NO. 41970-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ODEIS WALKER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Bryan Chushcoff

No. 09-1-02784-8

Brief of Respondent/Cross-Appellant

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A. CROSS-APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court erred when it gave jury instructions no. 46 where it declined to omit the "major participant" paragraph from the instruction over the State's objection. CP 250 (Instruction 46); 11 RP 1312, ln. 9 to p. 1317, ln. 19; 12 RP 1327, ln. 9 to p. 1328, ln. 2.

B. ISSUES PERTAINING TO APPELLANT'S AND CROSS-APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court's instructions nos. 10 and 13 (premeditation and "to convict" on Count I) were proper where they included "defendant or accomplice" language?

2. Whether the trial court erred when it included "major participant" language in instruction 46 on the aggravating circumstance?

3. Whether the prosecutors acted properly and did not commit misconduct so that Walker was not deprived of his right to a fair trial?

4. Whether trial counsel was not ineffective, or in the alternative the defendant suffered no prejudice if he was?

C. STATEMENT OF THE CASE.

1. Procedure

On June 4, 2009, the State filed an information based on an incident that occurred on June 2, 2009, charging the defendant with Count II, Murder in the First Degree; and Count IV, Robbery in the first Degree, both alleged to have been committed while armed with a firearm. CP 1-2.[1] On June 22, 2009, the State filed an amended information that added Count I, Aggravated Murder in the First Degree; Count III, Assault in the First Degree; Count V, Criminal Solicitation to Commit Robbery in the First Degree; Count VI Criminal Conspiracy to Commit Robbery in the First Degree. CP 3-6. Counts I and III included allegations that the defendant was armed with a firearm when he committed the crimes. CP 3-6.

On September 24, 2010, the State filed a Second Amended Information. CP 7-10. It modified Counts I, II, III to allege that the defendant acted as an accomplice. CP 7-10.

On January 24, 2011, the case was assigned to the Honorable Bryan Chushcoff for trial. CP 314. On February 3, 2011 the State filed a Third Amended Information. CP 11-14.

A jury was empaneled on March 7, 2011. CP 315. The jury

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[1] Counts I and III were [presumably] charged against co-defendants.

returned verdicts finding the defendant guilty as to all six counts. CP 256-261. The jury also answered "yes" as to all the special verdicts. CP 263-267.

On April 8, 2011, the court sentenced the defendant to a total sentence of Life, plus 303 months. CP 268-79.

The notice of appeal was timely filed on April 8, 2011. CP 280.

On April 11, 2011, the State timely filed a notice of cross-appeal. CP 307-08.

2. Facts

Wilbert Pina was in the customer service line at the Walmart Store in the City of Lakewood, Pierce County, WA on June 2, 2009. 4 RP 94, ln. 12-18. Mr. Pina had his 15-month-old son in a cart with him. 4 RP 94, ln. 1-21.

Mr. Pina had observed a Loomis armored car in front of the store, and, while standing in line, he observed the guard walk into the store and go into the office. 4 RP 95, ln. 16 to p. 96, ln. 8. The guard was Kirk Husted, who had worked for Loomis Armor for 16 years as a courier or guard. 4 RP 111, ln. 23 to p. 112, ln. 3.

A few minutes later Mr. Pina heard a bang, felt a push in his shoulder and thought someone had shoved him in line. 4 RP 94, ln. 21-23. However, when he turned around he observed two African-American men running out of the store with guns in their hands. 4 RP 94, ln. 23-25. Mr.

Pina saw one of the men run out, then back in and grab the money bag that was on the cart the Loomis guard carried. 4 RP 97, 5-13.

Thinking it was a shooting rampage, he grabbed his son and tucked him in. 4 RP 95, ln. 1-3. Then he felt a burning sensation in his shoulder and when he turned around and looked at it realized he had a bullet wound in it. 4 RP 95, ln. 7-10.

There was screaming and people were running around in shock. 4 RP 98, ln. 9-11. Mr. Pina turned to see what was going on and saw the Loomis guard laying on the floor in his own puddle of blood. 4 RP 98 12-14. Mr. Pina heard words to the effect of "freeze, give me your money" before the gunshot. 4 RP 96, ln. 18-21.

Mr. Pina and his son were both crying and his son was clinging to him. 4 RP 98, ln. 20-24. An ambulance came to treat Mr. Pina and he was forced to give his son to a stranger so he could be taken away in the ambulance. 4 RP 98, ln. 17 to p. 99, ln. 12; p. 108, ln. 16-18; p. 225, ln. 18-23. He was restrained in the ambulance and taken to the emergency room at Tacoma General Hospital. 4 RP 99, ln. 10-12; p. 103, ln. 23 to p. 104, ln. 5. The hospital confirmed that Mr. Pina suffered a gunshot wound, but was unable to safely remove the bullet so that it remains in his body. 4 RP 105, ln. 9 to p. 106, ln. 10.

Terri Groenwold was working at the Walmart store as a customer service manager. 4 RP 114, ln. 18 to p. 115, ln. 20. She observed the Loomis guard, Kirk Husted, come into the store for a money pickup. 4 RP 117, ln. 2-4. He came into the customer service area and actually had to stand behind Ms. Groenwold while he waited for a manager to come and open the money room. 4 RP 117, ln. 7-14. Ms. Groenwold spoke to him while he was waiting. 4 RP 117, ln. 15-16. The total amount of currency and coins turned over to Kurt Husted that day was $55, 188.82, as well as an additional $143,000 in checks. 5 RP 318, ln. 5-24.

When Kirk Husted left, he walked right by Terri Groenwold, who told him to have a good day. 4 RP 117, ln. 17-20. He walked by, then a guy came in, put the gun to Kirk's head and shot him and Kirk fell. 4 RP 118, ln. 1-3.

Jerry Cheatum worked as a gaming regulator for the Puyallup Tribe of Indians, who investigated stealing, robberies and people doing illegal things at the casino. 4 RP 121, ln. 14 to p. 122, ln. 13. He was familiar with Kurt Husted through his work for the Tribe where Kurt would come in and pick up money. 4 RP 123, ln. 8-11.

The day of the shooting Mr. Cheatum was at the Walmart store. 4 RP 122, ln. 14-17. He had finished his shopping and was 25 to 30 feet

away from the door, when all of a sudden a man in the area of the door said to Kurt Husted, "Excuse me sir," and then he heard a pop sound and saw Kurt go down. 4 RP 122, ln. 19 to p. 123, ln. 7. He saw one man holding the weapon, and another run across, grab the bag, then run back and they both left out the door. 4 RP 123, ln. 19-22.

Kurt Husted had been shot in the face between the nose and mouth. 4 RP 128, ln. 2-4. After the man shot Kurt Husted, he waived the gun back and forth and it was pointed in Mr. Cheatum's direction. 4 RP 130, ln. 24-25.

Tito Brown was also a customer at the Lakewood WalMart store on June 2, 2009. 4 RP 134, ln. 1-8. He had just approached the counter and began to interact with the clerk when heard a shot fired as a Loomis courier was walking out of the store. 4 RP 134, ln. 18 to p. 135, ln. 7. His first inkling was that someone had discharged a weapon inside the store. 4 RP 135, ln. 14-16.

Mr. Brown turned around and observed Kurt Husted falling at the same time. 4 RP 135, ln. 16-19. Near Kurt Husted Mr. Brown saw a man with a short, white shirt on reach down and grab a satchel. 4 RP 135, ln. 22-25. He believed he also saw another man reach down and grab a second satchel. 4 RP 135, ln. 25 to p. 136, ln. 5. Both men were African-American. 4 RP 136, ln. 10-12; 5 RP 221, ln. 19-23.

Mr. Brown saw them run outside the building, so he quickly stepped over the Loomis guard, ran outside and observed them getting into a white car. 4 RP 136, ln. 17-23. It was a white Buick Skylark, four-door. 4 RP 138, ln. 1-2. He memorized a partial plate getting all but one number. 4 RP 137, ln. 23-24.

In the store, Mr. Brown also had someone put the "wet floor" sign over a discharged shell casing he saw on the floor. 4 RP 143, ln. 18-20.

The partial license plate information obtained by Mr. Brown led police to a suspect, Calvin Findley. 4 RP 154, ln. 15-20.

Skyler Ford had worked for the border patrol for two years and then enlisted in the army and served as a scout sniper. 5 RP 278, ln. 8-12. He had been deployed in Iraq for 15 months and was stationed at Fort Lewis in the Spring of 2009. 5 RP 278, ln. 13-18. Because he had a lot of familiarity with weapons and guns firing, when he heard the gun shot, he knew exactly what it was. 5 RP 279, ln. 22 to p. 280, ln. 4. He had his family go in one of the back rooms, and then proceeded toward the gunshot because most likely if there was a shot fired, someone was injured. 5 RP 280,ln. 5-23. When he arrived on the scene where the Loomis guard was on the floor he searched the area to see if the shooters were on scene, and then after confirming that they were not he went over to Kurt Husted and knelt down next to him. 5 RP 281, ln. 2-7. Mr. Ford

was trying to talk to Kurt Husted and comfort him, and Mr. Husted was trying to speak to Skyler Ford, although Skyler couldn't make out any words. 5 RP 281, ln. 6-13. As he did this, Skyler Ford also put a finger on Kurt Husted's artery and could feel a pulse while Mr. Husted was trying to speak to Mr. Ford. 5 RP 282, ln. 9-15. However, keeping his finger on Mr. Husted's artery Mr. Husted just stopped and Skyler Ford couldn't feel a pulse any more and was gone, i.e. had died. 5 RP 282, ln. 9-15.

After Kurt Husted had died, Mr. Ford realized that there was a second person who had been hit by the same bullet, so he moved over to that area and found Wilbert Pina. 5 RP 284, ln. 21-24. He thought they needed a first-aid kit and went out to the Loomis truck to see if they had one, not thinking that there was a whole aisle full of medical supplies in the store. 5 RP 284, ln. 21-24. The truck was pulling away from the front of the store so he tried to chase it down, but before he got to it Lakewood Police Department came in from every direction and surrounded it. 5 RP 285, ln. 284, ln. 2-14. He notified the officers that there was not a suspect in the truck and that they had another person injured and in need of help inside the store as soon as possible. 5 RP 284, ln. 14-20. He was told that the officers had their orders [and couldn't help him], which upset him. 5 RP 284, ln. 14-20.

Lt. Steve Mauer arrived on scene in the area of the officers who had the armored car surrounded. 5 RP 204, ln. 3-7. Skyler Ford noticed Lt. Mauer pull up. 5 RP 284, ln. 22-23. He recognized Lt. Mauer from previously speaking with him about doing a ride-along with the Lakewood police. 5 RP 284, ln. 23-24. So he told the Lieutenant that someone inside was bleeding out and nobody would listen to him. 5 RP 204, ln. 8-19; p. 284, ln. 25 to p. 285, ln. 2. So Lt. Mauer drove to the front and ran inside the lobby of the store. 5 RP 204, ln. 25 to p. 205, ln. 1. As a result, he was the first law enforcement officer to respond inside the store. 5 RP 205, ln. 2-4.

Lt. Mauer observed Mr. Husted lying on the ground with his left side face down in a pool of blood. 5 RP 205, ln. 8-11; ln. 21. Mr. Husted's [right] eye was open and staring off into space. 5 RP 205, ln. 12-13. Lt. Mauer checked Mr. Husted's neck for a pulse, found nothing and it was clear that he was dead. 5 RP 205, ln. 22-24.

Tammy Neal was outside the store parked directly in front of the main entrance to the WalMart store in a handicapped spot, standing outside the vehicle and people watching while she waited for her roommate to finish shopping. 5 RP 291, ln. 21 to p. 293, ln. 3. She noticed the arrival of the Loomis armored car. 5 RP 293, ln. 4-7. She

saw a guard get out of the truck and go into the WalMart. 5 RP 293, ln. 13-17.

Then a white car came and parked, not quite behind the Loomis truck, but near it. 5 RP 293, ln. 10-12. Both passenger side doors opened and two black males got out of the front and back, while the driver, also a black male, stayed in the car. 5 RP 293, ln. 19-23; p. 294, ln. 25 to p. 295, ln. 2; p. 306, ln. 3-20. The men kind of looked and adjusted themselves and their hat and walked into the store. 5 RP 293, ln. 21-23.

The men were in the store maybe a minute, when she heard a big boom that sounded like it could have been a firecracker, and then a bunch of chaos ensued. 5 RP 293, ln. 23-24; p. 295, ln. 20-23; p. 298, ln. 5-6. Everybody was running out of the store screaming and crying. 5 RP 298, ln. 9-10. She also saw one of the men from the white car come out of the store with the money bag. 5 RP 298, ln. 22-24; p. 299, ln. 17-23. She didn't see the men get back in the white car, because after the boom it moved all the way around the parking lot. 5 RP 298, ln. 25 to p. 299, ln. 9; p. 302, ln. 20-21.

Tracy Holly was in a blue Honda Accord with her husband in the WalMart Parking lot. 5 RP 229, ln. 9-17. As they were leaving, they saw another woman who was getting ready to come out of her parking stall when a white car just flew right in front of her and basically cut her off. 5

RP 231, ln. 14-17. She and her husband were the next vehicle coming toward the white car and she said something to the effect of, "[O]h my gosh, look at the idiot." 5 RP 231, ln. 17-19. At the car passed her, she could see that the driver, the front seat passenger and a passenger in the back seat were black, dark-skinned persons. 5 RP 235, ln. 4-14. The driver and the person in the back were both male, however, she was not able to discern the gender of the front passenger. 5 RP 235, ln. 3-5 and ln. 8-12.

Later a detective showed Ms. Holly a photo montage with six photographs. 5 RP 238, ln. 8 to p. 240, ln. 3; Ex. 74(a) When she looked at the montage, Ms. Holly recognized the person in photo number two, which was in the top center of the montage, as the person she recognized. 5 RP 240, ln. 12-23. However, at the time she told the officer and signed the form that she did not recognize anyone because she was scared and didn't want to be part of it. 5 RP 241, ln. 4-21. She lied. 5 RP 241, ln. 24. After the detective took the montage away, Ms. Holly asked the Detective if it was number 2. 5 RP 242, ln. 3-18. The detective did not answer her question. 5 RP 242, ln. 19-20. Walker was the person in photo number two. 5 RP 331, ln. 19 to p. 332, ln. 2.

Ms. Holly also identified Walker in court as the driver of the white car. 5 RP 243, ln. 5-15. Ms. Holly said she was 100 percent sure of her

identification. 5 RP 243, ln. 16-17; p. 272, ln. 3-5.

Tonie Williams-Irby was Odeis Walker's girlfriend. She met him in Chicago in 2002 and the two moved to this area with five of their combined children in 2006. 7 RP 626, ln. 6-23; p. . Tonie was legally married to another man who she had tried to divorce a couple of years prior to meeting Walker, but she said he would not give her a divorce. 7 RP 626, ln. 24 to p. 627, ln. 15. However, Ms. Irby-Williams and Odeis Walker considered themselves husband and wife and called each other that, thinking it was nobody else's business. 7 RP 627, ln. 21 to p. 628, ln. 6.

Tony Williams-Irby was an employee at the WalMart. 5 RP 309, ln. 23-25. The store would have staff meetings every morning that employees were free to attend. 5 RP 308, ln. 23 to p. 309, ln. 2. The purpose of the meetings is to go over sales and the meetings would include a discussion of the profit the store was making. 5 RP 209, ln. 8-14.

Months in advance of the robbery, Tonie Williams-Irby heard Walker talking with Finley about killing the guard. 7 RP 665, ln. 1 to p. 666, ln. 21. In March of '99, Walker, Finley and began sitting around whispering with someone named Jonathan all the time and talking about WalMart a lot. 7 RP 663, ln. 5-17. They talked about a robbery of the WalMart in which Walker would be the getaway driver because he could

drive better than the rest of them, and because everybody in the store would know him because of his arm. 7 RP 663, ln. 20. Calvin was supposed to take the bag, and originally, Jonathan's role was to back him [Calvin?] up. 7 RP 664, ln. 23-25. But Jonathan was an alcoholic and Walker was afraid he would go into the store drunk and mess it up and everybody would go to jail. 7 RP 659, ln. 20-24.

So in mid-April Marshawn Turpin was present instead of Jonathan. 7 RP 659, ln. 18-22. Turpin was a friend of Irby-Williams's son Darrell Parrott. 7 RP 663, ln. 1-4. Walker told them that they needed to hurry up and do what they had to do and that they couldn't wait. 7 RP 659, ln. 23 to p. 660, ln. 1. If they messed [it?] up he would kill them because they would all go to jail. 7 RP 659, ln. 24 to 660, ln. 3. He also told them if they did the job without him they would kill him. 7 RP 660, ln. 3-5.

At some point Walker talked to Finley about getting the money bag from the guard and with regard to killing the guard to get the bag, told Finley to "do what you got to do." 7 RP 665, ln. 10-21.

Before the robbery occurred at Walmart, Walker had talked to Jessie Lewis about committing such a robbery. 9 RP 902, ln. 25 to p. 903, ln. 13. Calvin Finley was also present for the conversation. 9 RP 904, ln. 4-8. Lewis's role was to be to shoot the armored car guard at the WalMart. 9 RP 904, ln. 11-12. Walker's role was to be the driver. 9 RP

905, ln. 14-21. They were joined later by Turpin, who owned a gold Maxima. 9 RP 963, ln. 12-16.

Immediately after discussing the robbery with Lewis, Walker then took Lewis over to the WalMart Store to rob the armored car guard. 9 RP 904, ln. 21 to p. 905, ln. 5. Walker showed Lewis weapons that would be used, including a 9-milimeter and a black .45 [caliber]. 9 RP 905, ln. 10-11. After Lewis showed reluctance, they told him to go in there and Calvin would do whatever they had to do, shoot the guard, or whatever. 9 RP 906, ln. 4-9.

At first Lewis was interested and they went over to the WalMart store in a white Buick. 9 RP 906, ln. 11-21. For months prior to this Walker would sit in the parking lot with Marshawn and Calvin and watch the truck every day to time its movements, so he knew the schedule for the armored the truck, which appeared that day when he told Lewis it would. 7 RP 661, ln. 2-8; p. 662, ln. 8-13; 9 RP 906, ln. 17-23.

Prior to going in, Walker tried to give Lewis a 9-millimeter gun, but Lewis got nervous about the whole thing and didn't take it. 9 RP 911, ln. 9-23. Turpin had gone ahead of them into the store to scout things out, track the guard and he gave them a call. 9 RP 911, ln. 6-8; p. 912, ln. 1; p. 926, ln. 10-11.

Lewis and Finley went inside the store. 9 RP 906, ln. 909, ln. 22 to p. 910, ln. 6. Their intent was to rob the armored car guard. 9 RP 910, ln. 19-22. Lewis walked into the store behind Finley, who was showing him how they were going to do the crime. 9 RP 912, ln. 1-4.

But Lewis knew they weren't going to get away with the money like that and that it wasn't going to go down like they were trying to plan it to go down. 9 RP 912, ln 4-10. Lewis knew that someone was going to get killed. 9 RP 912, ln. 11-12. So instead, he walked out of the store. 9 RP 912, ln. 4.

Because Lewis left the store, they called him a bitch and stuff. 9 RP 912, ln. 15-16. Walker said they could have done it, but Lewis told him he wasn't doing that. 9 RP 913, ln. 20-21. Lewis told Walker that somebody was going to die and Lewis wasn't going to be involved in a murder. 9 RP 913,ln. 1-2. Walker told him that they were going to get away, that it was a clean "lick" [robbery] and tried to persuade Lewis to do it, but Lewis knew better. 9 RP 913, ln. 4-9.

On the day of Tonie Williams-Irby's birthday party, Walker tried to recruit Lewis to commit the robbery again. 9 RP 914, ln. 11-12.

Jordan Lopez, who was Lewis's baby's mother, overheard Walker talking about the robbery with Lewis before the day of the birthday party.

9 RP 900, ln. 5-10; p. 943, ln. 1-4. She also saw that Finley was present. 9 RP 943, ln. 10-16.

At the birthday party, Lopez saw Walker with a chrome colored gun clipped to the inside waist of his pants. 9 RP 947, ln. 12-19.

After Walker was unsuccessful recruiting Lewis to participate in the robbery of the armored car, he tried to recruit Williams-Irby's son, Darrell Parrott. 9 RP 966, ln. 18-25; p. 968, ln. 22 to p. 969, ln. 3. He told Parrott he could walk into WalMart with Finley and Walker would pay Parrott $5,000 for that. 9 RP 698, ln. 20-24. Walker told Parrot that he would have to walk in with a gun to watch Finley's back. 9 RP 969, ln. 7-10. They were going to rob the armored car. 9 RP 969, ln. 1-3. This was going to happen maybe a couple of days after the birthday party. 9 RP 970, ln. 11-15. Parrot declined. 9 RP 970, ln. 20-23.

At trial, the defendant, Walker, stipulated that Calvin Finley killed Kurt Husted inside the WalMart store in Lakewood, Washington. 6 RP 372, ln. 21 to p. 373, ln. 10; Ex. 67. Walker also stipulated that Marshawn Turpin was with Calvin Finley inside of the WalMart store in Lakewood when Kurt Husted was killed. 6 RP 373, ln. 1-16; Exs. 68.

On the day of the robbery, Walker had Tonie Williams-Irby go to the staff meeting so she could call to tell him the numbers for how much money the store made the day before. 8 RP 701, ln. 19 to p. 703, ln. 7.

After she heard someone had been shot, she realized they had done what they said they were going to do. 8 RP 708, ln. 18 to p. 709, ln. 5.

After the robbery as Irby-Williams rode with Walker to the house of someone named Al and she discussed with Walker what he did during the robbery and murder of the Loomis driver. 8 RP 723, ln. 4-7. Walker stated that he was sitting outside in the car on the phone with Finley. 8 RP 723, ln. 13-14. He said the man laughed at Finley, so Walker told Finley to kill the mother fucker. 8 RP 723, ln. 15-24.

The video shows that Finley walked up to the guard and shot him within two seconds of approaching him. Ex. 9. Turpin didn't flinch, but just reaches down and grabs the bag, suggesting he knew that the shooting was coming. Ex. 9.

On June 2, 2009 Odeis Walker and his girlfriend Tonie Williams-Irby were arrested in a green Tahoe SUV. 4 RP 154, ln. 22 to p. 155, ln. 4.

After Walker was arrested, officers interviewed him at the Lakewood police department. Walker admitted being at the WalMart on the day of the shooting, to pick up a car, a gold Maxima. 6 RP 411, ln. 18-21; 7 RP 561, ln. 16 to p. 562, ln. 3. A gold Maxima had been used in the robbery and had met up with the white car prior to the occurrence of the robbery. 7 RP 562, ln. 6-12. Walker said he had been asked by his

cousin, Calvin to pick up the Gold Maxima. 7 RP 564, ln. 17-19. Walker was shown two different pictures of the two subjects that were involved in the robbery and asked if he knew either of those people. 7 RP 563, ln. 4-8. Walker said it looked like his cousin. 7 RP 563, ln. 15-17. The officer asked if it looked like his cousin or was his cousin, to which Walker replied that it was his cousin, Calvin. 7 RP 563, ln. 20-25. Officers asked if it was Calvin Finley, and Walker said that it was. 7 RP 563, ln. 25 to p. 564, ln. 2.

After the arrests of Walker and Williams-Irby, officers conducted a search of their residence at 6110 59th Avenue West in University Place. 6 RP 480, ln. 15-18. In the master bedroom, officers found a pair of shoes that contained 9-millimeter ammunition. 6 RP 483, ln. 7 to p 485, ln. 2. In a cereal box in the closet, officers found a gun holster. 6 RP 485, ln. 6 to p. 486, ln. 11. A nine millimeter gun was never found in the house. 6 RP 485, ln. 3-5; p. 533, ln. 24 to p. 534, ln. 1. A safe was found in the closet that contained $20,000 even. 6 RP 462, ln. 6-13; p. 462, ln. 25 to p. 463, ln. 3; p. 465, ln. 6-8; 6 RP 489, ln. 11 to p. 490, ln. 25; Ex. 144. Officers were able to open the safe in the front yard. 6 RP 491, ln. 6-9. Inside was a white plastic bag with a Hi Point .44 caliber pistol, loaded and with a spare magazine. 6 RP 491, ln. 11-13. Underneath the gun in the bag was a piece of paper, and when officers lifted that up, there were

stacks of cash underneath, $20,000 total. 6 RP 491, ln. 18 to p. 492, ln. 2; 7 RP 6-9. In an outbuilding officers found another safe, inside which was a small black box that contained three rounds of 9mm Luger ammunition. 7 RP 530, ln. 16 to p. 532, ln. 13.

Detectives searched an Oldsmobile that was impounded after Finley's arrest and recovered a safe from the trunk that contained $21,830 in paper currency. 6 RP 447, ln. 20-23; p. 453, ln. 5-19; p. 459, ln. 14-22.

D. ARGUMENT.

1. THE COURT DID NOT ERR WHEN INSTRUCTING THE JURY AS TO PREMEDITATED MURDER OR UNANIMITY

The defense claims that the jury instructions alleviated the State of having to prove premeditation beyond a reasonable doubt where the instruction stated in pertinent part that:

> (1)...the defendant or an accomplice acted with intent to cause the death of Kurt Husted;
> (2) That the intent to cause the death was premeditated;
> ...

Br. App. 44 (citing CP 215 (Jury Instruction no. 13) (emphasis in Brief of Appellant). The defense further claims that the premeditation instruction contains the same "defendant or accomplice" language that is error. Br. App. 44-45.

In part, the State charted the defendant in Count I with Aggravated Murder in the First Degree committed as an accomplice, with the aggravating circumstance that the murder was committed in the course and furtherance of, or in immediate flight from the crime of robbery. CP 11. This crime was charged pursuant to RCW 9A.32.030(1)(a) for premeditated murder and RCW 10.95.020(11)(a) with regard to the aggravating circumstances. CP 11.

In order to be convicted of a crime as an accomplice, the defendant need not be charged as an accomplice in the information. ***State v. Bobenhouse***, 143 Wn. App. 315, 324, 177 P. 3d 209 (2008) (citing ***State v. McDonald***, 138 Wn.2d 680, 688, 981 P.2d 443 (1999)). Accomplice liability is neither an element of the crime, nor an alternative means of committing the crime. ***State v. Teal***, 152 Wn.2d 333, 338-339, 96 P.3d 974 (2004). Thus, the rule that all elements of a crime be listed in a single instruction is not violated when accomplice liability is described in a separate instruction. ***Teal***, 152 Wn.2d at 339.

The legislature has envisioned that accomplices can be guilty of premeditated murder (and even receive the death penalty). *See* ***State v. Roberts***, 142 Wn.2d 471, 502, 14 P.3d 713 (2000).

Here, the question then becomes one of what the requisite *mens rea* is for premeditated murder by way of accomplice liability. The

accomplice liability statute merely requires a *mens rea* of knowledge, and an *actus reus* of soliciting, commanding, encouraging, or requesting the commission of the crime. ***Roberts***, 142 Wn.2d at 502 (citing RCW 9A.08.020(3)(a). On the other hand, the premeditated murder statute requires a *mens rea* of premeditated intent to kill and the *actus reus* that causes the death of the victim. ***Roberts***, 142 Wn.2d at 501-02. The confusion arises from the fact that premeditated murder is a specific intent crime, thereby raising the question of whether the intent element of the crime can be attributed to the principal only, or the principal as well as an accomplice.

Accomplice liability attaches only when the accomplice acts with knowledge of assisting the commission of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. ***State v. Carter***, 154 Wn.2d 71, 76, 109 P.32 823 (2005); ***State v. Cronin***, 142 Wn.2d 658, 578-79, 14 P.3d 752 (2000); ***Roberts***, 142 Wn.2d at 509-13. An accomplice need not have knowledge of each element of the principal's crime, general knowledge of the specific crime is sufficient. ***Roberts***, 142 Wn.2d at 513. Thus, "[t]o convict an accomplice of premeditated murder in the first degree, the State need not 'show that the accomplice had the intent that the victim would be killed.'" ***State v. Thomas***, 166 Wn.2d 380, 387-88, 208

P.3d 1107 (2009) (citing ***State v. Guloy***, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985)). The State ..."need only prove that the defendant knew his actions would facilitate the crime for which he was eventually charged," (premeditated murder). ***Thomas***, 166 Wn.2d at 388 (citing ***Cronin***, 142 Wn.2d at 581-82).

The court has previously addressed the apparent difficulty of proving the intent element in a specific intent crime where accomplice liability is alleged. In ***State v. Haack***, the court held that it was not error to include "or an accomplice" language in the intent element of assault in the first degree. ***State v. Haack***, 88 Wn. App. 423, 426-27, 958 P.2d 1001 (1997), *review denied*, 148 Wn.2d 1009, 62 P.3d 890 (2003). The intent element of assault in the first degree requires that the assaultive act was done with intent to inflict great bodily harm. *See* ***Haack***, 88 Wn. App. at 427. In ***Haack***, the defendant raised essentially the same argument the defense raises here. Accordingly, the court's opinion in ***Haack*** is controlling on this issue notwithstanding the defense attempts to distinguish it. As the court in ***Haack*** noted, although the instruction given would allow the jury to convict based on splitting the elements of the crime between ***Haack*** and his brother, such is not an incorrect statement of the law of accomplice liability. ***Haack***, 88 Wn. App. at 427. This is because the legislature has said that anyone who participates in the

commission of a crime is guilty and should be charged as a principle regardless of the degree of participation. ***Haack***, 88 Wn. App. at 428.

Moreover, where multiple accomplices were to each commit one element of a crime, but no one individually commited all elements, under the defense theory there would not be a prosecutable crime even though a crime was committed (by all in concert). One purpose of the accomplice liability statute is to prevent precisely this kind of situation where no one individual has completed all the elements of the crime. That being the case, there is nothing in the accomplice liability statute that exempts specific intent crimes from accomplice liability, nor is there any good reason why such crimes should be excluded from accomplice liability. Yet, that is precisely the result that would occur if the court were to adopt the defense argument.

It is for this reason that the elements of the crime are the same for both a principal and an accomplice. ***State v. Carothers***, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), *overruled on other grounds* in ***State v. Harris***, 102 Wn.2d 148, 685 P.2d 584 (1984). *See also*, ***Teal***, 152 Wn.2d at 339; ***State v. Davis***, 101 Wn.2d 654, 682 P.2d 883 (1984). Indeed, in ***State v. Medley***, the court specifically stated that ***Carothers*** stood for the proposition that the lack of a unanimity instruction was not error because

the accomplice statute did not create a separate or alternative mode. ***State v. Medley***, 11 Wn. App. 491, 496-97, 524 P.2d 466 (1974).

If the court were to disagree with the State and hold that the instruction in this case was erroneous, the defendant is still not entitled to relief on this issue.

An omission or misstatement of the law in a jury instruction is erroneous if it relieves the State of its burden to prove every element of the crime charged. ***State v. Thomas***, 150 Wn.2d 821, 844, 83 P.3d 970 (2004) (citing ***State v. Brown***, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). However, not every omission or misstatement in an instruction has the effect of relieving the State's burden. ***Thomas***, 150 Wn.2d at 844. When an erroneous instruction omits an element of the offense or misstates the law, it is subject to a harmless error analysis. ***Thomas***, 150 Wn.2d at 844 (citing ***Neder v. United States***, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999); ***Brown***, 147 Wn.2d at 339). Even where an instruction omits an element of the offense, it does not necessarily render a criminal trial fundamentally unfair. ***Thomas***, 150 Wn.2d at 844-45 (quoting ***Neder***, 527 U.S. at 9). Such a constitutional error will be harmless if it appears "...'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***Thomas***, 150 Wn.2d at 845 (quoting

Neder, 527 U.S. at 15 (quoting ***Chapman v. California***, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967))). When an element in a jury instruction is omitted or misstated, "'the error is harmless if that element I supported by uncontroverted evidence.'" ***Thomas***, 150 Wn.2d at 845 (quoting ***Brown***, 147 Wn.2d at 341 (citing ***Neder***, 527 U.S. at 18)).

Where sufficient evidence in the record indicated that the particular defendant was a principal in certain of the charges, an error in the accomplice liability instruction was harmless beyond a reasonable doubt. ***Thomas***, 150 Wn.2d at 845 (citing ***Brown***, 147 Wn.2d at 341). The same logic applies to erroneous "to convict" instructions. ***Thomas***, 150 Wn.2d at 845.

Here, there was sufficient evidence in the record to support the conviction even if the court were to hold the instruction was error. Accordingly, any error was harmless beyond a reasonable doubt. It is likely that in most if not all instances of any such error in a case of premeditated murder the error would be harmless ***per se*** because in order to be an accomplice to such a murder, the accomplice would need to assist knowing it was a murder, which as a practical matter in virtually any circumstance is going to mean it was premeditated. It is hard to imagine a scenario in which one could be an accomplice to intentional murder without it being premeditated.

In order to be guilty of premeditated murder as an accomplice, Walker had to solicit, command, encourage, or request the commission of the crime knowing that crime would be premeditated murder. The parties stipulated that Calvin Finley killed Kurt Husted. 6 RP 373, ln. 6-10; Ex. 67. Premeditation may be shown by direct or circumstantial evidence. ***State v. Bingham***, 105 Wn.2d 820, 719 P.2d 109 (1986).

Here there was ample evidence that the crime was premeditated.

Months in advance of the robbery, Tonie Williams-Irby heard Walker talking with Finley about killing the guard and telling Finley to "do what you got to do. 7 RP 665, ln. 1 to p. 666, ln. 21.

Walker talked to Jessie Lewis about committing a robbery. 9 RP 902, ln. 25 to p. 903, ln. 13. Calvin Finley was present for the conversation. 9 RP 904, ln. 4-8. Lewis's role was to be to shoot the armored car guard at the WalMart. 9 RP 904, ln. 11-12. Walker then took Lewis to the WalMart Store to rob the armored car guard. 9 RP 904, ln. 21 to p. 905, ln. 5. Walker showed Lewis weapons that would be used, including a 9-miliimeter and a black .45. 9 RP 905, ln. 10-11. Walker's role was to be the driver. 9 RP 905, ln. 14-21. After Lewis showed reluctance, they told him to go in there and Calvin would do whatever they had to do, shoot the guard, or whatever. 9 RP 906, ln. 4-9.

Lewis and Finley and Turpin went inside the store. 9 RP 906, ln. 909, ln. 22 to p. 910, ln. 6. Their intent was to rob the armored car guard. 9 RP 910, ln. 19-22. Prior to going in, Walker tried to give Lewis a 9-millimeter gun, but Lewis got nervous about the whole thing and didn't take it. 9 RP 911, ln. 9-23. Lewis walked into the store behind Finley, who was showing him how they were going to do the crime. 9 RP 912, ln. 1-4.

But Lewis knew they weren't going to get away with the money like that and that it wasn't going to go down like they were trying to plan it to go down. 9 RP 912, ln 4-10. Lewis knew that someone was going to get killed. 9 RP 912, ln. 11-12.

Walker said they could have done it, but Lewis told him he wasn't doing that. 9 RP 913, ln. 20-21. Lewis told Walker that somebody was going to die and Lewis wasn't going to be involved in a murder. 9 RP 913,ln. 1-2. Walker told him that they were going to get away, that it was a clean "lick" [robbery] and tried to persuade Lewis to do it, but he knew better. 9 RP 913, ln. 4-9.

On the day of the birthday party, Walker tried to recruit Lewis to commit the robbery again. 9 RP 914, ln. 11-12.

Jordan Lopez overheard Walker talking about the robbery with Lewis before the day of the birthday party. 9 RP 943, ln. 1-4. Finley was

present. 9 RP 943, ln. 10-16. At the birthday party, Lopez saw Walker with a chrome colored gun clipped to the inside waist of his pants. 9 RP 947, ln. 12-19.

After Walker was unsuccessful recruiting Lewis to participate in the robbery of the armored car, he tried to recruit Darrell Parrott. 9 RP 966, ln. 18-25; p. 968, ln. 22 to p. 969, ln. 3. He told Parrot that he would have to walk in with a gun to watch Finley's back. 9 RP 969, ln. 7-10. Parrot declined. 9 RP 970, ln. 20-23.

On the day of the robbery, Walker had Tonie Williams-Irby go to the staff meeting so she could call to tell him the numbers for how much money the store made the day before. 8 RP 701, ln. 19 to p. 703, ln. 7. After she heard someone had been shot, she realized they had done what they said they were going to do. 8 RP 708, ln. 18 to p. 709, ln. 5.

After the robbery as Irby-Williams rode with Walker to the house of someone named Al, she discussed with Walker what he did during the robbery and murder of the Loomis driver. 8 RP 723, ln. 4-7. Walker stated that he was sitting outside in the car on the phone with Finley. 8 RP 723, ln. 13-14. He said the man laughed at Finley, so Walker told Finley to kill the mother fucker. 8 RP 723, ln. 15-24.

Later, when they were out to dinner at Red Lobster, Williams-Irby remembered Walker saying, this is how you do it. This is how you murder

these [!@^%&*$].[2] Darrell Parrott recalled hearing Walker tell Williams-Irby, I told you this is how you rob these motherfuckers [sic]. 9 RP 998, ln. 22-23.

The video shows that Finley walked up to the guard and shot him within two seconds of approaching him. Ex. 9, 32(d)-38(d); 6 RP 415, ln. 12-13; p. 418, ln. 12 to p. 422, ln. 3. Turpin didn't flinch, but just reaches down and grabs the bag, suggesting he knew that the shooting was coming. Ex. 9.

Nothing in this record supports the position that Walker had the intent to murder the guard, but Finley did not. For that reason, even if the to convict and premeditation instructions that contained "or an accomplice" were error, the error was harmless under the facts of this case.

The instructions in this case were not error. Even if they were error, any error was harmless. As such, they did not violate Walker's due process rights or right to a unanimous jury. The defendant's claim on this issue is without merit and should be denied.

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[2] Expletive deleted.

2. THE TRIAL COURT ERRED WHEN IT GAVE ITS INSTRUCTION 46 AND DECLINED TO EXCLUDE THE "MAJOR PARTICIPANT" LANGUAGE OBJECTED TO BY THE STATE.

The court's instruction number 46 included the following language over the State's objection:

> For the aggravating circumstance to apply, the defendant must have been a major participant in acts causing the death of Kurt Husted and the aggravating factors must specifically apply to the defendant's actions. The State has the burden of proving this beyond a reasonable doubt. If you have a reasonable doubt whether the defendant was a major participant, you should answer the special verdict, "no."

CP 50.

The State's position is that the court erred when it included that language because that language only applies when the State is seeking the death penalty where accomplice liability has been alleged. The State is asking this Court to hold that the addition of the language in this case was error, and that in the event of a reversal and remand of the conviction, the State be entitled to re-try the case without the erroneous language.

In ***State v. Roberts***, the court held that the imposition of the death penalty is constitutional only if the defendant was a major participant and the aggravating factors are specifically applied to the defendant. ***State v. Roberts***, 142 Wn.2d 471, 508-09, 14 P.3d 713 (2000). In reaching this holding, the court relied on the proposition that a capital sentence imposed

without an individualized determination that the punishment is appropriate constitutes cruel and unusual punishment that violates the Eighth and Fourteenth Amendments. ***Roberts***, 142 Wn.2d at 502 (citations omitted).

The United States Supreme Court has held that an accomplice could not be subjected to the death penalty where he did not kill or intend to kill. ***Roberts***, 142 Wn.2d at 502 (Citing ***Enmund v. Florida***, 458 U.S. 782, 798, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982)). The defendant in ***Enmund*** was convicted of felony murder for being the driver of a getaway car in an armed robbery of the home of an elderly couple. The court in ***Enmund*** also held the death penalty was disproportional to the crime of robbery-felony murder, i.e. felony murder *simpliciter*, even though the death penalty was constitutional for the crime of felony murder under other circumstances. ***Enmund***, 458 U.S. at 788. However, because the court in ***Endmund*** had already reversed the death penalty, it did not need to reach the question of whether the defendant's participation in the killings was given sufficient consideration by the jury as required by the Eighth and Fourteenth Amendments. ***Enmund***, 458 U.S. at 787 n. 4.

In a subsequent case, ***Tison v. Arizona***, the United States Supreme Court went on to address some of the unresolved issues regarding the degree of participation in a crime by accomplices. ***Tison v. Arizona***, 481 U.S. 137, 107 S. Ct. 1676, 95 L.Ed.2d 127 (1987). In ***Tison***, three sons aided their father, Gary Tison, in his escape from prison but did not actually perform an act of murder themselves. ***Tison***, 541 U.S. at 139.

Three days later, while still fleeing with his sons, the father, Gary Tison, and a fellow escapee Greenawalt stopped a passing motorist and ultimately shot and killed him, his wife, their fifteen-year-old niece, and two-year-old child. ***Tison***, 541 U.S. at 140.

The court in ***Tison*** reasoned that the Tison sons fell outside the category of felony murders explicitly held disproportional in ***Enmund*** because the participation of the two surviving Tison sons was major, rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life. ***Tison***, 418 U.S. at 151. The court went on to hold that [with regard to the limited applicability of the death penalty to felony murder] major participation in the felony committed, combined with reckless indifference to human life, is sufficient to establish the culpability requirement of ***Enmund*** [and therefore does not violate the Eighth Amendment prohibition on cruel and unusual punishment]. ***Tison***, 451 U.S. at 158.

The court also noted that while [for analytic reasons] it separately stated the two requirements of 1) major participation, and 2) reckless indifference to human life, the two requirements often overlap. ***Tison***, 481 U.S. at 158 n. 12. "Even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." ***Tison***, 481 U.S. at 158 n. 12.

Returning to ***State v. Roberts***, following on ***Tison***, the court in ***Roberts*** held that the jury instructions allowed Roberts to be convicted of premeditated murder in the first degree solely as an accomplice. ***Roberts***, 142 Wn.2d at 503-04. The court in ***Roberts*** found that case analogous to ***Tison*** because accomplice liability for premeditated murder was analogous to liability for felony murder where a defendant may be convicted for a lesser *mens rea* and lesser *actus reus* than would be necessary for a principal. ***Roberts***, 142 Wn.2d at 505.

The court in ***Roberts*** went on to hold that there must be a finding of major participation by a defendant in the acts giving rise to the homicide in order to impose the death penalty on a defendant convicted solely as an accomplice to premeditated first degree murder. ***Roberts***, 142 Wn.2d at 505. The court held that without such a finding, the Eighth and Fourteenth Amendments, as well as the cruel and unusual punishment clause of the Washington State Constitution, are violated. ***Roberts***, 142 Wn.2d at 505-06.[3]

Subsequent to ***Roberts***, in ***In re Howerton***, the court considered the validity of a defendant's life sentence for first-degree aggravated murder committed in the course of a robbery in which the State argued, and the

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[3] Although, for now, this is the controlling authority in Washington, given that ***Tison*** and ***Enmund*** were limited to application of the death penalty to felony murder, it remains an open question whether United States Supreme Court will ultimately adopt a requirement under the Eighth Amendment of a "major participation" finding for the application of the death penalty in premeditated murder.

court instructed, on liability as either a principal or an accomplice. ***In re Howerton***, 109 Wn. App. 494, 496-97, 36 P.3d 565 (2001). Similar to this case, one of the two aggravating factors was an allegation that the murder was committed in the course of, in furtherance of, or in flight from robbery. ***Howerton***, 109 Wn. App. at 497.

Howerton argued that because the aggravating factors were sentence enhancements and not elements of the crime, they should not apply to cases based on accomplice liability. ***Howerton***, 109 Wn. App. at 499 (citing ***State v. Irizarry***, 111 Wn.2d 591, 594, 763 P.2d 432 (1988)). The court concluded that there was a statutory basis for applying the aggravating factors to an accomplice. ***Howerton***, 109 Wn. App. at 500. *Accord* ***Roberts***, 142 Wn.2d at 501-02.

The court found the more difficult question to be "whether the aggravating factors can be attributed to a defendant solely on the basis of complicity [as an accomplice]," i.e. whether the Legislature intended to hold accomplices to premeditated murder strictly liable for the existence of aggravating factors, or whether the State must prove the applicability of the factors to the individual defendant. ***Howerton***, 109 Wn. App. at 500. In addressing this question, the court in ***Howerton*** looked to ***State v. McKim*** wherein the court concluded on the basis of statutory analysis that deadly weapon enhancements could only be applied to an unarmed codefendant if the State proved beyond a reasonable doubt that the accused knew the co-participant was armed. ***Howerton***, 109 Wn. App. at

500-01 (Citing ***State v. McKim***, 98 Wn.2d 111, 653 P.2d 1040 (1982)).[4] "In its analysis, the court [in ***McKim***] noted that while under the old accomplice liability statute an accomplice could be held strictly liable for sentence enhancements, '[t]he new complicity statute...makes an accomplice equally liable only for the substantive crime-any sentence enhancement must depend on the accused's own misconduct.'" ***Howerton***, 109 Wn. App. at 499 (quoting ***McKim***, 98Wn.2d at 117).

However, the passage from ***McKim*** that the ***Howerton*** court relied upon was inapplicable to Howerton's case and remains inapplicable now. The "new" statutory provision considered in ***McKim*** dates from 1976, while McKim's crime occurred in 1978, so that the court in ***McKim*** had to interpret the complicity statute in the context of the then extant statutory scheme for punishment via the parole system. *See* ***Howerton***, 109 Wn. App. at 500 n. 3; ***McKim***, 98 Wn.2d at 113, 114-16.

Because the complicity statute, as it existed in ***McKim*** (and still does exist) did not contain language sufficient to activate the deadly weapon statute by, the court in ***McKim*** instead had to look beyond the complicity statute to former RCW 9.95.015 (1978) [Prison Terms, Paroles and Probation]. The analysis in ***McKim*** thus pre-dates the SRA version of enhancement liability applied to accomplices. As such, it also pre-dated

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[4] The holding in ***McKim*** was quickly superceded by the adoption of the Sentencing Reform Act of 1981.

the analysis that pertained to Howerton, whose crimes were committed in 1994. *See* ***Howerton***, 109 Wn. App. at 496, 500 n. 3. Therefore, after the 1981 adoption of the SRA and in light of ***McKim***, it was thenceforth necessary to interpret accomplice liability for enhancements in light of the surrounding statutory scheme, and particularly the language of the particular enhancements themselves. *See* ***State v. Pineda-Pineda***, 154 Wn. App. 653, 662-63, 226 P.3d 164 (2010).

Thus, the adoption of the SRA, by changing the language of various enhancements, effectively superseded the analysis of ***McKim*** on the applicability of enhancements to accomplices even though the SRA made no direct changes to the complicity statute. For this reason, the reliance of the ***Howerton*** court on the analysis of ***McKim*** was misplaced.

Moreover, Washington Supreme Court opinions issued before ***Howerton*** make it abundantly clear that an accomplice in fact does have the exact same liability as a principal. *See* ***State v. Silva-Baltazar***, 125 Wn.2d 472, 886 P.2d 138 (1994). *See also*, ***State v. Carter***, 154 Wn.2d 71, 109 P.3d 823 (2005).

Having improperly relied on ***McKim***, the court in ***Howerton*** then went on to consider the effect of the Washington Supreme Court's opinion in ***Roberts***. ***Howerton***, 109 Wn. App. at 503ff. The court acknowledged that because the analysis in ***Roberts*** was so clearly focused on the capital aspect of the case, its holding was of limited application to Howerton's case. ***Howerton***, 109 Wn. App. at 505. The ***Howerton*** court noted that

the court in ***Roberts*** made it clear that in some cases, an accomplice to murder can be culpable for aggravating factors. ***Howerton***, 109 Wn. App. at 505. The court in ***Howerton*** went on to view the ***Roberts*** court's requirement that aggravating factors must be found to be specifically attributable to the defendant as consistent with its own analysis, as well as that of ***State v. McKim***. ***Howerton***, 109 Wn. App. at 505 (citing ***McKim***, 98 Wn.2d 111). The court in ***Howerton*** didn't really independently analyze the issue. It largely just adopted the analysis from ***McKim***.

In the version of WPIC 30.03 current as of 2008, the comment of the committee indicates that "For an aggravating circumstance to apply, the defendant must be a major participant in the acts causing the death of the victim." WASHINGTON PRACTICE, VOL. 11: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL, WPIC 30.03 (2008). While noting the requirement derived from death penalty cases, the committee adopted the applicability of this language to all enhancements in light of ***Howerton***, ***State v. Thomas*** (***Thomas I***), 150 Wn.2d 821, 83 P.3d 970 (2004), an especially *orbiter dictum* discussing ***Thomas I*** in ***State v. Whitaker***, 133 Wn. App. 199, 232-35, 135 P.3d 923 (2006). WASHINGTON PRACTICE, VOL. 11: WASHINGTON PATTERN JURY INSTRUCTIONS CRIMINAL, WPIC 30.03 (2008).

However, in 2009 in ***State v. Thomas*** (***Thomas II***), the Washington Supreme Court indicated that the applicability of the "major participant" requirement to non-death penalty cases remains an open question. ***State v. Thomas***, 166 Wn.2d 380, 388 n. 5, 208 P.3d 1107 (2009).

It was the State's position below that the language should not have been applied to instruction 46 where this is not a death penalty case. 12 RP 1327, ln. 9 to p. 1328, ln. 15. *See also*, 11 RP 1312, ln. 9 to p. 1317, ln. 17. It remains the State's position on appeal that the "major participant" requirement derives from the unique protections against cruel and unusual punishment that exist for death penalty cases, and that any application of the rule beyond that context exceeds constitutional requirements to protect against cruel and unusual punishment.

Under the Eighth Amendment to the United States Constitution the "major participant" requirement is limited to accomplice liability for felony murder. ***Enmund*** and ***Tison*** were both limited to accomplice liability for felony murder.

Accomplice liability for felony murder is fundamentally different from accomplice liability for premeditated murder. In felony murder, the accomplice only intends to assist in the commission of a felony which is less serious than murder and a death results. Under such circumstances, merely by assisting the principal perpetrator in some lesser crime, the defendant's actions do not warrant death, unless, as with an intentional murder, the accomplice was a major participant, and acted with reckless

disregard for human life. When the State proves these two facts, it demonstrates that the accomplice to felony murder acted in a manner comparable to an accomplice to intentional murder and therefore, in terms of facing the accomplice at risk for the death penalty, puts the accomplice to felony murder in the same standing as if he were an accomplice to intentional murder. It shows that the defendant acted in a similar manner, and with the same regard for human life as if he were aiding in an intentional murder.

It is notable that even the court in ***Roberts***, a death penalty case, only applied one of the two ***Tison*** requirements: major participation. That is because the other requirement from ***Tison*** is irrelevant for accomplices to intentional murder, since their conduct is already worse than showing reckless disregard for human life where their actions demonstrate actual and complete disregard for human life.

Assuming for the sake of argument that under the Eighth Amendment accomplice liability in non-death penalty cases does not require proof of major participation, the question then remains whether the prohibition against cruel and unusual punishment under the Washington Constitution would require a different result. It is not necessary to undertake a ***Gunwall*** analysis of the issue, because it is already well established that the Washington State Constitution's clause proscribing cruel punishment under Art. I, § 14 often provides greater protection than the Eighth Amendment. ***Roberts***, 142 Wn.2d at 506 n. 11 (citing ***State v.***

White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) (citing ***State v. Gunwall***, 106 Wn.2d 54, 720 P.2d 808 (1986))). The question then is in what ways are the protections greater under the cruel punishment clause of the Washington Constitution.

The Washington constitutional provision simply states:

> Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Const. Art. 1, § 14. Nonetheless, starting in 1980, the Washington Supreme Court began to interpret the cruel punishment provision of Art. 1, § 14 as providing greater protection than the federal constitution, notwithstanding the fact that it lacked the "or unusual" language of the Eighth Amendment. *See* ***State v. Fain***, 94 Wn.2d 387, 393, 617 P.2d 720 (1980).

In ***Fain*** the court held that where a defendant received a life sentence as a habitual offender for three convictions based upon fraud, all involving small dollar amounts, the crime was disproportionate and violated the cruel punishment clause under art. 1 § 14. ***Fain***, 94 Wn.2d 387.

In ***State v. Bartholomew***, the court held that statutory provision, which in part abrogated the applicability of the rules of evidence to death penalty special proceedings violated the prohibition against cruel punishment in art. 1, § 14. ***State v. Bartholomew***, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) (overturning RCW 10.95.060(3)). The rule allowed judges to admit any evidence they considered relevant notwithstanding the

rules of evidence, and resulted in a proceeding that lacked fundamental fairness contrary to the due process requirement under the state constitution. ***Bartholomew***, 101 Wn.2d at 640.

In ***State v. Manussier***, the court held that a life sentence as an habitual offender was not disproportionate and did not violate the cruel punishment prohibition of art. 1, § 14 for a defendant whose predicate offenses consisted of convictions for first and second degree robbery. ***State v. Manussier***, 129 Wn.2d 652, 921 P.2d 473 (1996).

In ***State v. Ames*** the court held that a life sentence under the persistent offender act was not disproportionate and did not violate the cruel punishment provision of art. 1, § 14 where the defendant had been convicted of first and second degree robbery and assault in the second degree, all statutorily defined as serious violent offenses. ***State v. Ames***, 89 Wn. App. 702, 950 P.2d 514 (1998).

In ***State v. Morin*** the court held that a life sentence under the persistent offender act was not disproportionate and did not violate the cruel punishment clause of art. 1, § 14 where the defendant was convicted of robbery in the first degree, burglary in the first degree and indecent liberties by forcible compulsion after having previously been convicted for rape in the fist degree. ***State v. Morin***, 100 Wn. App. 25, 995 P.2d 113 (2000).

All of the cases considering a challenge based upon disproportionality applied a four factor test first set forth in ***Fain.*** *See, e.g.* ***Morin***, 100 Wn. App. at 29-30. Those factors are: 1) the nature of the offense; 2) the legislative purpose behind the statute; 3) the punishment the defendant would have received in other jurisdictions; and 4) the punishment imposed for other offenses in the same jurisdiction. ***Morin***, 100 Wn. App. at 29-30.

Unfortunately, even though ***Enmund*** and ***Tison***, were concerned with disproportionality analyses, the four-part test from ***Fain*** is not particularly helpful in considering whether a "major participant" finding is required for accomplice liability to premeditated murder in a non-death penalty case. That is because it is so particular a distinction that it doesn't permit ready comparison with other jurisdictions. Nor is it analogous to anything else under State law. An electronic search reveals no out-of-state cases that have relied on ***Roberts***, even in the context of a death penalty sentence, much less a non-death penalty sentence.

As such, the existing Washington case law on art. 1, § 14 does not really provide any meaningful guidance. However, where that is the case, the State's position is that there is not a compelling reason to deviate from the Eighth Amendment and adopt the "major participant" requirement in non-death penalty convictions for premeditated murder by way of accomplice liability under art. 1, § 14.

In the event this Court were to reverse and remand the conviction for other reasons, the instruction aggravating circumstance instruction for premeditated murder given as instruction 46 below should be held error, and the court directed to properly instruct the jury as to this issue such that the State is not required to prove that the defendant was a major participant in causing the death of Kurt Husted.

3. THE PROSECUTORS DID NOT ERR, NOR DID THEY COMMIT MISCONDUCT.

Before an appellate court should review a claim based on prosecutorial misconduct, it should require "'...that [the] burden of showing essential unfairness be sustained by him who claims such injustice.'" ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962) (quoting ***United States ex rel. Darcy v. Handy***, 351 U.S. 454, 462, 76 S. Ct. 965, 970, 100 L. Ed. 1331 (1956)). Trial court rulings on claims of prosecutorial misconduct are reviewed for an abuse of discretion. ***State v. Stenson***, 132 Wn.2d 668, 940 P.2d 1239 (1997); ***State v. Ramos***, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011) (citing ***State v. Ish***, 170 Wn.2d 189, 195, 241 P.3d 389 (2010)). Claims of prosecutorial misconduct not raised in the trial court are reviewed to see if the conduct was so flagrant and ill-intentioned that it could not have been cured by an

instruction to the jury. ***State v. Belgarde***, 10 Wn.2d 504, 507, 775 P.2d 174 (1998).

Defendants are guaranteed the right to a fair and impartial trial by the Sixth and Fourteenth Amendments of the United State's Constitution, and by article I, section 3 and article I, section 22 (amendment 10) of the Washington Constitution. ***In re Crace***, 157 Wn. App. 81, 96, 236 P.3d 914 (2010) (quoting ***State v. Finch***, 137 Wn.2d 792, 844, 975 P.2d 967 (1999))

Prosecutors are quasi-judicial officers and in presenting a criminal case to a jury, prosecutors have a responsibility to seek a verdict free of prejudice and based upon reason. ***State v. Charlton***, 90 Wn.2d 657, 585 P.2d 142 (1978). In the interests of justice a prosecutor must act impartially. ***Charlton***, 90 Wn.2d at 664. If in the conduct of the State's case, a prosecutor's actions do not produce a verdict free of prejudice, it can deprive the defendant of the right to a fair trial. *See* ***State v. Monday***, 171 Wn.2d 667, 684, 257 P.3d 551 (2011).

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)).

Moreover, absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so "flagrant and ill intentioned" that no curative instruction would have obviated the prejudice it engendered. ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); ***State v. Ziegler***, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Finally, it is worth noting that "prosecutorial misconduct" is a term of art that is a misnomer because it encompasses all errors made by a prosecutor, and does not necessarily imply violations of the rules of professional conduct. See ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009).

> "Prosecutorial misconduct" is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct.

Fischer, 165 Wn.2d at 740 n. 1.

a. <u>It Was Not Error For The Prosecutor To Tell The Jury In Opening That Walker Was "Lying" To The Police.</u>

The defense takes issue with the following statement made by the prosecutor in opening:

> When the police question the defendant, he is being – he is adamant. He is cursing. He is yelling. He is swearing. He is saying he didn't have any idea why the police stopped him. Why did you arrest me? I didn't do anything. I had nothing to do with it. My wife, Williams-Irby, she didn't have anything to do with this. He is lying like crazy to the police.

Supp. RP (03-07-11) p. 48, ln. 13-19. [Emphasis added.]

Here, the State did not call Walker a liar. Instead, the prosecutor described Walker's conduct in the interview with the officers by saying Walker was "lying like crazy." While at first blush it may seem a fine distinction, there is a significant difference between calling a defendant a "liar," and accurately describing his conduct when he is engaged in "lying," which was the case here.

Calling someone a liar labels that person in a manner that is analogous to improperly admitting character evidence. *See, e.g.,* ER 404(a). It seeks to label the defendant generally and paint with a broad brush. However, to say that a defendant was lying, describes specific conduct in a particular instance, which is an altogether different action. It does not paint with a broad brush by labeling or describing the defendant's character in general.

In support of his claim, the defendant cites ***State v. Reed***, in which case the prosecutor in closing called the defendant a liar four times in conjunction with a number of other improper comments. ***State v. Reed***,

102 Wn.2d 140, 145, 684 P.2d 699 (1984). In ***Reed*** the prosecutor also asserted a personal opinion as to the credibility of a witness and the guilt or innocence of the defendant. ***Reed***, 102 Wn.2d at 145. The prosecutor in ***Reed*** also stated that defense counsel did not have a case and that the defendant was clearly "a murder two." ***Reed***, 102 Wn.2d at 145-46. Finally, the prosecutor in ***Reed*** additionally implied that defense witnesses should not be believed because they were from out of town and drove fancy cars. ***Reed***, 102 Wn.2d at 146. The court in ***Reed*** essentially held that it was the cumulative effect of totality of these errors that tainted the verdict. *See* ***Reed***, 102 Wn.2d at 146ff. Moreover, in assessing the error, the court in ***Reed*** placed the greatest weight on the prosecutor's emphasis of "...the fact that petitioner's counsel and expert witnesses were outsiders and that they drove expensive cars." *See* ***Reed***, 102 Wn.2d at 147.

Contrary to the defense reliance on ***Reed***, calling a defendant a liar is not in and of itself error. Indeed, it can be permissible to call a defendant a liar in closing, even several times, when doing so is done in reference to specific evidence, which "clearly demonstrated that in fact [the] defendant had lied." ***State v. Adams***, 76 Wn.2d 650, 660, 458 P.2d 558 (1969), *reversed on other grounds* by ***Adams v. Washington***, 403 U.S. 947, 91 S. Ct. 2273, 29 L.Ed.2d 885 (1971). The prosecutor in ***Adams*** apparently charged the defendant some 32 times with being a liar. ***Adams***, 76 Wn.2d at 660. The court went on to state, "Although the prosecutor's closing argument might have been better phrased by not

using the word 'liar', [sic] we believe that his argument comes within the rule which allows counsel to draw and express reasonable inferences from the evidence produced at trial." ***Adams***, 76 Wn.2d at 660.

The defense argues that the prosecutor's statement in this case was somehow more improper because it came in opening statements. Br. App. at 59.

The purpose of the prosecutor's opening statement is to outline the material evidence the State expects to introduce at trial. Ferguson, Royce A, Jr., WASHINGTON PRACTICE, VOL. 13: CRIMINAL PRACTICE AND PROCEDURE, § 4201, p. 215, c. 2004, 2011-12. Therefore, the opening statement must be based upon the evidence that the State anticipates producing, as well as the reasonable inferences that can be drawn therefrom. Ferguson at § 4201, p. 215 (citing ***State v. Aiken***, 72 Wn.2d 306, 351, 434 P.2d 10 (1967), *vacated on other grounds* by ***Wheat v. Washington***, 392 U.S. 652, 88 S. Ct. 2302, 20 L.Ed.2d 1357 (1968); ***State v. Kroll***, 87 Wn.2d 829, 834, 558 P.2d 173 (1976); ***State v. Grisby***, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), *certiorari denied* 459 U.S. 1211, 103 S. Ct. 1205, 75 L.Ed.2d 446 (1983); ***State v. Campbell***, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984)).

In its opening statement, the State may refer to admissible evidence expected to be presented at trial. Ferguson at § 4202, p. 216 (citing ***State v. Piche***, 71 Wn.2d 583, 585, 430 P.2d 522 (1967); ***State v. Mellis***, 2 Wn. App. 859, 860, 470 P.2d 558 (1970)). The State may also

include in its opening statement matters supported by a reasonable inference from the circumstantial evidence. Ferguson at § 4202, p. 216 (citing ***State v. Haga***, 13 Wn. App. 630, 536 P.2d 648 (1975); *certiorari denied* 425 U.S. 959, 96 S. Ct. 1740, 48 L.Ed.2d 204 (1976); ***Aiken***, 72 Wn.2d at 351).

> Any objection to misconduct in the opening statement is waived by failure to make an adequate timely objection and request for a corrective instruction or admonition, unless the misconduct is so flagrant and ill-intentioned, or the wrong inflicted so obvious and the prejudice so great that corrective instructions or admonitions clearly could not neutralize their effect.

Ferguson at § 4203, p. 217-18 (citing ***State v. Morris***, 70 Wn.2d 27, 422 P.2d 27 (1966).

A prosecutor's opening statement is not misconduct if it is closely supported by the evidence, and is not flagrant, persistent and ill intentioned or wrongly inflicted so as to unduly prejudice the defendant. Ferguson at § 4203, p. 217. Moreover, "[a]lleged improper conduct of the prosecuting attorney will not constitute grounds for reversing a conviction where the conduct did not influence the jury's verdict." Ferguson, § 4203, p. 217

Here, when the prosecutor said the defendant "is lying" it occurred once, in reference to specific lies he told to the police. As such, it was closely related to the evidence the State expected to put forth and, as a single instance, it was not persistent. Moreover, the State put forth

substantial evidence to support the description that Walker was lying to the police. Williams-Irby testified against Walker as to his involvement, and contradicted his claims to the police that he had nothing to do with it. Similarly, Jessie Lewis and Darrel Parrot contradicted Walker's claims to the police with their testimony that Walker tried to recruit them for the robbery, and that the plan from the beginning was to shoot the guard. 9 RP 902ff; 966ff. Because the State had a good faith basis to believe that the evidence would show that the defendant repeatedly lied to the police in his interview, the single statement to that effect in opening was not error.

This is particularly so because Walker's false statements to the officers were admissible as evidence of consciousness of guilt. ***State v. Clark***, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (citing ***State v. Allen***, 57 Wn. App. 134, 143, 787 P.2d 566, 788 P.2d 1084 (1990). Where he lied to the officers repeatedly throughout his interview, while simultaneously yelling and cursing in a belligerent manner, it is particularly relevant to his consciousness of guilt.

Moreover, jury instruction no. 1 directed the jury in pertinent part that:

> ...
> The Lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.
> ...

CP 203. *See also*, Second Supplemental RP 03-07-11, p. 4, ln. 13-18. The prosecutor's statement in opening that the defendant was "Lying like crazy" is not error where it occurred once, was an accurate reference to the conduct of the defendant, and was closely supported by the evidence put forth at trial. Accordingly, the defendant's claim on this issue should be denied as without merit.

b. The Prosecutors Did Not Err By Arguing In Closing That The Evidence That Established The Defendant's Guilt. Nor Where The Transcript Is Over 1,300 Pages Was It Error For Them To Have Captions In 137 PowerPoint Slides on Closing Times That His Guilt Was Proved In Different Ways.

The defense takes exception to the State's PowerPoint slide presentation used in closing. A large number of the State's slides in the PowerPoint slide show presentation for closing contained the heading "defendant walker guilty of premeditated murder" or something substantially similar.

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. ***State v. Finch***, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the

misconduct affected the jury's verdict. ***Finch***, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Allegedly improper comments in closing are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. ***State v. Bryant***, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) "remarks must be read in context." ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

> "It is not misconduct...for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel."

State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. ***State v. Mak***, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***State v. Binkin***, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. ***Binkin***, at 293-294.

Out of 267 total slides in the State's PowerPoint closing presentation, 120 had the heading "defendant walker guilty of premeditated murder" or something substantially equivalent.[5] All those slides contained textual summaries that were reviews of the evidence. They were interspersed with numerous slides that did not include the heading, but instead included copies of the jury instructions, photographic evidence, or other aspects of the argument. The slides with the heading challenged by the defense did not first appear until the 18th slide.

When viewed in the context of the total closing, it is clear that the purpose of the slides with the heading is to explain for the jury the arguments that show the defendant's guilt. The whole purpose of closing is for the State to argue that the defendant is guilty. The entire closing is an argument of the defendant's guilt. Accordingly, the fact that less than half of the State's slides have a heading referring to his guilt is not prejudical.

This is particularly so where the jury was instructed that:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and to apply

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[5] The State's count differs from that of defense count of 137. *See* Br. App. 61ff. The difference appears to be because the defense double counted slides that had additional text appear with a further click of the controller. This difference in the counts is only explained for the sake of accuracy in representations to the court. For, regardless of how counted, the difference between 120 or 137 slides with would not appear to be of any legal significance.

> the law. They are not evidence, however, and you should disregard any remark, statement, or argument, which is not supported by the evidence or by the law as I give it to you.

CP 203; Second Supplement RP 03-07-11, p. 4, ln. 13-18.

The defense claims in part that these headings constituted an improper expression of the personal opinion of the defendant's guilt. Br. App. 61-62. Nothing in the slides expresses a personal opinion of either of the prosecutors. All of the slides that contain the challenged heading list evidence that establishes Walker's guilt.

The defense claim that the heading on the slides was somehow an expression of the personal opinion of the prosecutor is not supported when the use of the slides with the heading is viewed in the context of the totality of the closing arguments.

The use of the heading on some slides was not error where those slides identified the evidence that established Walker's guilt.

Moreover, there was no objection to the heading on the slides. Even if the court were for some reason to hold that the heading was error, the defense has not shown that the use of the heading was so flagrant and ill intentioned that that no curative instruction would have obviated the prejudice.

Further, were the court to hold that the heading were error, a timely objection to the first few slides could have stopped the use of any further slides with the heading and required their removal before the State's

closing was allowed to proceed further, and any damage from the few slides could have been cured by a limiting instruction. To the extent that the defense argument is that the error consisted in or was amplified by the number of slides with the heading, the defendant is not entitled to relief on that basis due to the lack of a timely objection.

Finally, even if the court were to hold the heading on the slides was error, it was harmless where the evidence of Walker's guilt was overwhelming.

The defendant's claim on this issue is without merit where the headings on the slides was not error. The heading occurred on slides that listed or summarized points of evidence that established Walker's guilt. As such, the heading was appropriate and merely described the purpose of the slide.

Even if the headings were error, where they were not objected to, their inclusion was not so flagrant and ill intentioned that their use could not have been stopped or cured. The defendant's claim on this issue should be denied as without merit.

c. The State Is Entitled To Argue Reasonable Doubt And The State's Arguments As To Reasonable Doubt Were Not Error.

The defense argues that the State erred in making a number of arguments to the jury regarding reasonable doubt, and that these errors deprived the defendant of a fair trial. Br. App. 65. The defense alleges

the following specific errors:

1. That the state trivialized the burden of proof beyond a reasonable doubt by use of a jig-saw puzzle analogy. Exhibit 243 (PowerPoint closing, slides 198, and 260-61); 12 RP 1375; 1393

2. The State trivialized the burden of proof by making an analogy that the elements are like two steel rails in a railroad through the countryside supported by a whole bunch of railroad ties that are like the pieces of evidence in the case. 12 RP 1432

3. The State trivialized the burden of proof by its use of a basketball analogy when it said, when it said that "When the State has scored 40 points to the defendant's 2 points, that doesn't mean that there is a reasonable doubt in this case." 12 RP 1433.

Each of these arguments is addressed separately below.

While one might think that, because the reasonable doubt burden of proof has been around for a long time, we would have a lot of guidance about it. *See*, ***Brinegar v. U.S.***, 338 U.S. 160, 174, 69 S. Ct. 1302, 93 L. Ed. 2d 1809 (1949) (reaffirmed by ***In re Winship*** 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). However, the courts themselves have had trouble defining "reasonable doubt".

The explanation of the concept of "reasonable doubt" has challenged courts and attorneys for many years. In 1997, in considering a non-standard reasonable doubt instruction, Division I observed that:

"Scholars will continue endlessly to debate the best definition of reasonable doubt." ***State v. Castle***, 86 Wn. App. 48, 62, 935 P.2d 656, *review denied* 133 Wn. 2d 1014 (1997). That same year, Division I considered yet another nonstandard reasonable doubt instruction in ***State v. Cervantes***, 87 Wn. App. 440, 942 P.2d 382 (1997). For a period of time, the ***Castle*** instruction was approved for general use. *See*, 11 Washington Practice, Pattern Jury Instructions (2d edition, 1994), 4.01A (1998 pocket part). Eventually, in ***State v. Bennett***, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Supreme Court requested that trial courts cease using the ***Castle*** instruction, in favor of the standard WPIC 4.01.

"A 'reasonable doubt', at a minimum, is one based upon 'reason.'" "A fanciful doubt is not a reasonable doubt." ***Victor v. Nebraska***, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)(citing ***Jackson v. Virginia***, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The confusion over a definition of reasonable doubt comes from that fact that while the reasonable doubt standard is a requirement of due process, the United States Constitution neither prohibits nor requires trial courts to define reasonable doubt. ***Victor***, 511 U.S. at 5; 23A C.J.S. Criminal Law § 1809; 75A Am.Jur.2d Trial § 1158. Some courts hold to the position that trial courts should make no attempt to define reasonable doubt because no definition or explanation can make any clearer what is meant by the phrase, while other courts hew to the position that trial courts

must define reasonable doubt, at least where requested to do so. 75A Am.Jur.2d Trial § 1158. 23A C.J.S. Criminal Law § 1809.

It is worth noting that the closing arguments in any particular case are largely unique to that case and must be considered individually in the context of the totality of the closing argument.

> 'Misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom. What would be misconduct in one case might very well be held not to be misconduct in another. Each situation involving the question of misconduct must stand by itself and must be considered in the light of all its facts and circumstances to the end that verdicts properly arrived at shall not be disturbed, and that those verdicts which may have been induced by prejudice or by something beyond the issues, shall not be allowed to stand...'

State v. Beard, 74 Wn.2d 335, 342, 444 P.2d 651 (1968) (quoting ***State v. Navone***, 185 Wash, 532, 538, 58 P.3d 1028 (1936)). Any analysis or review that fails to consider the claimed error individually in the context of the totality of the case would be improper, especially where claims of prosecutorial misconduct are reviewed for abuse of discretion and were not objected to below.

Although a particular analogy may have been used improperly in closing in one case, that does not mean that that same or similar analogy cannot be used properly in a different context or with different argument. In the end, it always comes down to what the analogy was applied to, and how the specific argument was made.

i. Notwithstanding the authority relied upon by defense, the State's use of a jigsaw puzzle analogy in closing in this case did not trivialize reasonable doubt.

In closing, the State made reference to a jigsaw puzzle analogy two times. 12 RP1375 and 1393. Both occurred in conjunction with images in the PowerPoint closing. Ex. 243 (PowerPoint, slides 198, 260-61)

As to this issue, the defense relies upon two cases, ***State v. Johnson***, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), and ***State v. Jones***, 163 Wn. App. 354, ¶29, 259 P.3d 351 (2011).[6] *See* Br. App. at 66.

Here, the first instance of the puzzle analogy in closing occurred in arguing Walker's guilt of premeditated murder as an accomplice. 12 RP1375. The prosecutor said:

> The evidence is simply overwhelming that the defendant is an accomplice. All of the evidence are like pieces of the puzzle. When you put that puzzle together, he, clearly is an accomplice to the crime of murder.

12 RP 1375, ln. 2-6; Ex. 243, slide 198.

This statement and the surrounding argument contain no reference to reasonable doubt whatsoever. Reasonable doubt is not analogized to a

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[6] The reason the ***Jones*** case only contains a paragraph number for the pinpoint site is because that portion of the opinion is unpublished. Apparently it was originally marked for publication and subsequently retracted and only published in part. It is a bit confusing and the State is confident defense counsel only cited to due to an honest mistake.

trivial task such as doing a jigsaw puzzle. Rather, here, the puzzle analogy is used as an analogy for putting all the evidence together [to create a clear picture that Walker is an accomplice]. In this instance, the use of the puzzle analogy is to how the evidence fits together. That is not improper.

The first use of the puzzle analogy did not refer to reasonable doubt whatsoever, and certainly did not trivialize reasonable doubt by comparing it to a trivial activity like building a puzzle. Accordingly, this instance of the analogy was not error and does not warrant reversal.

The second instance of the puzzle analogy occurred at the end of the State's closing as part of the conclusion of its argument that the evidence that established the defendant's guilt beyond a reasonable doubt. The prosecutor said:

> The Court has also instructed you that in order to find the defendant guilty of these crimes, you must find him guilty beyond a reasonable doubt. A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.
>
> Reasonable doubt is not an impossible standard. It is not magic. Imagine, if you will, a jigsaw puzzle of the Tacoma Dome. There will come a time when you are putting that puzzle together, that you will be able to say with some certainty beyond a reasonable doubt what the puzzle is. The Tacoma Dome.
>
> Because there will always be some unanswered question in every case, some doubt, the burden of proof is not proof beyond a shadow of a doubt or proof beyond any and all doubt. It is proof beyond a reasonable doubt. If you know in your gut, if you know in your heart that the

> defendant is guilty as an accomplice, then you are convinced beyond a reasonable doubt.
>
> This case is different than most cases because there is absolutely no doubt that the defendant is guilty beyond a reasonable doubt. When you put all of the pieces of the puzzle together, it is clear that the defendant is guilty beyond a reasonable doubt.

12 RP 1392, ln. 18 to p. 1293, ln. 18.

Although this second use of the puzzle analogy occurred in conjunction with an argument about reasonable doubt, the analogy was made with regard to connecting the evidence, and not treating the reasonable doubt standard the equivalent of a trivial decision.

Telling the jury that when all the evidence is connected together, like the pieces of a jigsaw puzzle, that a picture of the defendant's guilt is established beyond a reasonable doubt in no way trivializes the reasonable doubt standard. Instead, it properly asks the jury to look at the evidence as a whole, and not each piece in isolation. Reasonable doubt is not analogized to the trivial activity of doing a jigsaw puzzle. Rather, the analogy is to how the jury views the evidence as a connected whole. The proper puzzle argument is that when the jury considers the evidence as a whole, like when it puts the pieces of a jig saw puzzle, the defendant's guilt is established beyond a reasonable doubt.

This case is controlled by ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011). In ***Curtiss***, the court held that an argument substantially similar to this one was not error because, considered in context, the

argument used an analogy to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof. ***Curtiss***, 161 Wn. App. at 700-01. The court held that such an argument was "not analogous to weighing of competing interests inherent in a choice that individuals make in their everyday lives." ***Curtiss***, 161 Wn. App. at 701.

The State does not claim here that no prosecutor has ever used the puzzle analogy improperly. There are other, improper arguments that could be made that would trivialize the reasonable doubt standard. Similarly, there are other different arguments that could properly apply the puzzle analogy to reasonable doubt.[7]

Depending upon the particular facts and circumstances of each case, there are presumably an infinite number of arguments that validly make proper use of the puzzle analogy, just as there are presumably an infinite number of arguments that make improper use of the puzzle analogy. The point is that the puzzle analogy itself does not inherently trivialize the reasonable doubt standard. It cannot. The standard can only

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[7] For instance, another proper use of the puzzle analogy would be to argue that: With a jigsaw puzzle, it is possible to have some pieces of information missing, but to still know beyond a reasonable doubt what the image on the puzzle is. Similarly, in a criminal case it is possible not to have answers to every possible question, but still be convinced of a defendant's guilt beyond a reasonable doubt. It is not necessary that the State prove everything, provide every piece and answer every question. All that is required is that the State prove each element of the crime beyond a reasonable doubt. Such an argument too does not trivialize reasonable doubt. It merely gives the jury a concrete real life example of the fact that they can be convinced of something even though they don't have complete information.

be trivialized depending upon how the analogy is used in a particular case.

The case law cited by defense establishes that in some instances the prosecutor may use a puzzle analogy improperly and thereby trivialize the reasonable doubt standard. However, that did not happen in this case. The argument, as made in this case, was not improper. The State's analogy did not trivialize reasonable doubt or reduce the State's burden. Rather, the argument here told the jury that when it put all the pieces of the puzzle, i.e, the evidence, together, they will be certain beyond a reasonable doubt of the defendant's guilt.

The State's use of the jigsaw puzzle analogy in this case occurred on March 23, 2011, which was prior to this court's issuance of its opinions in ***Jones*** and ***Johnson***, which were issued on August 30, 2011, and November 24, 2010 respectively. Because the prosecutors in this case did not have the benefit of those published opinions, the use of the analogy was not in disregard of that authority, and was therefore not flagrant and ill intentioned. *See* ***State v. Fleming***, 83 Wn. App. 209, 214, 921 P. 2d 1076 (1996) (holding in part, that the prosecutor's "find the witness lying or mistaken" argument was flagrant and ill-intentioned, because this argument had earlier been held improper) (citing ***State v. Casteneda-Perez***, 61 Wn. App. 354, 362-363, 810 P. 2d 74 (1991)). *But see* ***Johnson***, 158 Wn. App. at 685 (declining to follow that aspect of the ***Fleming*** decision).

Nor was the use of the puzzle analogies objected to by the defense in this case.

Because defense counsel did not object to the puzzle analogy in this case, the defense must show that the State's argument was flagrant and ill-intentioned in order to prevail on appeal. However, the defendant cannot make that showing where another panel of the court in ***Curtiss*** has held that the puzzle analogy is not improper. For these reasons, the defendant's claim on this issue must also be denied as without merit.

ii. The Prosecutor's "Two Rails" Analogy In Closing Was Not Improper.

The second and third analogies the defense challenges were made in relatively close proximity to each other. For the sake of reviewing them in context, that portion of the argument containing both is included here. The prosecutor made the following statement in rebuttal:

> I want to talk a little bit more about reasonable doubt. You have six different instructions that are called – what we call the "to convict" instructions. That is because the instruction starts with those two words, "to convict the defendant of...", and it identifies the crime. There is six different counts here, so you have six "to convict" instructions. I urge you to use those as the roadmap of what the State must prove. It is critical that you understand this, that the State must prove those elements that are described in each one of the "to convict" instructions. Nothing more; nothing less; but nothing more than that. That is what we have to prove beyond a reasonable doubt.
>
> The way we do that, and have done so in this case is to provide you a great deal of evidence that supports those elements. You might think of it – well, let me say this, the defense in their argument – and you can tell – they would

love for you to think that if you have a problem with any piece, any single piece of the supporting evidence, that that creates a reasonable doubt. They identify what they think are flaws or problems with the testimony of a particular witness or some piece of evidence, and they say, well, how can that convince you beyond a reasonable doubt? It is like a divide and conquer sort of argument. They want you to segment out individual pieces of evidence that you might have some issue with and then, therefore, conclude, well, you must have a reasonable doubt about the case. Well, that is not correct. The law requires that you consider the evidence as a whole and not this divide-and-conquer approach.

You might look at it like this, consider the elements that must be proven – imagine, if you will, a set of railroad tracks in the countryside. You have two steel rails. Those are like the elements that we have to prove. Underneath that, supporting those elements, are a whole bunch of railroad ties. Those are like the individual pieces of evidence that you have in this case. 200-plus exhibits, testimony from lots and lots of witnesses, all of these photographs, those are the individual pieces of evidence that are like the railroad ties that support the elements.

Well, some of the ties, if you will, some pieces of evidence might not be that strong in your mind. You might give little weight to certain testimony or pieces of evidence. Still, the State can readily prove its case because the elements, themselves, that which we have to prove are still supported by ample solid evidence. If you take away some of the railroad ties, you still have well-supported rails.

It is the elements that have been proven beyond a reasonable doubt, not ever [sic] bit of evidence in the case. I hope that you can see that important distinction. Don't fall for the divide-and-conquer argument.

Now, the defense – because this is March Madness basketball season, I will use – forgive me for using a sports analogy, but I'll use a basketball analogy, okay.

The defense would like you to believe that the State has to present a perfect case. They have to essentially, hold the opponent scoreless. They need to play a perfect flawless game to prove its case. The fact is, -- I mean, this

> is a trial. People's memories can be fallible. There is no such thing as a perfect case. The defense is going to score a bucket or two on occasion. When the State has scored 40 points to the defendant's two points, that doesn't mean that there is a reasonable doubt in the case.
>
> For instance, the window was up when Ms. Holly thought that it was down. Two points for a bucket. The window was plainly up. Ms. Holly got that wrong. In her ability to remember going back that far, she got that wrong. She apparently, got wrong, too, where she was at in the parking lot when she described what happened. Does that mean Ms. Holly wasn't there?
>
> [Prosecutor goes on to discuss other evidence in the case.]

12 RP 1230, ln. 18 to p. 1433, ln. 18. [Emphasis added.]

This railroad rails and ties analogy does not trivialize the burden of proving the case beyond a reasonable doubt. Instead it argues to the jury that even if some of the evidence is incomplete or unconvincing, proof of the elements of the crime can still be established if there is sufficient other convincing evidence to support the element. As was the case with the puzzle analogy, this analogy goes to the jury's weighing of the evidence as to each element.

It does not argue how high proof beyond a reasonable doubt is, seek to minimize proof beyond a reasonable doubt, or compare it to simplistic decision making that trivializes it. In this regard, that the rails argument here is proper is consistent with the holding in ***Curtiss*** insofar as it does not compare reasonable doubt to the type of "...weighing of

competing interests inherent in a choice that individuals make in their everyday lives." ***Curtiss***, 161 Wn. App. at 701.

Where the rails analogy argued to the jury that they should view the evidence in support of an element as whole, and even if items of evidence here or there were weak or missing, the remaining evidence could still support a finding of the element, the argument was proper. It did not refer to the reasonable doubt standard, or seek to reduce or trivialize it. Therefore, the use of the analogy was not error. Moreover, where it was not objected to, and was not flagrant or ill intentioned, the defendant is not entitled to relief on this claim. Accordingly, the defendant's claim on this issue should be denied.

iii. The Basketball Analogy Was Not Improper.

The prosecutor's statements in rebuttal using a basketball analogy are provided in context in the preceding section (2.c.ii) and for the sake of economy are not repeated here, but rather incorporated by reference.

The basketball analogy follows closely after the rails analogy, while the prosecutor was still talking about the fact that just because some items of evidence have problems, are weak or are not in the State's favor, does not mean that the State cannot prove the case beyond a reasonable doubt. The point of the basketball analogy is that the State doesn't have to put on a perfect trial. Just because the defense makes a few points on a couple items of evidences, doesn't mean that the State has not proved the

elements of the crime beyond a reasonable doubt with other evidence. The prosecutor then went on to acknowledge a couple points of evidence that a witness, Ms. Holly, appeared to be mistaken about.

As with the rail analogy, the basketball analogy was not about the reasonable doubt burden. It was about the evidence and how the State didn't have to have a perfect case in which all the evidence favored it, but that some evidence could favor the defendant, but that the State could still prove its case beyond a reasonable doubt. Indeed, the basketball analogy was a follow-up alternative explanation of the rail analogy. Both were about the fact that certain items of evidence might not favor the State, that the jury might have doubts about particular pieces of evidence. However, the State was only required to prove the elements of each crime, and as long as the totality of the evidence proved each element beyond a reasonable doubt, the State could prove its case.

As with the rail analogy, this argument does not address the reasonable doubt standard. Accordingly, it does not seek to reduce, minimize or trivialize the standard. *See* ***Curtiss***, 161 Wn. App. at 701. As such, there was no error. Moreover, the defense did not object to the analogy or request a limiting instruction, and the use of the analogy was not flagrant or ill intentioned. For this reason, the defendant's claim is without merit. For that reason, the defendant's claim on this issue should be denied.

d. The State's Urging Of The Jury To Find The Truth And "Remedy" The Crimes Was Not Error.

i. **It Was Not Error For The Prosecutor To Urge The Jury To Find The Truth.**

The defense claims that the prosecutor erred when he argued to the jury that the truth needs to come out and that a trial is a search for the truth. *See* Br. App. 68-69 (citing12 RP 1435-37). In support of its claim on this issue, the defense relies upon three cases out of this court: ***State v. Anderson***, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), *review denied* 170 Wn.2d 1002, 245 P.3d 226 (2010); ***State v. Emery***, 161 Wn. App. 172, 253 P.3d 413 (2011), *review granted*, 172 Wn.2d 1014 (2011); and ***State v. Evans***, 163 Wn. App 635, 644, 260 P.3d 934 (2011).[8] *See* Br. App. at 69.

In ***Anderson***, the court held that it was improper where the prosecutor made repeated requests that the jury "declare the truth." ***Anderson***, 153 Wn. App. at 429. Without citing any authority for its proposition, adopted the argument of defense and held that the statements were improper because the jury's job is not to "solve" a case, or "declare what happened on the day in question, but to determine whether the State has proved its allegations against the defendant beyond a reasonable doubt. ***Anderson***, 153 Wn. App. at 429. Nonetheless, the court in

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[8] Per ACCORDS, the Supreme Court's consideration of the petition for review in ***Evans*** is stayed pending the court's decision in ***Emery***.

Anderson went on to hold that the defendant did not show that the comments affected the verdict where defense counsel timely objected to them.

In ***Emery*** the court reiterated its holding in ***Anderson***, that arguments that the jury "declare the truth" or "speak the truth" are improper. ***Emery***, 161 Wn. App. at 195. However, again, the court cites no authority for this position other than its earlier holding in ***Anderson***. ***Emery***, 161 Wn. App. at 195. The prosecutor in ***Emery*** also used the "fill in the blank" argument for reasonable doubt, which the court also held was improper. Nonetheless, again, as in ***Anderson***, the court went on to hold that although the arguments were improper, the defendant had failed to demonstrate any prejudice and was therefore not entitled to relief based upon them. ***Emery***, 161 Wn. App. at 196.

In ***Evans***, the court again held that a prosecutor's request that the jury "declare the truth" is improper. ***Evans***, 163 Wn. App. at 644. And again, the court relied solely upon the holding in ***Anderson*** and did not cite any other authority for its proposition. ***Evans***, 163 Wn. App. at 644.

In ***Evans*** the court held that the statement was particularly troubling because the jury heard only State witnesses. ***Evans***, 163 Wn. App. at 644. The prosecutor's argument "invited the jury to overlook any credibility issues with the State's own witnesses by '[peeling] back [the] different layers of the onion to get to the truth,' presumably those parts of the witnesses' testimony that supported the State's case. ***Evans***, 163 Wn.

App. at 644. The prosecutor further urged the jurors to "apply those elements and decide: Is [this] what happened? [I]s that not what happened." The court held when taken together, those arguments suggest to the jury that it had an obligation to determine the truth and that it should disregard the less appealing parts of the State's witnesses' testimony.[9] ***Evans***, 163 Wn. App. at 645. The prosecutor further suggested that the jury not ask for more evidence even though "you are always going to wish you had more," and went on to say that the court's instruction, "doesn't tell you to say, 'Well, I wish I had more.'" ***Evans***, 163 Wn. App. at 645.

The court in ***Evans*** held that the additional arguments by the prosecutor "aggravated the erroneous truth-seeking argument by suggesting that the jurors disregard weaknesses in the State's case." ***Evans***, 163 Wn. App. at 645. When taken in conjunction with a fill-in-the-blank" argument on reasonable doubt, the court in ***Evans*** held that the prosecutor's closing arguments overstepped the bounds of ethical advocacy. The court held that the comments could not have been cured by a curative instruction or the instructions as given and reversed event though defense counsel failed to object. ***Evans***, 163 Wn. App. at 648.

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[9] Of course, depending upon how it is made, arguing that the jury should disregard the less appealing parts of the State's evidence is perfectly proper argument that is made routinely. The whole point of argument is to emphasize the strengths of a party's case and minimize the weaknesses.

Unfortunately, the cases upon which the defense relies are contrary to well established previously existing controlling precedent on this issue. Further, the analysis upon which the cases cited by the defense rely is logically flawed.

In ***State v. Curtiss***, this court recently rejected a claim of prosecutorial misconduct based on the prosecutor's argument in closing. ***State v. Curtiss***, 161 Wn. App. at 673, 250 P.3d 496 (2011). The prosecutor in ***Curtiss*** argued in closing that:

> The word "verdict" in Latin means "to speak the truth." We ask that you return a verdict that you know speaks the truth, a verdict of guilty to Murder in the First Degree;

and in rebuttal that:

> The trial is a search for the truth and a search for justice, and the evidence in this case is overwhelming. [Curtiss] is guilty of Murder in the First Degree as an accomplice. Consider all the evidence as a whole. Do you know in your gut—do you know in your heart that Rene Curtiss is guilty as an accomplice to murder? The answer is yes.
>
> We are asking you to return a verdict that you know is just, a verdict of guilty to Murder in the First Degree.

Curtiss, 161 Wn. App. at 701. In rejecting the defendant's claim, the court in ***Curtiss*** noted that court's frequently state that a criminal trial's purpose is a search for truth and justice. ***Curtiss***, 161 Wn. App. at 701 (citing ***State v. Gakin***, 24 Wn. App. 681, 686, 603 P.2d 380 (1979), *review denied*, 93 Wn.2d 1011 (1980)). In ***Gakin***, the court stated that the search

for truth is the ultimate objective of a criminal trial. ***Gakin***, 24 Wn. App. at 686. ***State v. Gakin***, 24 Wn. App. 681, 686, 603 P.2d 380 (1979)

The three cases the defendant relies upon are inconsistent with established precedent to the extent that those cases hold that it is not the role of the jury to seek the truth. Washington courts have long held that the jury has a truth seeking role.

The jury has a truth seeking function in determining the credibility of witnesses. Quite recently, in ***State v. Martin***, the court held that prohibiting questioning intended to elicit that the defendant had tailored his testimony, "...would inhibit the jury's ability to judge credibility and thereby seek the truth." *See* ***State v. Wallin***, --- Wn. App. ---, 29 3d 1072, 1074 (2012) (quoting ***State v. Martin***, 171 Wn.2d 521, 252 P.3d 872 (2011)). The court in ***Wallin*** goes on to cite the United State's Supreme Court for the proposition that:

> Witness credibility is important to the "'truth-seeking function'" of trial and a defendant-witness is therefore treated like any other witness.

Wallin, 269 P.3d at 1075 (quoting ***Griffin v. California***, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965) (quoting ***Perry v. Leeke***, 488 U.S. 272, 282, 109 S. Ct. 594, 102 L.Ed.2d 264 (1989))). [Emphasis added.]

> "A trial is not just combat; it is also truth-seeking; and each party is entitled to place its case before the jury at one time in an orderly, measured and balanced fashion, and thus spare the jury from having to deal with bombshells later on.

> It is on this theory that defense counsel, in beginning their examination of a defendant, will often ask him about his criminal record, knowing that if they do not ask, the prosecutor will do so on cross-examination. What is sauce for the goose is sauce for the gander."

State v. Ish, 170 Wn.2d 189, 203, 241 P.3d 389 (2010) (quoting ***State v. Bourgeoise***, 133 Wn.2d 389, 402-03, 945 P.2d 1120 (1997) (quoting ***United States v. LeFevour***, 798 F.2d 977, 984 (7th Cir. 1986))).

[Emphasis added.]

> In ***Rohrich*** we recognized that at the core of the right to confrontation [of witnesses] is 'a preference for live testimony.' We have held that live testimony, under oath, subject to cross-examination, and under the watchful eyes of the jury maximizes the accuracy of the truth-seeking process in criminal trials.

State v. Clark, 19 Wn.2d 160-61, 985 P.2d 377 (1999) (quoting ***State v. Foster***, 135 Wn.2d 441, 464, 957 P.2d 712 (1998) (citation omitted) (quoting ***State v. Rohrich***, 132 Wn.2d 472, 447, 939 P.2d 967 (1997).

[Emphasis added.]

It can hardly be error for a prosecutor to ask the jury to fulfill a role that the Washington Supreme Court has repeatedly asserted in criminal cases is indeed one of the functions of the jury.

The three cases the defense relies upon suffer from a logical error that was first promulgated in ***Anderson,*** and repeated in the subsequent cases that relied upon it. The court in Anderson was of course completely

correct when it stated that "the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." ***Anderson***, 153 Wn. App. at 429. The logical error in ***Anderson*** and its progeny is that it does not therefore follow that the jury's role is not to determine or declare the truth. Indeed, the jury's role is to declare the truth any time it finds that the State has proved the defendant's guilt beyond a reasonable doubt. In reaching a verdict of guilt, the jury has to weigh the credibility of the witnesses, weigh the evidence and determine whether the State has proved the defendant's guilt beyond a reasonable doubt. When it finds a defendant guilty, the jury is necessarily saying it found the State proved the defendant's guilt beyond a reasonable doubt, and that the State's evidence was therefore true beyond a reasonable doubt. Every jury verdict of inherently declares the truth of the defendant's guilt.

The mistake of the court in ***Anderson*** and its progeny is that it focused exclusively on the jury's role in weighing the burden of proof, and failed to consider the jury's action in order find a defendant guilty.

Perhaps the best rejection of the argument that it is error for a prosecutor in closing to argue the truth-seeking role of the jury is contained in the following quote from the Seventh Circuit Court of Appeals.

> We do not find any error in the attorney's closing statements, much less plain error. There was nothing wrong with referring to trials as "searches for truth." As we commented at oral argument, trials are searches for the truth; the burden of proof is just a device to allocate the risk of error between the parties. Indeed, both the Supreme Court and this court have repeatedly noted that criminal jury trials serve an important "truth-seeking" function. [Citation omitted.] The attorneys here did no more than to repeat that uncontroversial proposition.

United States v. Harper, 662 F.3d 958, 961 (7th Cir. 2011).

As to this case, a careful review of the record in context is revealing. It was only in rebuttal that the State made arguments regarding the jury's search for the truth. However, it was defense counsel in closing who first raised the issue of the jury determining the truth.

Defense counsel first argued that the State's case relied upon Tonie Williams-Irby's statements about Walker telling Finley to shoot the guard, but that her statements were contradicted by the video evidence. 12 RP 1416, ln. 18 to p. 1417, ln. 22. He emphasized that the jury should have a healthy distrust of government. 12 RP 1417, ln. 22-23. Then he returned to arguing that the video evidence contradicts Williams-Irby's testimony. 12 RP 1417, ln. 24 to p. 1418, ln. 10.

Defense counsel then emphasized,

> The statement[, "] you have to do what you have got to do, ["] according to Ms. Williams-Irby, is important. Why is it important? Because it changes that four seconds. ... That testimony is the only thing that changes – Is the difference

> between Count I and Count II, Aggravated Murder in the First Degree to Felony Murder in the First Degree. That testimony was bought and paid for. Not in money, not in gold, not in riches, but in liberty, but in liberty. Think about that.

12 RP 1418, ln. 11-25. *See also* 7 RP 665, ln. 14.

Defense counsel then goes on to argue that the State is the only party who can get away with putting on testimony that is bought and paid for. 12 RP 1419, ln. 1-10. Defense counsel then continues:

> The key elements in this case, the premeditation, the planning, the statements afterwards, who testified to them? Tonie Williams-Irby. Her plea agreement says – and you have it. It is in evidence. <u>They are the ones that determine the truth. Not what you think or what the judge thinks or the rest of us think.</u> It is pleasing them.

Thus, defense counsel argued that by its agreement with Tonie Williams-Irby for her testimony, the State was depriving the jury of its role to determine the truth.

Where defense counsel first raised this argument in closing, it was appropriate for the State to make a responsive argument in rebuttal that the jury should follow its instructions and pursue its truth-seeking role in deciding the facts of the case, that the jury should be the ones to decide the truth.

Indeed, the prosecutor's argument in rebuttal was consistent with that.

> ...The truth needs to come out. A trial is a search for the truth.
>
> Now, it's our job, Ms. Farina and I, to present you all of the information that the law allows us to present, and it is your job to decide what the truth is. I say to you that, you know, finding the truth, that's justice. Justice is like, you know, a multifaceted diamond. There are different parts of it. One facet of justice is the revelation of the truth. That's what we're trying to accomplish here.

12 RP 1435, ln. 1-10. [Emphasis added.] Further down that same page, the prosecutor continued,

> ...Regardless of your views, of the wisdom of penalties that might be attached to crimes here, you have to set them aside and tell us the truth of what happened by your verdicts, set aside issues of punishment.
>
> Tonie Williams-Irby said it so very well when the defense was trying, but failing, to get her to say that the truth is what the prosecutors want to hear. Remember that discussion with her? She [sic] tried hard to get her to say that. Unexpectedly, what she explained was that part of her motivation in testifying is that she wants the Husted family to know the truth. The truth coming out in this courtroom is a powerful form of justice.
>
> Ladies and gentlemen, by your verdicts, you can tell the Husted family –
>
> [Objection by defense counsel.]

12 RP 1435, ln. 16 to p. 1436, ln. 6. [Emphasis added.]

A colloquy ensues, at the end of which, the court tells the prosecutor:

> THE COURT: There is a potential at least that you are asking the jury to send a message and not follow the law. That's the problem. You can't do that, Mr. Costello. You certainly, can ask them to follow – to do their duty. If they do their duty, they'll find the defendant guilty. That's fine.
>
> MR. COSTELLO: Are you going to forbid me

> from telling the jury – asking the jury to return true verdicts?
>
> THE COURT: No.
>
> MR. COSTELLO: Is that phrase objectionable?
>
> THE COURT: No. It's not on behalf of the community. Not on behalf of the family, but on behalf of the instructions that they have received. I think that would be just fine.

Rebuttal thereupon continues.

> I have been talking about finding the truth in this trial. Now when a crime is committed against the public, to put it mildly, the peace and dignity of the people of the state of Washington is offended by the crimes that are committed, by the defendant's crimes, the remedy in this public trial is for you to return true verdicts, finding the defendant guilty as charged.
>
> On behalf of the honorable people –
>
> [Defense counsel objects, but the court hasn't heard what the prosecutor has to say and wants to hear it.]
>
> On behalf of the people of Washington, whom we're honored to represent, we thank you for you service in this case.

12 RP 1437, ln. 23 to p. 1439, ln. 10. [Emphasis added.]

That concluded the State's rebuttal, and defendant's trial counsel did not request a limiting instruction, further object, or raise any additional claims of error.

The prosecutor argued that the jury should tell the truth of what happened by their verdicts. What the prosecutor asked them to do was to render a verdict that was a truthful verdict. He tells the jury that it is their job to decide what the truth is. He tells them that justice is multi-faceted

and that one such facet is the revelation of truth, which is what the State is trying to accomplish by the trial.

None of this argument is erroneous. Notwithstanding ***Anderson*** and its progeny, nothing in this argument was in any way improper, or harmed the defendant. The argument did not suggest that the jury take up an improper role. Not only are the arguments proper, they also could in no way harm the defendant. When the court asked the jury to render true verdicts, he was encouraging them to do their job faithfully and properly. That cannot have prejudiced the defendant.

For all the foregoing reasons, the defense claim on this issue is without merit and should be denied.

ii. It was not error for the prosecutor to urge the jury to "remedy" the crimes.

The defense also claims the prosecutor erred when he said,

> Now when a crime is committed against the public, to put it mildly, the peace and dignity of the people of the state of Washington is offended by the crimes that are committed, by the defendant's crimes, the remedy in this public trial is for you to return true verdicts, finding the defendant guilty as charged.

Br. App. 70-72. The defense claim here is that the prosecutor's argument was an improper appeal to community conscience and to passion. Br. App. 71-72.

However the defense argument mischaracterizes the prosecutor's argument by taking a portion of it out of context and focusing on the word

"remedy." A detailed review of the argument in its overall context is contained in the preceding sub-section of this brief (2.d.i.). For the sake of brevity is not repeated again here, but rather incorporated by reference.

Taken in context, the prosecutor's argument is not improper. The State had already argued at length, both in closing and rebuttal, that the evidence established the defendant's guilt. The prosecutor in rebuttal then points out that crimes are committed against the peace and dignity of the public, not just the victim. This is a correct statement of the law. *See, e.g.* ***State v. Schultz***, 170 Wn.2d 746, 764, 248 P.32 484 (2011); ***State v. Veliz***, 160 Wn. App. 396, 407, 247 P.3d 833 (2011) (citing RCW 9A.04.020(1)(a)).

The prosecutor argued that the peace and dignity of the people of the state of Washington is offended by the defendant's crimes and that the remedy in the public trial is for the jury to return true verdicts, which verdicts the State argued, would be to find the defendant guilty as charged. There is nothing wrong in the prosecutor asking the jury to return true verdicts finding the defendant guilty. Indeed, it is what they should do and his asking them to return true verdicts is commendable. The prosecutor tells the jury that where the State had proved the defendant's guilt beyond a reasonable doubt, in the context of this public trial, the remedy available is to return a true verdict. Nothing in that is error.

Moreover, the arguments were proper argument against the possibility of jury nullification in disregard of their instructions in the

event the jury found the defendant was an accomplice where the defendant planned the robbery, but did not enter the store or pull the trigger on the gun. This was also to some degree responsive to arguments made in the defense closing, where the defense encouraged the jury not to trust the State. 12 RP 1396, ln. 23 to p. 1397, ln. 7; p. 1398, ln. 19-3; p. 1417, ln. 18-23. The counter to that argument was to ask the jury to provide the remedy available in a public trial of returning a true verdict of guilt.

Nor was the argument designed to inflame the passions of the jury. In support of this aspect of the argument, the defense relies upon ***State v. Ramos***, 164 Wn. App. 327, 263 P.3d 1268 (2011). *See* Br. App. 71. However, ***Ramos*** is inapplicable. In ***Ramos***, the prosecutor argued that the jury should convict the defendant because he was part of the drug world and in order to protect the community from drug dealing at a shopping center. ***Ramos***, 164 Wn. App. at 337. It is well established that a prosecutor may not argue that a jury should convict the defendant in order to protect the community, deter future law breaking, or other reasons unrelated to the crimes charged. ***Ramos***, 164 Wn. App. at 338. The obvious reason is that if the jury followed the prosecutor's admonition it could convict the defendant for reasons "wholly irrelevant to his own guilt or innocence." ***Ramos***, 164 Wn. App. at 338.

Contrary to the situation in ***Ramos***, the prosecutor here did not argue that the jury send a message or protect the community and its

values. Instead, he told the jury that in the trial, the remedy to the defendant's crimes was to return a true verdict finding him guilty. Such an argument was lawful and appropriate.

The defendant also relies upon ***State v. Echevarria*** in support of this argument. Br. App. 71 (citing ***State v. Echevarria***, 71 Wn. App. 595, 860 P.2d 420 (1993)). However, ***Echevarria*** is also inapplicable to this case. In ***Echevarria***, in his opening statement, the prosecutor made lengthy reference to the ongoing war on drugs, said this case would not be about the leaders, but the enlisted men or recruits who become involved for the power or the money or the greed or peer pressure." ***Echevarria***, 71 Wn. App. at 597. The prosecutor then made reference to how successful and successful wars are fought with veiled references to the Gulf War and the war in Vietnam. ***Echevarria***, 71 Wn. App. at 597.

The statements in ***Echevarria***, particularly in opening, could only have the affect of inflaming the passions of the jury. Nor did they really have anything to do with the case in ***Echevarria,*** and whether or not the defendant delivered cocaine.

To the contrary, when viewed in the context of the totality of the defense closing and rebuttal, the statements in this case were accurate statements of the law, argued for the defendant's guilt based upon the evidence and asked the jury to return a true verdict of guilty.

Understood in context, the prosecutor's argument in rebuttal that the remedy in the trial was for the jury to return a true verdict of guilt was

not error. Accordingly, the claim on this issue is without merit and should be denied.

Even if the court were to hold it was error, this particular comment was not objected to. The defense has made no showing on appeal that the statement was flagrant and ill intentioned. Nor has the defense made a showing of harm. Accordingly, the defendant's claim on this issue is without merit and should be denied.

e. The State's Comments Regarding Defense Counsel's "Misleading" Arguments Were Not Prohibited Where Defense Counsel Provoked Them By His Argument

The prosecutor in rebuttal stated that in closing the defense invited the jury to distrust the government. The prosecutor acknowledges that the jury ought not to trust the State. He then went on "...to discuss whether the defense has been trustworthy in this case." and then over the next three pages of the transcript identifies specific points of evidence and arguments made by the defense that he argued were not true. 12 RP 1425, ln. 22 to p. 1429, ln. 23.

In making most of these points, the prosecutor argued that the defense was engaged in attempts to "mislead" the jury and "desperate." 12 RP 1426, ln. 18-20; p. 1427, ln. 5-11; p. 1427, ln. 19-24; p. 1428, ln. 21-22; p. 1429, ln. 23.

In support of its claim on this issue, the defense relies on ***State v. Thorgerson***, 172 Wn. 2d, 438, 258 P.3d 43 (2011). *See* Br. App. at 72-75.

"It is improper for a prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." ***State v. Thorgerson***, 172 Wn.2d 438, 451, 258 P.3d 43 (2011) (citing ***State v. Warren***, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); ***State v. Negrete***, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

The prosecutor in ***Thorgerson*** "accused the defense counsel of engaging in sleight of hand tactics and used disparaging terms like "bogus" and "desperation" to describe the defense." ***Thorgerson***, 172 Wn.2d at 450. The court in ***Thorgerson*** did refer to the term "desperation" as disparaging. ***Thorgerson***, 172 Wn.2d at 450. However, the court particularly took issue with the word "bogus" and the fact that at least one disparaging argument made by the prosecutor about defense counsel ("sleight of hand") was planned in advance and was therefore ill-intentioned misconduct. ***Thorgerson***, 172 Wn.2d at 451-52.

Even so, the court in ***Thorgerson*** held that the misconduct was not likely to have altered the outcome of the case, and in any case, a curative instruction would have alleviated any prejudicial effect. ***Thorgerson***, 172 Wn.2d at 452.

However, to the extent that a prosecutor's arguments can be fairly said to focus on the evidence before the jury, no misconduct occurs. *See* ***Thorgerson***, 172 Wn.2d at 451.

Unlike the prosecutor's statements in ***Thorgerson***, here the prosecutor's statements were not planned in advance. The prosecutor here

started up with rebuttal immediately after the defense finished its closing. *See* 12 RP 1421, ln. 23 to p. 1422, ln. 7. Nor is there anything in the record, or anything suggested by the defense that the prosecutor here laid the groundwork for this argument during trial as did the prosecutor in ***Thorgerson***.

Indeed, the arguments made by the prosecutor here were a response to the prosecutor's perception that defense counsel had first disparaged the prosecuting attorneys so that the prosecutor was making an attempt to counter that argument.

When he began to discuss the State's case, defense counsel said,

> "It is okay to have a healthy distrust of government because sometimes they don't always want to present to you what all of the evidence shows.
>
> Can I just give you an example in this case?"

12 RP 1397, ln. 4-8. He told the jury that the prosecutors were trying to sell them something a number of times. 12 RP 1398, ln. 20-21; p. 1400, ln. 1-3; p. 1402, ln. 14-15, ln. 21.

Perhaps most offensive was defense counsels claim that Williams-Irby's testimony was bought and paid for in liberty [with her 20-year plea deal], and that only the State can buy and pay for testimony in this way, and that if he [defense counsel] did so, he would be charged with a crime

and the jury wouldn't believe it, but that is what the State did.[10] 12 RP 1418, ln. 23 to p. 1419, ln. 10. Defense counsel stated that through the plea agreement the prosecutors are the ones who determine the truth, as what is pleasing to them. 12 RP 1419, ln. 11-17. He continued with this theme, saying that hopefully some day the system will change and our system of government won't allow someone to come in and exchange their testimony for something more valuable than gold. 12 RP 1920, ln. 3-7.

Otherwise improper remarks are not grounds for reversal when "they are invited, provoked, or occasioned by defense counsel, and when the comments are in response to counsel's acts or statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them." ***State v. La Porte***, 58 Wn.2d 816, 822, 365 P.2d 24 (1961). *See also*, ***State v. Prado***, 144 Wn. App. 227, 181 P.3d 01 (2008); ***State v. Davenport***, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984).

In ***La Porte*** the defendant was convicted of second degree assault, but one of the defense themes in closing was that at the time of trial, defendant had pleaded guilty to and already served six months in jail on a

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[10] While as a practical matter only prosecutors are in a position to offer plea deals to defendants, defense counsel routinely hire expert witnesses. Nor is it a crime for either side to make such arrangements in exchange for testimony, so long as it is for truthful testimony. Neither party is entitled to suborn perjury, or knowingly put on false testimony, and they face the same penalties if they do.

less serious crime arising from the same incident, thus laying a foundation for a claim of double jeopardy. ***La Porte***, 58 Wn.2d at 821. Defense counsel also argued that the state entertained some ulterior motive in also bringing the assault charge based upon the same incident. ***La Porte***, 58 Wn.2d at 821. The court *sua sponte* interrupted defense counsel and stated: "He pled guilty to petty larceny and he is not being tried for that, and I will ask you not to so argue that to the jury." ***La Porte***, 58 Wn.2d at 821-22. Nonetheless, defense counsel continued,

> We have the two counts now before you. *I think you have seen the picture.* I think from what you may reasonably draw from the evidence, the reasonable inference to be drawn from the evidence as an over-all picture is *that of someone seeking blood. Why?*

La Porte, 58 Wn.2d at 822 (italics in original).

In rebuttal the prosecutor responded to these arguments:

> "...he has asked why the State has done this? Why are we trying to send him to the penitentiary, which of course is why he is here.'
>
> ...
>
> "..and there is only one reason that he is here today, charged again with the same facts, and that is what the evidence shows you; that within two months of being released from the county jail on the prior assault, he was out doing it again. That is the only reason he is here today charged with two counts of assault, second, and that is the reason why the State is asking you to send this man to the penitentiary."

La Porte, 58 Wn.2d at 822. The court noted that it was improper for the prosecutor to refer to the penitentiary because the jury may not consider

the possibility of penalty in determining the defendant's guilt. ***La Porte***, 58 Wn.2d at 822. When viewed in the context of defense counsel's eliciting defendant's criminal history, the fact the defendant hadn't been to the penitentiary, and argument asking why somebody was "seeking blood," the court held that the prosecutor's statement was not so flagrant that any instruction could not have cured any possible error. ***La Porte***, 58 Wn.2d at 823.

Here the comments of defense counsel regarding the prosecutors were far more egregious than those in ***La Porte***. The comment of defense counsel in ***La Porte*** of "an over-all picture is that of someone seeking blood. Why?" occurred once and merely insinuated an improper motive on the part of the prosecutor. Here, defense counsel repeatedly suggested that the prosecutors not only intentionally put on false testimony, but that they used the plea deal to tamper with the witness so that she would commit perjury. These are extremely serious allegations. Defense counsel cast the most vile aspersions of corrupt criminal and unethical conduct on the prosecutors, and were based not on facts in the record, but rather on implications of things implied to have occurred outside the record. *See* RAP 3.4(e); RAP 3.5(d). Defense counsel's comments also suggest to the jury that the entire legal system is corrupt, including possibly the court as well. *See* RAP 8.2. For the prosecutors, the further

implication of the comments is that nothing in the State's case should be trusted because the prosecutors have fabricated and falsified the case. Because it involves claims outside the record in the case, the State's ability to effectively respond to such an argument within the normal bounds of argument is extremely limited at best.

The prosecutor here was in the unenviable position of simultaneously having to address personal attacks on the integrity of the prosecutors that were improperly used to call into question the State's entire case, correct defense counsel's misstatements of the evidence, and show the jury that the State's arguments for the defendant's guilt were in fact credible.

None of the words used by the prosecutor here is necessarily disparaging. "Desperate" means having lost hope, yielding to despair: moved by despair: involving the adoption of grim rash or otherwise extreme measures to escape defeat or frustration. Webster's Third New International Dictionary 613 (2002). The court did take exception to the use of the word "desperate" ***Thorgerson***, however, that was where it was used in conjunction with "bogus" and "sleight of hand," which the court found to be the primary sources of error. ***Thorgerson***, 172 Wn.2d at 450-52. As the dictionary definition indicates, "desperate is not necessarily disparaging, and can fairly describe a party's argument where the party has a particularly weak case, as was the situation here. "Mislead" means

to lead in a wrong direction or into a mistaken action or belief: deceive. Webster's Third New International Dictionary 1444 (2002). "Misstate" means to state wrongly: give a false account of. Webster's Third New International Dictionary 1446 (2002). "Trustworthy" means worthy of confidence, dependable. Webster's Third New International Dictionary (2002) p. 2457.

When taken together, the words used by the prosecutor here can simply indicate that the arguments of defense counsel are incorrect and unreliable. They do not inherently indicate that defense counsel was deceitful.

Even if the court were to hold that when viewed together in context that the prosecutor's statements went too far and were error, the defendant is not entitled to relief. The prosecutor's arguments were not flagrant and ill intentioned. They were an attempt to respond to similar arguments from defense counsel. The arguments simultaneously attempted to address factually inaccurate misstatements by defense counsel and thereby show that the State was not attempting to present a false picture to the jury. Where the comments were responsive to defense counsel and not pre-planned, they were not flagrant and ill-intentioned and could have been cured by an instruction.

The prosecutor's comments were not objected to by defense counsel. Even if the prosecutor's comments were error, as a response in kind to the arguments of defense they were less egregious than the pre-

planned comments in ***Thorgerson***. Where the improper comments in ***Thorgerson*** could have been cured by an instruction to the jury, all the more so could these have been.

Moreover, the jury is presumed to follow its instructions. ***State v. Yates***, 161 Wn.2d 714, 168 P.3d 359 (2007). Here, it was instructed that:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.
> ...
> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 203, 204 (Instruction no. 1)

When viewed in context, the prosecutor's comment were not improper where they were a response provoked by defense counsel's attack on the integrity of the prosecutors, relying on facts not in evidence. Even if the prosecutor's statements were error, where they were not objected to, they were not flagrant and ill-intentioned, and would have been curable by an instruction. Accordingly, the defendant's claim on this issue is without merit and should be denied.

f. The State Used A Proper Argument Regarding Premeditation And Did Not Misinform The Jury

The defense claims that the State used an improper analogy in closing to explain premeditation when it said,

> Just by going to – stopping at a stop sign or a railroad crossing, that is deliberation. You formulate the intent and then you act.

12 RP 1376, ln. 11-16. This argument was used in conjunction with a PowerPoint slide. Ex. 243, slide no. 206. *See* Appendix A.

Premeditation was an element of Count I, premeditated murder in the first degree, as charged in this case. *See*, CP 216 (Instruction no. 13).

Premeditation "must involve more than a moment in point of time." ***State v. Monaghan***, --- Wn. App. ---, 270 P.3d 616 (2012) (quoting RCW 9A.32.020(1); ***State v. Gregory***, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006) (quoting RCW 9A.32.020(1)). As defined by the Washington Supreme Court:

> Premeditation is the deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. The State must show that the defendant decided to cause the victim's death after some period of reflection, however short.

Gregory, 158 Wn.2d at 817 (quoting ***State v. Hoffman***, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). "In other words, the State must show that the

defendant decided to cause the victim's death after some period of reflection, however short." ***Monaghan***, --- Wn. App. ---, 270 P.3d at 623.

The prosecutor's argument had nothing to do with reasonable doubt. Instead it was focused on the fact that premeditation involves some period of reflection, however short. The prosecutor's point was that it is possible to think beforehand, deliberate or reflect even if only very briefly before deciding to act in one way or another.

The slide that accompanied the argument indicated that when you stop at the signs, look to the left and right, decide it if is safe to enter and then go forward, that split second decision involved deliberation as to, "is it safe to enter" and that involved premeditation because it was weighing beforehand. Ex. 243 (slide 206). *See* Appendix A.

The defendant's trial counsel objected to the argument, claiming that it trivialized reasonable doubt [at least with regard to premeditation] by comparing it to everyday activities, and thereby lessened the reasonable doubt standard. 12 RP 1377, n. 1-7. The prosecutor responded that the slide did not address reasonable doubt, but rather demonstrated that "premeditation means more than a moment in time, but it can be seconds. 12 RP 1378, ln. 10-13. The court agreed that the slide, when taken in the totality of the context, communicated what the prosecutor claimed it did – that you form an intent to cross the tracks. 12 RP 1378, ln. 8-16. The

court disagreed that the State was acting to lessen its burden. He interpreted it as an attempt to explain the instruction, and one that did not attempt to redefine the instruction. 12 RP 1380, ln. 4-11. The court then overruled the objection. 12 RP 1380, ln. 12-13.

The defense on appeal now raises a new argument regarding the State's arguments in closing regarding premeditation. The defense now claims that the prosecutor's statements in closing were error "because the increments the State cited amount to less than moment in time." The defense claims that the prosecutor's argument that premeditation could occur in "just seconds" or in a "split second" is error because those time periods are less than a moment in time. However, the defense cites no authority for this proposition. Nor was this objection raised below.

The defense provides no citation to the record for the alleged violations. Moreover, the State is unable to find any instance of "split second" being used in closing, by anyone.[11] The prosecutor did argue,

> Finley raised his gun and fired within two seconds of raising gun. That is premeditation.

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[11] The State has had the record in this case scanned into an Adobe PDF file that can be electronically scanned one volume at a time. No match for "split second" could be found using any number of searches, including manually reading through the argument section.

12 RP 1382, ln. 17-18.[12]

Where a defendant fails to support an argument with citation to relevant authority or to relevant facts in the record, the court will not consider the issue. *See* ***Spradlin Rock Products, Inc. v. Public Utility District No. 1***, 164 Wn. App. 641, 667, 226 P.3d 229 (2011); ***Ensley v. Pitcher***, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***Smith v. State***, 135 Wn. App. 259, 270 n. 11, 144 P.3d 331 (2006).

Further, "'Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" ***Spradlin Rock Products, Inc.***, 164 Wn. App. at 667 (quoting ***Holland v. City of Tacoma***, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

The defense argument also fails on the merits. The defense argument rests on the idea that seconds are less than a "moment" in time. Br. App. at 76. However, a "moment" is a minute portion of time: a point

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[12] The prosecutor did say,
"premeditation" means more than a moment in time, but it can be seconds. Premeditation can be <u>just seconds</u>, minutes, hours, days.

12 RP 1378, ln. 12-14. [Emphasis added.] However, this argument was made to the court outside the presence of the jury.

of time: instant. Webster's Third New International Dictionary 1456 (2002). A "second" is the 60th part of a minute of time, but under some circumstances it can also be used to mean an instant of time or moment. Webster's Third New International Dictionary 2050 (2002). Understood in context, it is clear from the prosecutor's argument that her argument was that a moment was an instant in time, while seconds, as measured time are something more than a moment. Indeed, both of the prosecutor's statements in front of the jury were to "seconds". 12 RP 1376, ln. 13; p. 1382, ln. 17-18. The prosecutor never referred to "a second." While premeditation requires more than a moment in time, a second, as a measured unit of time is more than a moment, which is an instant, or a point.

Moreover, "[t]he planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury." ***State v. Bingham***, 105 Wn.2d 820, 827, 719 P.2d 109 (1986) (citing ***State v. Tikka***, 8 Wn. App. 736, 509 P.2d 101 (1973)). *See also*, ***State v. Griffith***, 91 Wash.2d 572, 577, 589 P.2d 799 (1979). Here there was ample evidence that the murder was planned in advance. Jessie Lewis actually walked away in the midst of the first attempt to commit the crime and Darell Parrott subsequently refused to participate in the robbery because they both recognized that it involved a

murder and wanted no part of that. 9 RP 904ff. Calvin Finley was present when Walker discussed the murder/robbery with Jessie Lewis. 9 RP 904, ln. 4-8. Walker obtained the guns well in advance and provided a gun to Finley to be used in the commission of the robbery. 7 RP 666, ln. 5-11; p. 690, ln. 3-17; 8 RP 718, ln. 4-6; p. 785, ln. 6 to p. 787, ln. 25; 9 RP 905, ln. 10 -13.

When the prosecutor began her arguments with regard to "premeditation" she stated,

> "Premeditated has been defined as though over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the formation of a subtle purpose. It would still be premeditated.
>
> Premeditation must involve more than a moment in time. The law requires some time, however long or short, in which it a design to kill is deliberately formed.
>
> ...

12 RP 1376, ln. 2-9. It was very shortly after this that defense counsel objected.

Resuming argument after defense counsel's objection was overruled, the prosecutor said,

> ... Premeditation does not require devising a plan months in advance, weeks in advance, days in advance, or even hours in advance. A person can formulate the intent and plan and only moments later can carry through on that plan to commit murder. This is premeditation.

12 RP 1381, ln. 7-12.[13]

Nothing about these arguments is incorrect or improper. They correctly state the law. The appellant's claim on this issue is without merit and should be denied. This is particularly so where defendant's trial counsel raised no objection to the argument on the basis the defense now asserts.

g. While The State Claims There Was No Prosecutorial Misconduct, Even If It Did Occur, It Was Harmless And Did Not Constitute Cumulative Error, Nor Is Reversal Warranted.

i. **Even if the court were to hold that any of the instance of alleged prosecutorial misconduct were error, any error was harmless**

Two different standards for harmless error have been applied to Washington cases. In ***State v. Whelchel***, the Washington Supreme Court held that a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. ***State v. Whelchel***, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)(holding the error was harmless were statements were admitted in violation of the defendant's rights under the

[13] It hardly bears pointing out that "moments" are more than "a moment."

confrontation clause). The court in ***Whelchel*** held that independent of the improperly admitted statements, there was overwhelming evidence to support the defendant's conviction so that the erroneous admission was harmless beyond a reasonable doubt. ***Whelchel***, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a habeas corpus motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. ***Whelchel v. Washington***, 232 F.3d 1197, 1205-06 (9th Cir. 2000). In ***Whelchel***, the Ninth Circuit affirmed the Federal District Court's grant of habeas corpus relief to the defendant, holding that the statements were not cumulative of other evidence, and were inherently suspect. ***Whelchel***, 232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. ***Whelchel***, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. ***Whelchel***, 232 F.3d at 1211.

Additionally, the court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, the defendant has made no showing of harm as to any of the alleged errors by the prosecutor. Accordingly, he is not entitled to any relief.

ii. There Was No Cumulative Error

The doctrine of cumulative error does not apply when a defendant fails to establish how claimed instances of prosecutorial misconduct affected the outcome of the trial or how the combined claimed instances affected the outcome of the trial. ***Thorgerson***, 172 Wn.2d at 454.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. ***Rose***, 478 U.S. at 577. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232 (1973)(internal quotation omitted). Allowing

for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. ***Rose***, 478 U.S. at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime 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) *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First,

there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *See*, ***Russell***, 125 Wn.2d at 93, 94. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See,* ***Russell***, 125 Wn.2d at 93, 94. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g.*, ***Johnson***, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See e.g.,* ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *rev. denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.")(emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did

not amount to cumulative error) and ***State v. Kinard***, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four error relating to defendant's credibility combined with two errors relating to credibility of state witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976)

(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See,* ***Stevens***, 58 Wn. App. at 498.

h. In The Event The Court Were To Hold That Any Of The Prosecutor's Actions In This Case Were Error, It Should Refer To It As Error And Not As Misconduct.

Modern society increasingly recognizes the power of words. Language that was utilized, without malice, in past years may now appear offensive. Legislatures, courts, and professional organizations are all taking action to replace obsolete, offensive, or misused terms with more appropriate references. *See, e.g.*, Laws of 2010, ch. 94, §§ 1 and 9(4) (replaces the terms "developmentally disabled" and "mentally retarded" in numerous statutes with more "more appropriate references").

Recently, both the American Bar Association's Criminal Justice Section (ABA) and the National District Attorneys Association (NDAA) have urged courts to distinguish between "attorney misconduct" and "attorney error." *See* American Bar Association Criminal Justice Section Report to the House of Delegates 111A,

http://www.abanet.org/leadership/2009/annual/summary_of_recommendations/One_Hundred_Eleven_A.DOC (last visited 03-22-12); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited 03-22-12). These resolutions are consistent with recent appellate court opinions from other jurisdictions which hold that the phrase "prosecutorial misconduct" should be reserved for deliberate violations of a rule or practice as opposed to those missteps of the type that all trial lawyers make from time to time. *See, e.g.*, ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*; ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 26-27 n. 2 (2007).

> [Courts] must be mindful that words pregnant with meaning carry repercussions beyond the pale of the case at hand. The public face of the prosecutor – and her service to a broad community of interests – ensures that her actions will be scrutinized by those who are bound to misinterpret her "misconduct" in court as an automatic rebuke of her professionalism, trustworthiness, or competence. The stain to her representation will come regardless of whether the taint was deserved.

State v. Maluia, 107 Haw. 20, 108 P.3d 974, 987 (2005) (Nakayama, J. dissenting). This taint to the prosecutor's reputation extends to the court system itself, undermining the public's perception that criminal defendants receive justice.

The State encourages this Court to follow the recommendations of the ABA and NDAA in analyzing claims of prosecutorial misconduct.

4. THE DEFENDANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE WITHOUT MERIT.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. ***McFarland***, 127 Wn.2d at 333-34; ***State v. Riley***, 121 Wn.2d 22, 846 P.2d 1365 (1993).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence,

the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating counsel's strategic decisions." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***McNeal***, 145 Wn.2d at 362).

Trial counsel's failure to anticipate changes in the law does not constitute deficient performance. ***State v. Slighte***, 157 Wn. App. 618, 624, 238 P.3d 83 (2010).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on

direct appeal, the reviewing court will not consider matters outside the trial record. ***McFarland***, 127 Wn.2d at 338 n. 5. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. ***McFarland***, 127 Wn.2d at 334.

a. Trial Counsel Was Not Ineffective For Failing To Request A Cautionary Instruction Regarding Williams-Irby's Testimony.

The defense claims that defense counsel should have requested a limiting instruction with regard to Williams-Irby's testimony where she was an accomplice who provided testimony on behalf of the State. Br. App. 82 (citing WPIC 6.05.).

While under some circumstances it may be reversible error not to give the instruction if requested, it is not ineffective assistance of counsel not to request the instruction. Indeed, even when requested the instruction is required only where the prosecution relies solely on uncorroborated testimony of an accomplice. *See* ***State v. Carothers***, 84 Wn.2d 256, 525 P.2d 731 (1974); ***State v. Willoughby***, 29 Wn. App. 828, 630 P.2d 1378 (1981); ***State v. Harris***, 102 Wn.2d 148, 155, 685 P.2d 584 (1984).

That was not the case here where there substantial amount of evidence other than Williams-Irby's testimony. That other evidence

consisted of video footage, testimony of the witnesses at the store, as well as the testimony of Jessie Lewis and Darrel Parrot. Williams-Irby's testimony constituted a small portion of the 1300 page record, which also included over 240 exhibits. The instruction was not necessary in this case, nor was trial counsel ineffective for failing to request it. Accordingly, the defense claim on this issue should be denied as without merit.

b. Trial Counsel Was Not Ineffective For Failing To Object To The Alleged Prosecutorial Misconduct.

For the reasons argued in section 3 above, the instances of alleged misconduct were not improper and the claims they were are without merit.

Further, for a number of the claims of prosecutorial misconduct, the cases upon which the defense relies were not issued at the time trial occurred, so that defense counsel did not have the benefit of them and had no reason to make the arguments. *See,* ***State v. Slighte***, 157 Wn. App. 618, 624, 238 P.3d 83 (2010).

Further, ***State v. Curtiss***, calls into doubt the authority the defense relies upon for several of the instances of alleged prosecutorial misconduct. ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011). Where that is the case, it also could not have been prosecutorial misconduct for defendant's trial counsel to fail to object.

The defense has failed to show that trial counsel's performance in this regard was deficient. Nor have they shown that there were no good tactical reasons for not objecting.

Finally, defense counsel did make some objections, however, they were overruled.

For all these reasons, the defense claim on this issue is without merit and should be denied.

E. CONCLUSION.

For the foregoing reasons, the defendant's claims are without merit and should be denied.

The trial court erred when it included the "major participant" language in Instruction 46 regarding the aggravating circumstance. This Court should hold that that language was error. In the event this Court were to reverse and remand the matter to the trial court for re-trial, it should direct the court not to use the erroneous "major participant" language in the future.

DATED: March 26, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

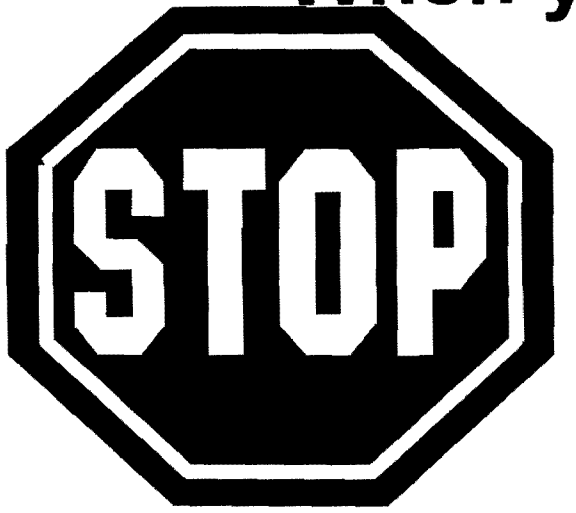
Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be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

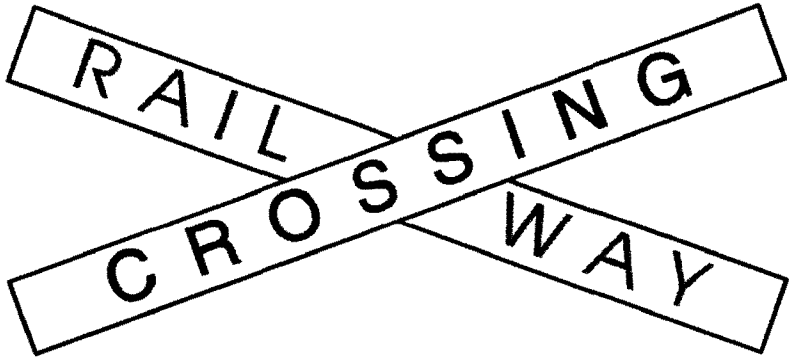
3-26-12
Date Signature

Appendix A

Black and White Copy of
PowerPoint Slide no. 206

"PREMEDITATION"
Everyday Decisions
When you see these SIGNS





Look to the left

Look to the right

Decide if it is safe to enter

- **Then go forward**

That split second decision
Involved DELIBERATION
Is it safe to enter
Involved PREMEDITATION
Weighing beforehand

PIERCE COUNTY PROSECUTOR

March 26, 2012 - 4:16 PM

Transmittal Letter

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Case Name: State v. Walker

Court of Appeals Case Number: 41970-0

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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