ***Christensen***, at 194. However, an appellate court will review the trial court's ultimate decision to admit or exclude evidence for an abuse of discretion. ***State v. DeVincentis***, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. ***State v. Rafay***, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

In reviewing a motion to suppress evidence, the appellate court examines whether substantial evidence supports the findings and whether the findings support the trial court's conclusions of law. *See* ***State v. Kipp***, 171 Wn. App. 14, 25, 286 P. 3d 68 (2012).

The Privacy Act under RCW 9.73.030 applies only to private conversations or communications. ***State v. Clark***, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). RCW 9.73.030 states in the relevant part:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (b) Private conversations, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

When a conversation is not private, the act does not apply. *See* ***State v. D.J.W.***, 76 Wn. App. 135, 140, 882 P.2d 1999 (1994). ***Clark*** and ***D.J.W.*** both analyzed the factual circumstances of a conversation in the application of the privacy statute. Both cases held that conversations between drug dealers on a public street, where any passerby could overhear the conversation, were not "private communications." ***Clark***, 129 Wn.2d at 224; ***D.J.W.***, 76 Wn. App. at 141. ***Clark*** also found the presence of a third party to be a significant factor in determining whether the conversation was expected to be private, because the third person(s) could reveal what transpired to others. ***Clark***, at 226.

The first step in determining whether the Privacy Act applies to a particular recorded conversation is to determine if the conversation was "private." The statute does not define the term "private conversation," but

appellate courts have given the term its ordinary and usual meaning:

> Belonging to one's self...secret...intended only for the persons involved (a conversation)... holding a confidential relationship to something... a secret message: a private communication ... secretly: not open or in public.

State v. Forrester, 21 Wn. App. 855, 861, 587 P.2d 179 (1978) (some alterations in original) (quoting Webster's Third International Dictionary (1969)), *cited by* ***State v. Townsend***, 147 Wn.2d 666, 673, 57 P. 3d 255 (2002).

A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. ***Townsend***, 147 Wn.2d at 673; *see also* ***State v. Roden***, 169 Wn. App. 59, 64, 279 P. 3d 461 (2012); *rev'd on other grounds* 179 Wn. 2d 893, 673-674 (2014). The courts look at several factors to determine a person's subjective intent including the duration and subject matter of the communication; the location of the communication and the potential presence of third parties; and the role of the nonconsenting party and his or her relationship to the consenting party. ***Townsend***, 147 Wn.2d at 673; ***Clark***, 129 Wn.2d at 226-27. Determination of these factors is largely a question of fact for the trial court. ***Roden***, 169 Wn. App. at 64.

In ***State v. Christensen***, 153 Wn.2d 186, 102 P.3d 789 (2004), a mother used the speakerphone function of the family's cordless telephone system to surreptitiously listen to a conversation between her daughter and

her daughter's boyfriend, Christiansen, in which a crime was discussed. Over objection, the mother testified against Christiansen at his trial based on what she had overheard. The Supreme Court found that the conversation was private because Christiansen manifested his desire for a private conversation by asking to speak with his girlfriend when he called the house. The girlfriend manifested her desire to have a private conversation with Christiansen by taking the cordless phone to her room and shutting the door. *Id.*, at 193. Under these circumstances, the court found that the parties' expectation that there telephone conversation would be private was reasonable. *Id.*

In ***Townsend***, *supra*, the defendant set email messages to "Amber," a police officer posing as an underage girl. The Court found that such a "conversation" would ordinarily be private because the subject matter, which was sexual in nature, was private and Townsend manifested his subjective intent that the emails be kept private by asking Amber to keep 'us' a secret. 147 Wn.2d 674. However, despite finding the communications were ordinarily private, the Court found no Privacy Act violation because Townsend implicitly consented to the recording of his emails by using a computer, which must record an email communication. 147 Wn. 2d at 676, 678.

Similarly, in ***Roden***, *supra*, the "recording device" was a cellular telephone. Police had acquired the phone from a drug dealer, Mr. Lee. Roden had sent a text message to Lee's cell phone. Police arranged to meet

Roden, purportedly to sell him drugs. He was subsequently prosecuted. 179 Wn. 2d at 897.

In ***Kadoranian v. Bellingham Police Department***, 119 Wn.2d 178, 829 P.2d 1061 (1992), the Supreme Court refused to find a Privacy Act violation when a police informant inadvertently recorded a telephone conversation the informant had with a drug dealer's daughter, Alice Kadoranian, who answered the phone when the informant called. Alice Kadoranian's conversation took place in her residence, but was not a private communication because she freely gave out information that her father was not home to a third party, did not seem to care who received that information. The court found that there was no evidence that Ms. Kadoranian intended to keep the information she shared over the telephone a secret and that she did not have a reasonable expectation that her conversation was private. Because Alice Kadoranian's conversation was not private, the court found there was no Privacy Act violation. ***Kadoranian***, 119 Wn.2d at 190.

As the holding in ***Kadoranian*** suggests, not all communications that occur in a residence are private. By analogy, where a person opens his home to outsiders for a transaction, such a transaction is not private, even when the transaction takes place in a private home. *See* ***State v. Hastings***, 119 Wn.2d 229, 233, 830 P.2d 658 (1992). There, undercover officers entered the defendant's home to purchase drugs. The circumstances made it clear that Hastings' dealings, although in his home,

were not private because he had invited other persons inside, knowing their intentions. *Id.*, at 232.

Here, the Berniards admitted the KOMO news crew into their home. They knew that it was a news crew covering the story of the Edgewood home invasion robbery/murder and the defendant's involvement in it. This was in no way a "private conversation".

b. The Berniards implicitly consented to recording of the communication.

Even if the Berniards' interview with Sabra Gertsch and the KOMO news team was a private communication, the Berniards consented to the recording of the interview. The Privacy Act requires that all parties consent before a private conversation is recorded. RCW 9.73.030(1). However, when the recording is made by an employee of a regularly published newspaper or television station acting in the course of news gathering, the subject of the recorded conversation is deemed to have consented when the recording device is readily apparent or obvious to the speaker. RCW 9.76.030(4). A violation of the Privacy Act subjects the person recording the conversation to both criminal and civil liability under RCW 9.73.050 and .080.

In this case, the Berniards admitted a KOMO TV news team into their home. The reporter and cameraman identified themselves as news gatherers. As the trial judge concluded, it was obvious that the news team

was there to share whatever statements were made with the public. 5 RP 96. The Berniards consented to the recording.

4. THE TRIAL COURT DID NOT ERR IN APPLYING THE AGGRAVATING SENTENCING FACTORS FOUND BY THE JURY.

a. Deliberate cruelty.

RCW 9.94A.535(3)(a). "Deliberate cruelty is gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself." ***State v. Jennings***, 106 Wn. App. 532, 550, 24 P. 3d 430 (2001). Deliberate cruelty has been defined as behavior "not usually associated with the commission of the offense in question," or as "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." ***State v. Ferguson***, 142 Wn. 2d 631, 645, 15 P. 3d 1271 (2001)(additional internal cites omitted).

Here, the defendant kicked Mrs. Sanders in the head as she lay on the floor with her hands tied behind her. He pistol-whipped J.S. These acts go beyond the force necessary to accomplish a robbery. These actions were gratuitous violence to inflict both physical and psychological pain. It was deliberate cruelty.

b. Sophistication and planning.

A sentencing aggravating factor must be based upon the defendant's own actions. *See* ***State v. Hayes***, 182 Wn. 2d 556, 342 P. 3d

1144 (2015); ***State v. Weller***, 185 Wn. App. 913, 344 P. 3d 695 (2015). Here, the State alleged that the "sophistication and planning" sentencing aggravator under RCW 9.94A.535(3)(m). The verdict forms demonstrate that the jury did find that the defendant, as distinct from an accomplice, used a "high degree of sophistication or planning". CP 304.

The defendant argues that there was no evidence that he was the planner of these crimes. App. Brf., at 58. Where more than one person participates in a crime, it is not necessary to assign roles or to characterize particular participants. In ***State v. DeLeon***, 185 Wn. App. 171, 341 P. 3d 315 (2014), the defendant and two fellow gang members were charged with assault in the first degree for shooting at rival gang members. The State alleged the gang sentencing aggravator under RCW 9.94A.535(3)(aa) for the defendant and his two codefendants. The Court of Appeals opinion did not examine the roles of the defendants; which of the defendants was the driver, which the shooter, etc. It applied the sentencing analysis to each defendant equally.

The appellate court reviews the jury's special interrogatories under a sufficiency of the evidence standard. ***State v. Yates***, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). Evidence is sufficient to prove the aggravating circumstance if after viewing the evidence in the light most favorable to the State, any rational jury could find the facts to support an aggravating circumstance beyond a reasonable doubt. RCW 9.94A.537(3); ***Yates***, 161 Wn.2d at 752. A challenge to the sufficiency of the evidence admits the

truth of the State's evidence and any inferences the jury may reasonably draw from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The Court defers to the trier of fact on "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

Here, the defendant and four others picked the Sanders' home to invade from a Craigslist posting. The four coordinated when and where to arrive, maintaining contact through their cell phones. There was a division of roles and a plan of attack. In that plan, Higashi and Knight posed as buyers of the ring. They used a planned cue to call in the defendant and Reese, who were masked and immediately proceeded upstairs to round up other victims. The plan of attack was coordinated by the use of their cell phones. The defendant and Amanda Knight used anonymous prepaid cell phones in order to escape detection. By challenging the sufficiency of the evidence to find the aggravating circumstance, the defendant admits all of this is true, and all reasonable inferences from the evidence.

From this evidence, the jurors could, and did, conclude that the defendant was one of four who participated in a well-planned and executed home-invasion robbery. The statute does not require, nor the State need to prove, that the defendant was the only planner; but that "The offense involved a high degree of sophistication or planning." It was for the jurors to decide in fact whether these actions amounted to a "high degree".

c. Vagueness challenge.

In ***State v. Baldwin***, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), the Washington Supreme Court held, "[D]ue process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." The Court stated the sentencing guideline statutes do not define conduct, permit arbitrary arrest and criminal prosecution, inform the public of penalties attached to criminal conduct, vary the statutory maximum or minimum penalties that the legislature assigned to illegal conduct, or set penalties. ***Baldwin***, 150 Wn.2d at 459.

More recently, in ***State v. Chanthabouly***, 164 Wn. App. 104, 141-142, 262 P. 3d 144 (2011), the defendant challenged the "destructive and foreseeable impact" aggravating circumstance under RCW 9.94A.535(3)(r) as unconstitutionally vague. This Court, citing ***Baldwin***, held that the defendant was precluded from challenging the sentence aggravator statute as vague.

This case is controlled by ***Baldwin***. The defendant cannot challenge the sentence aggravators as unconstitutionally vague.

5. THE SPECIAL VERDICT INSTRUCTION AND FORMS WERE CORRECTLY WORDED.

a. The defendant failed to preserve this issue for review.

If a defendant fails to object to a jury instruction or verdict form regarding a special verdict, his objection is waived for appeal. *See* ***State v. Nunez***, 160 Wn. App. 150, 248 P. 3d 103 (2011); *rev'd on other grounds*, 174 Wn. 2d 707, 285 P. 3d 21 (2012). Here, the defendant was most concerned with the instruction regarding "deliberate cruelty" as applied to an accomplice. 18 RP 1797-1798. He also wanted a missing witness instruction. 18 RP 1800. The defendant only proposed two instructions. CP 227, 228. Other than this, he did not object to the State's proposed instructions or the wording of the verdict forms. Therefore, he has not preserved this issue for appeal.

b. The wording of the special verdict form was correct.

Even if he had preserved the issue, the wording was correct under ***Nunez***. ***Nunez*** settled the issue raised in ***State v. Bashaw***, 169 Wn.2d 133, 234 P.3d 195 (2010) regarding the wording of special verdict forms to find aggravating circumstances. The jury only needs to be unanimous to find the aggravating circumstance. 174 Wn. 2d at 718. If they cannot agree, or they are unanimous that the answer is "no", the result is the same: the

answer is no. In ***Nunez***, the Court endorsed the instruction from ***State v. Brett***, 126 Wn. 2d 136, 174, 892 P. 2d 29 (1995), namely:

> If, after fully and fairly considering all of the evidence or lack of evidence you are not able to reach a unanimous decision as to any element of any one of the aggravating circumstances, do not fill in the blank for that alternative.

See ***Nunez***, at 719.

Here, the firearm special verdict forms reflected the approved language in ***Nunez***. *See, e.g.* CP 297. The sentence aggravator special verdict forms asked yes or no. There was also a space to indicate that the form was intentionally left blank. *See, e.g.* CP 303. The defendant did not object to these instructions and forms, and there was no error.

6. CUMULATIVE ERROR DID NOT DEPRIVE THE DEFENDANT A FAIR TRIAL.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine, in that the

type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994).

The record of this case, as a whole, shows that the defendant received a fair trial. As argued above, the trial court made correct evidentiary rulings, and the evidence bore out the defendant's guilt.

D. CONCLUSION.

The defendant received a fair trial where he was able to argue his theory of the case, which was "It wasn't me." In the light of identification by one of the victims and the defendant's admission to his own family, as well as other evidence, his jury rejected his version. For the reasons detailed in this brief, the State respectfully requests that the conviction be affirmed.

DATED: April 28, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

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

4.29.16
Date Signature

PIERCE COUNTY PROSECUTOR

April 29, 2016 - 10:38 AM

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