No. 43870-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREY TROSCLAIR,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Vicki L. Hogan, Judge

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2. The trial court erred in denying a motion for a mistrial after a police witness testified about asking Trosclair about taking a polygraph exam.

3. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct which compels reversal.

4. The cumulative effect of the errors resulted in a violation of Trosclair's rights to a fundamentally fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were Trosclair's rights to confrontation violated when the prosecution was allowed to admit the statements of a non-testifying codefendant at trial and the codefendant's statements were insufficiently redacted so that the confession still clearly pointed to Trosclair?

2. Were Trosclair's rights to confrontation violated when the prosecution repeatedly elicited testimony which informed the jury that a witness who had died before trial had identified Trosclair through a photographic montage?

3. Did the trial court err in denying Trosclair's motion for mistrial after a police witness told the jury that, when asked if a polygraph or "lie detector" test would "clear" him of the murder, Trosclair said it would not?

4. Did the prosecutor commit flagrant, prejudicial and ill-intentioned misconduct in telling the jury that they had to decide the truth in order to decide the case and that they should convict if they simply "knew" Trosclair was guilty of the underlying felony or attempting the underlying felony?

5. Does the cumulative effect of the errors compel reversal where that effect deprived Trosclair of his rights to a fair trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Corey Trosclair was charged by amended information with first-degree felony murder and second-degree felony murder, both charged with a firearm enhancement. CP 11-12; RCW 9.94A.530; RCW 9.94A.533; RCW 9A.32.030(1)(c); RCW 9A.32.050(1)(b). After pretrial proceedings before the Honorable Katherine Stolz on January 12, February 23 and April 5, 2012, further pretrial motions and a jury trial were held before the Honorable Vicki Hogan on May 10, 22, 29-30, June 22, July 12, 16, 17, 19, 23, 24, 25, 26, 30 and 31, August 1, 2, 6, 7, 8, 9, 13, 14, 15 and 24, 2012.[1] The jury convicted Trosclair as charged and, on September 21, 2012, the court imposed a base sentence of 493 months with an additional 60 months flat time for the enhancement. CP 409-24. Trosclair appealed and this pleading follows. See CP 425.

2. Testimony at trial

On January 16, 2011, Lenard Masten was shot in a dark parking lot of the apartment building where he lived. 3RP 384. The police were called and Lakewood Police Department ("LPD") officer Jeremy James was the first to arrive. 3RP 408-10. 8 or 9 people were standing around a man on the ground and James called for medical aid, then moved people back. 3RP 410-11. It was "chaotic" and there was a woman kneeling next to Masten who said she was his girlfriend. 3RP 420.

James described the lighting at the time as "not great," noting that

[1] Explanation of references to the verbatim report of proceedings is contained in Appendix A hereto.

"[a] lot of flashlights and other lights were brought in as the investigation continued." 3RP 411. When asked if he could see much, the officer said he might have been able to recognize someone from 30-35 feet away with the lighting. 3RP 426.

James lifted up Masten's shirt and saw what he thought was a gunshot wound to the stomach. 3RP 412. Masten was conscious, so James asked him a few questions. 3RP 412. The officer could tell Masten was having a hard time breathing, so he told Masten to "relax and not talk." 3RP 412. James asked, however, if Masten knew who shot him and Masten nodded "yes," then rolled over and wrote something unintelligible in the mud. 3RP 412.

A paramedic who was there that night said that Masten was actually speaking and answering questions appropriately on the scene. 3RP 1007. Another LPD officer, Daniel Tenney, testified that, when Tenney asked Masten if he knew who shot him, Masten specifically said he did not know and all he actually knew was it was "a black male." 3RP 402.

Tenney admitted it was "pretty dark" in the area, there was not "a lot of lighting in the parking lot" and the buildings nearby had maybe "a couple of porch lights from the stairwell." 3RP 404. Although the officer first said he thought he could "actually pretty well" see in the dark, he admitted he would "[p]robably not" be able to see anything specific about anyone who was 50 feet away, especially a stranger. 3RP 404.

The woman some witnesses said had referred to Masten as her boyfriend was named Michelle Davis. 3RP 420-22. An officer testified

that, as Masten left in the ambulance, Davis said she needed to go to the hospital where he was being taken but officers did not allow her to leave. 3RP 422. Instead, she was required to "stick around" until they talked to her and got her "information." 3RP 422.

LPD investigator Jeff Martin spoke to Davis and was also involved with talking to people at the complex a few days later, including a woman named Shannon Henderson. 3RP 673. Henderson, who knew Masten only as "Solo," testified that she had seen him about 7 or 8 the night of the incident. RP 429-33. Later that night, she heard some argument outside and someone said "what's up, nigga," or something similar. 3RP 433. At that point, Henderson heard what sounded like a gunshot. 3RP 433.

Henderson got on the floor and then tried to sort of peek through the blinds to see what was going on. 3RP 434. She heard "commotion" and saw "a guy" over Masten. 3RP 434. Henderson thought she saw the "guy" going through Masten's pockets, after which the other man picked Masten up under his armpits and started to carry him. 4RP 434-35. The man dropped Masten when he could not get him over the curb and fell himself. 4RP 434.

Henderson also said she then saw a different man go up the stairs of the apartment complex. 3RP 434. Although she told police that someone had gone into Masten's apartment and come right back out, she actually did not see that happen because she could not see the door. 3RP 434, 442. Instead, she saw what she described as a "gesture to go" and a man she could not really see well went to the door and then came away quickly. 3RP 434, 442-45.

In fact, Henderson said, it was so dark and the lighting was so poor that Henderson could not tell the race of the two men she saw. 3RP 440, 445. The men were wearing dark clothes and Henderson said they ran together to a black SUV, either a GMC or Suburban and drove away. 3RP 437-40.

Henderson admitted that she did nothing that night about what she knew. 3RP 438. She did not say anything to police and in fact did not even answer the door when they knocked. 3RP 438. A few days later, they showed her a photomontage and she did not recognize anyone. 3RP 439.

Nadise Davis[2] also knew Masten as "Solo" during the year and a half or so during which Masten and Nadise's sister, Michelle Davis, were dating. 3RP 473-75. Nadise was in the apartment of her sister, Denise, the night of the incident. 3RP 479. According to Nadise, when she heard what sounded like a gunshot, she asked her sister if she had heard that, then ran to look out the apartment window. 3RP 479. Because she could not see anything, Nadise said, she climbed on the bed and tried to peek above the cars. 3RP 479. Nadise said she thought she saw Masten in the parking lot between cars trying to fight or wrestle someone, so Nadise just ran out as fast as she could to try to help. 3RP 479.

Denise Davis, in contrast, said it was she, not Nadise, who said, "was that a gunshot," and that Nadise had responded, "I don't know."

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[2]Because they share the same last name as Michelle, Nadies Davis will be referred to as "Nadise," Denise Davis will be referred to as "Denise," and Marlene Davis will be referred to as "Marlene," with no disrespect intended.

3RP 509-510. Denise said she then leaned out the window and saw a black male figure leaning over someone in the parking lot and heard them cursing really loud. 3RP 510. Denise said, "I think they are down there fighting," and ran out the door to her van. 3RP 510. She pulled out of her parking space and saw a "dark colored Ford Expedition" pulling out with their lights off, with a dark colored male-figure driving. 3RP 510.

Nadise said when she came outside, it appeared Masten was trying to walk or stand up all the way and was moving slowly towards the bottom of the stairs. 3RP 484. She thought he reached for the stairwell and could not grab it so he just fell down after that. 3RP 484. She also said there was a guy who looked like he was going through Masten's pockets and she actually thought he stood up and started running towards her. 3RP 480. At that point, she said, another guy was coming down the bottom part of the staircase, towards her. 3RP 480. Nadise thought the guy on the stairs, who had a gun in his hand, was tall, with a goatee, weighing maybe 240 pounds although he might have weighed less because his clothes were baggy. 3RP 480.

Nadise admitted that "[i]t was pretty dark outside" and she could not "see every detail." 3RP 501. Both the guys she saw were black. 3RP 481.

According to Nadise, the man who had the gun was holding it in his left hand and he tried to cover it when she saw it. 3RP 481. The two men then ran away together, running right past her. 3RP 485. She thought what they drove off in sounded and looked like a truck. 3RP 485. She could not say what color it might be. 3RP 502.

Nadise stayed with Masten, trying to help. 3RP 485. She said that Masten could not talk and she was trying to yell at him to keep his attention. 3RP 485-86. At some point, Masten turned on his side and started scratching some numbers or letters in the dirt. 3RP 485-86.

Nadise testified that she was with Masten on the ground for a minute or two and then heard her sister, Michelle Davis, scream through the open apartment window upstairs. 3RP 488. Davis came down and got next to Masten, saying his name over and over. 3RRP 489.

Aaron Howell, another neighbor, was also home that night. 3RP 1050. Howell was in his apartment when he heard what sounded like a shot. 3RP 1043-48. He opened his door and saw a man standing outside. 3RP 1043-48. Howell said he and the man looked at each other for a few minutes before the other man turned around, walked away and got into a dark green, black or "maybe blue" SUV, which then pulled away. 3RP 1048-49. At that point, Howell heard someone screaming, "someone shot my boyfriend." 3RP 1050.

When he caught up to Davis in the parking lot, Howell asked where her boyfriend was, told her to call 9-1-1, and went to Masten on the ground. 3RP 1050. Howell, who was in the military, then started trying to render aid to Masten until police came and he was "shooed back." 3RP 1052.

Howell said it was dark but there was a sort of "orangeish" light right above the person he saw that night. 3RP 1055. The way it was, Howell could only see about 3/4 of the man's face but he thought he saw it "well." 3RP 1057. Howell told officers the man he saw was a hundred

yards away, but subsequent measurements indicated it was probably about 100 feet. 3RP 1069-71.

Howell admitted that he did not say anything that night to police about having seen a man, even though Howell had a "[v]ague memory" of being talked to by an officer at the scene. 3RP 1062. He had only told them about seeing a man after Marlene, Howell's landlady, had talked to Howell, apparently telling them what Howell had said to her about being there that night. 3RP 1062.

Nadise admitted that, before Masten was taken away by the medics, Michelle Davis also took several items from him, including his cellular telephone. 3RP 494. Denise said that even before she moved her van, her sister, Davis, had handed Denise some money and asked her to hold on to it, so she had hidden it in her van. 3RP 516. Howell, who was sure he arrived at Masten's side before Davis, did not see anyone taking anything from him. 3RP 1073. An officer later verified that Davis had taken Masten's wallet, phone and also $1,000 while Masten was on the ground. 3RP 1720.

When Denise pulled her van into the middle of the parking lot again, she saw Davis and Nadise kneeling by Masten. 3RP 512. Denise heard Masten say, "call my mom," and saw him write a phone number or something in the mud, but could not read what he wrote. 3RP 512.

Marlene Davis, mom of Michelle, Denise and Nadise, was the manager of and lived at the apartment complex where this all occurred. 3RP 558. Marlene first learned something was happening when Davis came banging on her door saying, "mom, mom, they shot Solo." 3RP 558,

561. Marlene then followed her daughter to where Masten was lying on the ground. 3RP 562. Marlene recalled that Masten's eyes were "rolling around" and also that, at one point, he started writing numbers in the dirt. 3RP 563.

According to Denise, after police arrived and Masten was being looked at and taken away, police were saying that Masten was going to be okay and his wounds were not serious. 3RP 517. Denise and Davis decided to go to the hospital where Masten had been taken but Davis said that she first had to drop off some "stuff." 3RP 517. Davis then put two backpacks inside Denise's apartment. 3RP 517.

Denise admitted that the backpacks contained drugs, money and a gun. 3RP 522. Denise recalled that people kept calling Masten's cellphone after the incident, and Davis kept answering. 3RP 531. The calls included some from people who were angry with Davis and seemed to be threatening her. 3RP 534.

On the way to the hospital, Davis told Denise what had happened earlier that night. 3RP 519. Denise testified that Davis said she had been cooking dinner and Masten had gone to the store when Davis had heard a sound she thought might be a gunshot. 3RP 519. Davis told Denise that she had looked out the bedroom window and seen two black males, one standing over Masten and cursing and one at the bottom of the stairs, starting to run up. 3RP 519. Denise did not remember what Davis said after that.

A few days after the incident, Howell was shown a montage but did not pick anyone out. 3RP 1053. Howell remembered telling Officer

Martin at that time that the man he saw was more "Hispanic[-]looking." 3RP 1054. In fact, Howell admitted, he specifically told officers, "I don't remember it being African American. He was lighter skinned, and I mean lighter skinned as in Hispanic." 3RP 1075. Howell also said he would not have "tagged" the person he saw as being African American. 3RP 1076.

Joseph Adams testified that he considered Masten "like an uncle" and that Masten was a "close family friend" Adams had met when he was 10 or 11 years old. 3RP 1313-15, 1423. Adams, who had been in prison from ages 11-21, got out and shortly after had contact with Masten again because Masten wanted to buy drugs. 3RP 1316, 1426-27. Adams became Masten's wholesaler. 3RP 1317, 1427-28. In fact, when Masten was out of town in December 2010, Adams admitted he had Masten's drug business cell phone and was "using his clientele." 3RP 1435.

Adams admitted he had moved in with Masten and was living in the apartment before Masten died, although there was conflicting evidence about whether he was still living there at the time of Masten's death 3RP 1317, 1427-28. Adams testified that he had moved out a few weeks before, because a detective had called him telling him he had enough evidence to arrest Adams for a robbery, so Adams had "stayed away from everybody" in order to avoid arrest. 3RP 1319.

That detective was John Ringer. 3RP 1352.

Adams said he was driving back to Tacoma from Seattle the night of the incident when Denise "texted" him that Masten had been shot. 3RP 1320. Adams had then talked to Denise and decided she was telling the truth. 3RP 1320. Adams was with Courtney Johnson, the woman he had

left with his son when he moved into Masten's apartment. 3RP 1324, 1530, 1354.

Adams estimated that it was an hour or an hour and a half after Denise called him that Adams ended up meeting "up" with Denise and Davis. 3RP 1322. Adams switched out his car and had someone else drive him to the meeting because Adams "didn't really trust" the two women he was going to meet and he actually thought they might be setting him up for police. 3RP 1323. As a result, Adams had the person driving the car go around the block first to make sure the women were by themselves. 3RP 1324.

At the time, Adams admitted, he and Denise Davis had been dating for a month or two. 3RP 1444.

Davis' sister testified that, when Adams showed up and asked what happened, Davis spoke to him about it. 3RP 520-21.

Adams maintained that Davis gave Adams "nothing" at that time, but, a moment later, admitted that Davis had given Adams the cell phone which Davis had taken from Masten before he died. 3RP 1325. Adams opined that he was given the phone because Davis knew Adams as a "nephew" of Masten, knew how close they were and thought it was right to give him the phone. 3RP 1326.

After they met up, Adams said he and the women drove around for 30 minutes or an hour, during which Adams had to "meet" a couple of people. 3RP 1327. They then went back to the apartment complex where Masten had been shot. 3RP 1327. Denise had kids and was concerned about the drugs, gun and money Davis had stashed in Denise's apartment

after the shooting. 3RP 522.

Davis and Adams stayed in the car but Denise got out, went into her apartment, then returned and gave a backpack to Adams. 3RP 523, 1328. Adams said all that was in the backpack was some video game equipment and a "lockbox" which he opened later and which had "dope," cash and a gun. 3RP 1328. On cross-examination, Adams admitted that, in fact, there were two backpacks, not one. 3RP 1462. Adams did not turn over the drugs, money or gun, instead selling the gun and drugs for thousands of dollars. 3RP 1463. 1499.

Although Adams called Masten's family after the shooting and told them he was going to take care of them, he never gave them any of the money in the backpacks, nor did he give them any of the money he got from selling Masten's gun and drugs. 3RP 1464. In fact, Adams admitted, he "never did anything for them." 3RP 1464.

At that point, Adams said, they all went to a bar because Davis and Denise "like to drink" and Adams wanted them to "calm down." 3RP 1329. They drank for about a half hour and then went to a friend's home to spend the night. 3RP 1330.

In February of 2011, a month after the shooting, a warrant had been issued for Adams for his involvement in a 2009 robbery and Adams was unsuccessful in his efforts to "get away." 3RP 1331, 1468-69. By this time, Adams had heard from someone that a man named Corey Trosclair was identified in the newspaper as the suspected "shooter" of Masten, so Adams started asking around in the unit to see who had the name "Corey Trosclair." 3RP 1332-34. When Adams then discovered Trosclair was in

the unit, Adams confronted the other man, telling Trosclair that Masten was "like an uncle," that Adams had lived with Masten and that Adams knew that Trosclair had either killed Masten or at least had something to do with it. 3RP 1334. Adams said that Trosclair had put his head "down" when confronted, and had been shaking his head, "no." 3RP 1335-36.

Adams said he then told Trosclair that he "didn't want no problems with him" and was not "trying to, you know, start anything" but that Adams also felt Trosclair was at fault for Adams being in jail because Adams thought the "whole homicide situation brought a lot of unnecessary attention" to Adams, who was originally suspected in the shooting. 3RP 1335.

For the next two or three days, Adams said, there was "tension" between Adams and Trosclair and they did not speak. 3RP 1336. Then, Adams said, Trosclair came over and asked why Adams was in custody. 3RP 1336-37. Adams told Trosclair it was for a robbery but that it was "BS" and police had only come after him for the crime because he had not talked to them about Masten's murder. 3RP 1337. Adams said Trosclair reported seeing Adams' picture in a photographic montage police had when Trosclair was talking to detectives. 3RP 1337.

Adams said he asked Trosclair how he had gotten "locked up" and Trosclair had responded that it had something to do with his cell phone records and that someone was "cooperating against him." 3RP 1337. Trosclair also told Adams he had set up a camera system on his house to keep track of who was driving by. 3RP 1337.

Adams said Trosclair then said the shooting was an accident. 3RP

1338. According to Adams, Trosclair said someone had bought cocaine from Masten earlier that day but it was "bad" or "cut" and so Trosclair felt Masten was cheating them. 3RP 1338. Adams admitted, however, that selling bad drugs to someone was bad for business and that he had never heard of Masten selling bad drugs to anyone before. 3RP 1437.

Adams claimed that Trosclair said "him and the people he was with decided to rob Solo," and that one of those people was "Mario." 3RP 1338. A "deal" was set up for a gas station near Masten's apartment and the men then went to Masten's apartment to catch him when he left to go to the meeting. 3RP 1339.

Adams said Trosclair admitted to having a gun with him and to shooting Masten by accident when he started getting loud and tried to reach for the gun. 3RP 1339. Adams also said Trosclair tried to get into Masten's apartment but the door was locked, so he "came back and tried to see what Solo had," running when someone saw him. 3RP 1339.

Adams declared that, once Trosclair had told Adams these things, Adams first thought he should "retaliate" against Trosclair for killing Masten. 3RP 1341. Ultimately Adams decided it would have made "more problems" for Adams, so he decided against it. 3RP 1341. Adams said that the two men kind of "avoided each other" after that but that, shortly before Adams was moved, Trosclair had given Adams some food when Adams was hungry, so they started "talking and building a rapport." 3RP 1341.

Adams admitted that, when he was released in mid-April, his robbery case was still going on. 3RP 1344. In fact, he was focused on

"preparing on fighting my case." 3RP 1344. Nevertheless, Adams did not call detectives and tell them what he claimed Trosclair had said in exchange for trying to get leniency at that time. 3RP 1344.

He had been released but failed to appear for a court date so, on November 1, 2011, Adams was taken back into custody. 3RP 1345. Adams claimed he and Trosclair were in the same unit within a couple of days and they still had a "good rapport." 3RP 1345.

Adams first flatly denied calling anyone, including family members, or doing things to "better" Trosclair's situation at jail after Adams was taken back into custody. 3RP 1345. A moment later, however, Adams admitted he might have called Trosclair's mom and referred to Trosclair as his "home boy." 3RP 1346. Adams also conceded he let Trosclair use Adams' calling card. 3RP 1346. Adams maintained that there was "no problems between me and him" and they were both in the same situation "fighting a case for . . .freedom" so there was a "rapport." 3RP 1346.

Adams admitted that, after he was taken back into custody in November of 2011, he was doing everything he could to try to get out of and calling people probably four to six times. 3RP 1348, 1351. The phone calls included calls to Adams' friend, Anthony Smith, talking about how Adams could help himself out in relation to his charges. 3RP 1351, 1471-72. Smith had worked with Detective Ringer in the past and, in February or March of 2012, told Adams that Ringer "was interested in homicide and robberies." 3RP 1352. Adams kept calling Ringer, making an effort four or five times and asking Ringer "what do you want to know"

in Adams' efforts to get some kind of break from what he was facing. 3RP 1353. Ringer responded that he was interested in learning about robbery and homicide cases. 3RP 1353.

During his time in custody, Adams admitted, he spoke to his mother, his ex and a man named Anthony Smith about how he could get some information to get a "deal" from police. 3RP 1351. Smith worked with Detective Ringer in the past and, in February or March of 2012, told Adams that Ringer "was interested in homicide and robberies." 3RP 1352. Adams kept calling Ringer, making an effort four or five times and asking Ringer "what do you want to know" in Adams' efforts to get some kind of break from what he was facing. 3RP 1353. Ringer responded that he was interested in learning about robbery and homicide cases. 3RP 1353.

Adams admitted that the detective said the only way Adams could "help" himself was if he had information on any "homicide or robbery." 3RP 1349. Adams then freely told the detective about "a couple of robberies" Adams knew about but he thought the detective did not seem very interested. 3RP 1349.

By December of 2011, Adams conceded he was interested in making a "deal" and was hoping to get leniency at sentencing. 3RP 1350. Yet he never raised the alleged "admissions" Trosclair made to him. 3RP 1351. Adams claimed at trial that he was afraid that Trosclair would find out that Adams had told police about it and that Trosclair would either hurt him or get someone else to as a result. 3RP 1351. Adams also claimed he thought what he knew was not particularly useful because Trosclair said someone was "already cooperating against him." 3RP 1351.

Detective John Ringer of Tacoma was investigating Adams for his drug dealing and went with Martin to visit and talk to Adams. 3RP 1205-1206. In December of 2011, Adams had talked to Ringer and another agent, trying to give them "drug information" in exchange for leniency for his own crime but Ringer told him, "[y]ou are not getting out. You are not going to work as an informant for us on the street." 3RP 1230. The officers told Adams that his chances of getting out based on cooperation were "slim to none," and that the only way the officer could help him would be if he "knew about some old unsolved homicides from back in the day," or some robberies. 3RP 1210. Adams then tried to give the officers something they could use but had only known about one incident where someone got shot in the leg. 3RP 1230-31. Ringer said it was "too late" on that charge because an arrest had already been made and they did not need his help. 3RP 1483.

Although Adams knew that Ringer needed some information about a homicide or robbery, and although Adams claimed he had the alleged confession of Trosclair to both a homicide and a robbery "tucked away," he never raised that with Ringer at that time. 3RP 1483. In fact, Adams told the officers in December of 2011 that he did not know anything about any unsolved homicides. 3RP 1231.

Adams conceded to having told his mom that Trosclair not only had not done it but that he was not there. 3RP 1359. Adams said he did not want his mom to be "looking down" at him for not "retaliating" against Trosclair for killing Masten. 3RP 1359, 1472. On cross-examination, he said it was not because he did not want to make his mom

upset but rather he did not want his family to judge him for "not retaliating, knowing he killed somebody close to us." 3RP 1472.

It was only in April of 2012 that Adams told the officers about what Adams claimed Trosclair had confessed. 3RP 1362. By that time,

Adams had three separate pending criminal matters that he was trying to get out of responsibility for, all of which resulted in him facing a "deal" for one single charge of second-degree robbery with a 22-29 month range, as opposed to the multiple charges and 15.75 to 19.25 years Adams faced before he incriminated Trosclair. 3RP 1366.

A forensic scientist testified that he was told by officers that suspects may have fled along a pathway where there were footprints in the mud. 6RP 43. He took some impressions at the scene of those prints. 3RP 643, 664. All of the shoes found in Trosclair's home were gathered in a tub and impressions made. 3RP 624, 1666. None of them had similar "class characteristics" to the impressions taken at the scene of the crime. 3RP 624, 1666.

Martin testified that, based on phone records, several calls made around 8 on the evening of the shooting came from the "landline" phone of a man named Mario Steele. 3RP 784. Steele was dating Kisha Fisher, Trosclair's sister, and, after initially denying knowledge or involvement, she ultimately said she had set up a drug deal for Mario Steele to buy drugs from Masten about 3 that day. 3RP 795. She also described "Mr. Trosclair's call to Mario Steele's cell phone at 8:23." 3RP 806, 817, 821-24.

Phone records indicated that Trosclair's phone made a phone call

to Steele's home phone from the area near the apartment at 3:23 that day, and made another call to someone else at 3:23 p.m. but was heading away from that neighborhood at 3:25 that day. 3RP 826. At 3:37 there was another phone call to Steele's home phone, and again with the phone moving north at about 3:41. 3RP 827. Later that day at 7:55 p.m. a phone was placed to Steele's home phone and Trosclair's phone was using the tower nearest to Masten's apartment in that area again in calling Steele at 8:12 and 8:15 and the officer thought there was a three-way call conducted with Trosclair, Steele and Masten's phones at 8:23, about seven minutes before the first 9-1-1 call. 3RP 830.

A couple of months after the incident, Martin showed Howell a photo montage with a picture of Trosclair in it. 3RP 855. Howell identified him as the man he saw that night. 3RP 856, 883, 1060.

Trosclair was interviewed and he said heard from his sister that police had his phone number but he did not know why. 3RP 834. The officer read Trosclair's statement and his admission that Fisher was Trosclair's sister. 3RP 836. Trosclair said he thought it had been a month or so since he had last been in the area where Masten lived, an area of town known as "Chocolate City." 3RP 837. The officer confronted Trosclair with information in his cell phone records about his phone being in the Chocolate City area and Trosclair said,"I don't know how that could be," denying that he was there. 3RP 841.

At that point, the officer confronted Trosclair saying, "the three of you were there," meaning Trosclair and Steele and Solo was selling dope to Steele. 3RP 841. The officer told Trosclair to "[e]xplain it, Corey,

explain how your phone got there," but Trosclair could not. 3RP 842. Trosclair was clear, however, that he was not personally at Chocolate City at that time. 3RP 842. The officer confronted Trosclair with phone calls to Steele's at 6:55, then Chocolate City at 8:12 and etc. 3RP 844. 3RP 845. The officer walked Trosclair through the three-way call with Masten's, Trosclair's and Steele's phone numbers. 3RP 845.

Also in the testimony, the officer said that Trosclair's phone called Steele's home phone 29 times in one day. 3RP 850. Trosclair maintained he was not there and did not know anything about it. 3RP 852. He denied being there, too. 3RP 852. The officer at one point told Trosclair his opinion that, "[w]ith all due respect," Trosclair, at 40 years of age, would not give his phone to other people. 3RP 853.

An officer involved in investigating the case admitted that it had been established that it was Steele, not Trosclair, who had made at least one of the calls from Trosclair's phone that night. 3RP 1730. The officer also admitted that he did not actually know who had used the phone. 3RP 1731.

D. ARGUMENT

1. TROSCLAIR'S RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM WERE REPEATEDLY VIOLATED, THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL AND THE TRIAL COURT ERRED IN ADMITTING IMPROPER EVIDENCE

The Sixth Amendment guarantees the accused in a criminal case the right to confront the witnesses against them. See State v. Jasper, 174 Wn.2d 96, 108-109, 271 P.3d 876 (2012). As part of that right,

testimonial statements made out-of-court by a nontestifying witness cannot be used at trial unless the defendant has had a prior opportunity for cross-examination. See Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Further, the statement of a nontestifying codefendant may not be used at trial unless that statement rendered non-testimonial by removing all reference to the non-declarant defendant. See Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

In this case, this Court should reverse, because Trosclair's rights to confrontation were violated in two ways. First, those rights were violated by the admission of the statement of Kisha Fisher, Trosclair's codefendant, because the redactions were insufficient to eliminate the prejudice to Trosclair. Second, Trosclair's confrontation rights were violated by introduction and use of evidence of statements made by Masten's girlfriend, Davis, who died before trial. Further, the trial court erred in admitting Davis' statements to her sister, Denise, because those statements were not admissible under either the "excited utterance" or "present sense impression" theory.

a. The motion to sever should have been granted and Trosclair's confrontation clause rights were violated

First, Trosclair's rights to confrontation were violated by the trial court's failure to sever Trosclair's trial from that of Fisher, because Fisher's interview with police was presented as evidence at trial and the redactions made to the statement did not eliminate the prejudice to Trosclair.

i. Relevant facts

Before trial, Trosclair moved under CrR 4.4(c)(1) to have his case tried separately from that of his sister, Kisha Fisher, because Fisher's confession to police implicated Trosclair, as well. CP 58-59; 3RP 209. Trosclair argued that Fisher's statements could not be redacted sufficiently to eliminate prejudice to Trosclair and that, as a result, admission of the statements would violate Trosclair's Article I, section 22 and Sixth Amendment rights. CP 58-59. The state opposed the motion, arguing that the redactions were sufficient. CP 86-93.

Before the court, counsel pointed out that using the term "first guy" in the place of Trosclair's name still made it clear to whom the statements were referring. 3RP 210-11. The prosecutor argued that replacement was sufficient because the state only had to make the statement "facially neutral" which was done by "not identifying the non-testifying defendant by name," and by making sure the statements was "[f]ree of obvious deletions" such as a "blank." 3RP 214. The prosecutor also relied on the fact that a limiting instruction would be given stating that Fisher's confession should not be used against Trosclair. 3RP 214.

The court changed a few redactions but denied the motion to sever. 3RP 219. Counsel again objected that, with the redactions the way they were, the prosecution did not "even have to put on the case." 3RP 221.

Later, in his testimony at trial, Officer Martin testified that Trosclair and Fisher were brother and sister. 3RP 834, 36. When the jury was out, counsel moved for a mistrial, saying that "[t]here is now no way that this jury cannot associate" Trosclair and Fisher for the crime and for

the purposes of her statement being admitted at trial. 3RP 867-68. The court denied the motion. 3RP 871.

When Officer Conlon and the prosecutor reading separate roles, Fisher's redacted interview with police was read into the record. 3RP 1609-42. Included in that interview were statements from Fisher that

-the case was serious, which she knew because the "first guy" and Fisher's boyfriend, Mario Steele, were already in jail for it (3RP 1609)

-two guys and Steele went to go get some cocaine earlier in the day and one of the two was someone she did not know from California (3RP 1610)

-that the "first guy" "stays out in Kent" and does not really "come over" that often (3RP 1612)

-that the first guy did not ask for drugs and "[w]hy would he wait until that day to ask" Fisher for drugs (3RP 1624)

-that she knew the "first guy" did not have a car (3RP 1612)

-that the guy from California called them "cousin" but was not her cousin and had no relationship to her

3RP 1609-1633. Regarding the latter comment, the following exchange also occurred:

A: He's not. He's not my cousin. He is no relationship to me.

Q: No relation to **the first guy** that you know of?

A: No relation to my family.

3RP 1615 (emphasis added). The prosecutor also read into the record a part of the interview of Fisher in which an officer asked her if she knew

Masten was claiming to have "prostituted her" out when they dated. 3RP 1632. Fisher had responded that she had not hear that and the officer had then asked why it was new to her as she claimed but both Steele and Trosclair (mentioned by first name) had known about it. 3RP 1632.

ii. Trosclair's confrontation rights were violated

It is a violation of the defendant's right to confrontation for a court to admit the confession of a nontestifying codefendant unless there is sufficient redaction so that "not only the defendant's name, but any reference to his or her existence," is removed. See Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). This rule, called the "Bruton" rule after the relevant seminal case, is based on concerns about the defendant's rights to confrontation and the enduring prejudice a codefendant's statement can cause.

Prior to Bruton, the high court had held that it was not improper to put two or more codefendants together for trial and admit the confession of one, so long as the jury was given a limiting instruction telling the jury the confession could be used only against the confessing defendant. See Bruton, 391 U.S. at 125. But in Bruton, the Court reversed its decision that a limiting instruction was sufficient to ensure that the codefendant's statement would not be used against another codefendant at trial:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

391 U.S. at 135.

In our state, rule CrR 4.4(c) was adopted to ensure that such prejudice did not occur, mandating that a trial court must grant a motion for severance unless the prosecutor either agrees not to introduce the statement of the nontestifying codefendant or unless the statement is sanitized by deleting all reference to the moving defendant *and* a limiting instruction is given. See, e.g., State v. Wheeler, 95 Wn.2d 799, 806, 631 P.2d 376 (1981).

The problem in this case is that the redactions did not delete all reference to and effectively identified Trosclair by replacing his name with "the other guy," allowing in evidence that Trosclair and Fisher were brother and sister and linking Trosclair and Steele clearly in the juror's minds. A statement cannot be rendered proper for confrontation clause purposes by replacing the defendant's name with a substitute which gives the implication that the statement refers to that defendant. Gray v. Maryland, 523 U.S. 185, 195, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). The Gray Court declared:

> Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result.

Gray, 523 U.S. at 192.

In Gray, there were six men alleged to have been involved in the beating death of the victim. 523 U.S. at 189. One man, Bell, confessed to his involvement, also incriminating Gray and a third man, who later died.

Bell and Gray, however, were the only two tried together, with Bell's statement admitted and Gray's name replaced by "deleted" or a blank space. 523 U.S. at 189-90. The Court found those redactions insufficient because the statement obviously "referred directly to the existence of the non-confessing defendant" and drew the jury's attention to the fact that two specific defendants were involved - the same number of people on trial. 523 U.S. at 196. The Court reasoned:

> [the redacted statements] obviously refer directly to someone, often obviously the defendant and . . .involve inferences that a jury ordinarily could make immediately. . .[so that] the accusation that the redacted confession makes 'is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.'

Gray, 523 U.S. at 196, quoting, Richardson, 481 U.S. at 208.

Indeed, the Gray Court noted, such redaction runs the risk of causing the jury to react the same as if they were given an unredacted confession, "for the jury will often realize that the confession refers specifically to the defendant." Gray, 523 U.S. at 193. And this is true even if the prosecutor does not link the defendant to the deleted name, because jurors are likely to "know immediately that the blank in the phrase refers to a codefendant." Id. Further, a juror who does not know the law and wonders "to whom the blank might refer need only lift his eyes" to the person "sitting at counsel table, to find what will seem the obvious answer." Gray, 523 U.S. at 193.

Notably, even before Gray, the highest court in Iowa had held redactions insufficient under Bruton where the redactions changed the defendant's name to "the other guy." See State v. Jefferson, 574 N.W.2d 268 (1997). In Jefferson, the state's case centered on two defendants

committing a robbery and, while the confession of one did not specifically name the other, the confession "was not silent on the existence of an accomplice" because they "repeatedly referred to the 'other guy' involved in the robbery." 574 N.W.2d at 272. The Iowa Court contrasted a case where two people were being jointly tried and the statement of one was changed not only to remove the defendant's name but also to refer to the people involved by the non-specific plural pronoun "they." Referring to "they" in that context could have meant "anyone or a group of individuals acting with the codefendants," the Court pointed out, but in Jefferson there were two perpetrators and there were only two defendants in the courtroom, so that "[n]o doubt could be left in a reasonable juror's mind that Jefferson was "the other guy," and principal player, identified in" the codefendant's statements. 574 N.W.2d at 275.

Here, as in Jefferson, there were only two suspects seen the night of the incident. One of them was clearly identified in Fisher's statements as Steele, and the other was clearly linked to Fisher and identified as Trosclair in multiple ways. Through the insufficiently redacted statement, the jury heard that Fisher and Trosclair were brother and sister. The jury was of course aware that both were on trial for involvement in the same crime. Further, Fisher's statements showed not only that she knew "the other guy" but that she knew him well enough to know he did not have a car, that he lived down in Kent and did not visit often, and that he would have no reason to ask her to get drugs right then. Most egregious, the jury heard Fisher refer to the first guy as "family" when she was saying the California "cousin" was not actually related, after which the jury heard

comments about Steele and Trosclair, identified by name, having some knowledge of a claim that Masten had involved Fisher in prostitution.

The redactions in this case did not cure the prejudice to Trosclair in admitting his sister's statements at trial. While the replacement of "the other guy" was not a "blank," as the Gray Court noted, Bruton also applies where there is an "other similarly obvious alteration," because a blank and such an alteration are both "directly accusatory." Gray, 523 U.S. at 194.

State v. Vincent, 131 Wn. App. 147, 120 P.3d 120 (2005), review denied, 158 Wn.2d 1015 (2006), is instructive. In that case, the appellate court held that the redactions were insufficient even though they removed the name of the suspect. The crimes involved two brothers, one of whom allegedly made incriminating statements to a jailhouse informant. 131 Wn. App. at 150. At trial, the second brother moved to sever after the prosecution sought to admit the first brother's statements, but the court denied the motion, instead ordering the statements amended to take out the second brother's name and refer to him as "the other guy." 151 Wn. App. at 151. The court also gave a limiting instruction, telling the jury it could not consider the incriminating out-of-court statement made by one defendant as evidence against the other. Id.

The Vincent Court rejected the prosecution's claim that replacing the defendant's name with a pronoun or phrase such as "the other guy" satisfies Bruton in all situations. Vincent, 131 Wn. App. at 154. Instead, the Court declared,

> [t]he question is not the precise words used in a redaction, but whether the redaction is sufficient to protect the codefendant from the prejudice of a statement he cannot cross-examine - that is, to

> prevent the jury from concluding the redacted reference is obviously to the codefendant, making it impossible for the jury to comply with the court's instruction to consider the evidence only against the defendant who made the statements.

131 Wn. App. at 154. There were only two participants in the crimes, the Court noted, and only two defendants, and all of the witnesses said there was only one guy other than the one whose confession was admitted. Thus, the Court held, the "only reasonable inference the jury could have drawn" from the references to the "other guy" was that the guy was the other codefendant. Id. The redaction "thus failed in its purpose" and confrontation clause rights under Bruton were violated. Id.

As in Gray and Vincent, the redactions here were insufficient to remedy the Bruton issue. This Court should so hold and should reverse.

b. Trosclair's rights to confrontation were violated by admission of testimonial evidence from Michelle Davis

i. Relevant facts

About a year after Masten was shot, Michelle Davis, his girlfriend, died in an unrelated incident. 3RP 248, 506. Before her death, she had picked Trosclair out of a lineup as being involved in Masten's case. 3RP 95.

During trial Officer Martin testified that he did a photomontage including Trosclair and presented it to Davis, after which went and he got an arrest warrant for Trosclair. 3RP 831. Counsel did not object but, a few moments later, with the jury out, counsel moved for a mistrial, arguing that the prosecution had given a clear indication that Davis had picked out Trosclair from the montage she had been shown. 3RP 867. Counsel

pointed out that, as Davis was dead, it was not possible for the defense to cross-examine her about her identification, and it was a violation of Trosclair's confrontation clause rights to have the evidence come in. 3RP 867. In denying the motion, the court simply declared, "[a]s to Ms. Davis, and her identification." 3RP 873.

Later in trial, when Officer Conlon was testifying about showing photo montages to witnesses, the following exchange occurred:

Q: And who were those photomontages shown to?

A: Michelle Davis, Aaron Howell, and I believe Nadise Davis.

Q: Okay. And at any point did Nadise Davis make an identification?

A: No, she didn't.

Q: Did Michelle Davis?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Basis.

[DEFENSE COUNSEL]: Sixth Amendment, right of cross[-]examination.

THE COURT: As to Ms. Davis, sustained.

[DEFENSE COUNSEL]: Yeah, Ms. Davis.

THE COURT: Sustained. Jury is instructed to disregard.

BY [THE PROSECUTOR]:

Q: What did you do next?

A: We arrested Corey Trosclair.

3RP 1581.

In closing argument, the prosecutor declared:

> I'll tell you what's not a coincidence. Minutes after two black males arrange to buy cocaine from Lenard Masten via three-way call, Lenard Masten is robbed and shot by two black males. It's not a coincidence that Michelle Davis picked these two out of a photomontage, or that Michelle picked Mario Steele out of a photomontage.

3RP 1885. A few moments later, with the jury out, defense counsel raised the issue that the prosecutor had said that Michelle Davis had picked Trosclair out of a lineup. RP 1907. The court then said, "[h]e corrected it[.]" RP 1907. Counsel said it was a "mistrial issue without a doubt." RP 1907. The prosecutor then said, "[t]hey were. They were. That was the evidence." RP 1907. Counsel said "[t]here was no evidence in that end - - " but the court cut him off, telling him to allow the prosecutor to argue. RP 1907. The court denied the motion for mistrial, stating "[t]here was correction about the lineup and the selections that were made in the lineup." RP 1909.

ii. Admission of the statements violated Trosclair's rights to confrontation

The trial court erred in denying the motions for mistrial after the repeated introduction of the evidence that Davis had identified Trosclair from a lineup, because it violated Trosclair's rights to confrontation. A potential violation of the confrontation clause is reviewed de novo. See Jasper, 174 Wn.2d at 108-109. The right to confrontation is, at its heart, the right to cross-examination, because cross-examination is "the principal means" by which our system ensures "the believability of a witness and the truth of his testimony." See Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

In Crawford, supra, the U.S. Supreme Court examined the

"bedrock procedural guarantee" of the right to confrontation and held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 1374. As a result, the Court concluded, where a witness does not testify at trial, out-of-court "testimonial" statements of that witness are not admissible at trial, unless the defendant has had a prior opportunity to cross-examine the witness. 541 U.S. at 1369.

The definition of when something is "testimonial" for the purposes of the confrontation clause is evolving in response to Crawford but includes statements made to police when "the circumstances indicate" that there is no "ongoing emergency," and also that "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." State v. Mason, 160 Wn.2d 910, 918-19, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008), reversed in part and on other grounds by Giles v. California, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008), quoting, Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The factors the U.S. Supreme Court has adopted to determine whether the primary purpose of interrogation is to respond to an ongoing emergency or instead to establish or prove past events, which are:

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? . . .(3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the

elicited statements were necessary to resolve the present emergency
or do they show, instead, what had happened in the past? . .
(4) What was the level of formality of the interrogation?

State v. Koslowski, 166 Wn.2d 409, 412, 209 P.3d 479 (2009), citing, Davis, supra. Thus, in Koslowki, statements the victim made in describing an assault, restraint and robbery to officers who responded to a 9-1-1 call were testimonial. The statements were "made to police officers responding to a report of a crime," when there was no ongoing emergency and no evidence that the robbers might return, the robbery was complete and there was no evidence of continuing danger. 166 Wn.2d at 422. In short, she was clearly "describing past events and not events as they were actually happening." Id.

Here, there can be no question that Davis' out-of-court identification of Trosclair was testimonial. Davis made that identification when asked by police who presented her with a photograph montage well after the crime, not in response to officers reporting to an ongoing emergency but as part of the criminal investigation leading to the prosecution against the defendant. Further, it cannot be suggested that a reasonable person would have any belief other than that an identification they made to police about who they said had committed a crime would potentially be use in such a prosecution. Nor can there be a dispute that a pretrial identification procedure, with a created photographic montage, a page of warnings and a signed document, lacks "formality." A statement made identifying a defendant under such circumstances is clearly "testimonial." See, e.g., United States v. Pugh, 405 F.3d 390, 400 (2005)

(so holding).

Trosclair's confrontation clause rights were repeatedly violated by the admission of this evidence, and the court should have granted a mistrial as a result. A mistrial should be granted based on the introduction of evidence if the evidence may have affected the outcome of the trial and thus denied the defendant of his right to a fair trial. See State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); see also, State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In determining whether a trial irregularity has this impact, the court looks at 1) the seriousness of the irregularity, 2) whether it involved cumulative evidence, and 3) whether a curative instruction was capable of curing the irregularity. See State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

In looking at those factors here, the admission of the evidence was very serious. A crucial question in the case was whether Trosclair was the perpetrator, and the identification by Davis went directly to the heart of that issue. Further, once the jury heard that Davis had identified Trosclair it is difficult to conceive of them being able to ignore that or have that information "cured" by an instruction, especially given the context in which it was introduced. Indeed, at one point, it came in because the officer testified about being able to get a warrant for Trosclair's arrest right after the identification was made, clearly telling the jury not only that Davis had identified Trosclair but also that the police had believed the identification enough and it was strong enough for legal machinery against Trosclair to start.

Trosclair's confrontation clause rights were repeatedly violated at trial, and the prosecution cannot show the constitutional errors harmless beyond a reasonable doubt. This Court should so hold and should reverse.

2. THE COURT ERRED IN REFUSING TO GRANT A MISTRIAL AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Reversal is also required because the court erred in failing to grant a mistrial after a police witness testified about asking Trosclair about taking a polygraph.

a. Relevant facts

During pretrial discussions, counsel mentioned Trosclair's statements to police, saying he did not have many objections as to its admission, "except for the fact that, you know, the last page they want him to take a polygraph. That needs to be taken out." 3RP 193.

At that time, however, the court was not yet ruling on redactions. 3RP 195. Counsel did not raise the issue again.

In direct examination of Officer Martin, the prosecutor was apparently reading through an interview Martin did with Trosclair, going through what was said page by page. 3RP 853-55. After asking about whether Trosclair was left-handed, the following exchange occurred:

Q: Okay. And then at the very end: Did you suggest a lie detector could clear Mr. Trosclair?

A: Yes.

Q: What was his answer?

A: No, it won't.

3RP 855. A few moments later, with the jury out, counsel said there had

been "a long discussion" on polygraphs and voice identification prior to the motions in limine and that the prosecution knew "you can't use a polygraph, and you can't use the information that somebody refused to take a polygraph." 3RP 866. He argued that it was a violation of Trosclair's constitutional rights to remain silent to use the evidence. 3RP 866.

Counsel explained that he had not wanted to object because he was concerned about bringing it to the jury's attention further, although he had not idea "how you unring the bell" at this point. 3RP 866.

In response, the prosecutor told the court that counsel had raised the issue "but never actually made a motion before Your Honor with respect to this beforehand." 3RP 868. The prosecutor admitted he had "thought about it" and "looked at some law" and decided not to mention that Trosclair "refused to take" a polygraph so he had "phrased the question very specifically." 3RP 868. The prosecutor said the remark was not "a refusal" to take the test but an admission that "I haven't been telling you the truth." 3RP 868.

Counsel said he "obviously, wasn't in the room when the State asked the question" but that the question was still improper. 3RP 871. He went on:

> I don't know how you unring this bell. They [the jury] are left with the impression that my client refused to take a polygraph. They don't know that polygraphs can't be used at trial. They are not going to hear that information. All they know is this is something that, you know, maybe could have cleared him if he had taken it. If he is innocent, why didn't he take a polygraph.

3RP 872. In ruling, the court noted that there was a "dilemma of

highlighting" testimony by objecting at the time of the testimony but noted there was no objection at the time. 3RP 880. The court said that did not "diminish" the question of whether or not Trosclair's rights were violated. 3RP 880. The court said "given the way the question was asked, the Court is denying the motion." 3RP 880.

Later in trial, counsel told the court he was going to "propose that we redact" Trosclair's interview "to leave out the part with the polygraph." 3RP 1551. The prosecutor said the interview was not going to be admitted so it did not matter and counsel started arguing but then stopped himself, apologized, said, "[y]ou're right," and the court moved on. 3RP 1551.

b. Mistrial should have been granted

The trial court erred in refusing to grant the motion for mistrial, because the introduction of this evidence was highly irregular, did not involve cumulative evidence and the prejudicial impact could not have been cured. See, e.g., Johnson, 124 Wn.2d at 76. Polygraph evidence is inadmissible in our state because it is not accepted as reliable. See, e.g., State v. Ahlfinger, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988). Further, such evidence is excluded because it is so "seductive" and likely to sway the jury because a "lie detector" is "a machine that purports to test truthfulness." Id. Other courts similarly hold that the defendant's "refusal to take a polygraph examination and of his response to the investigator's request that he do so" are not admissible at trial. See, e.g., People v. Eickhoff, 471 N.E.2d 1066 (Ill. App. 1984).

Thus, in Eickhoff, the prosecution appealed the trial court's order suppressing evidence of the defendant's "refusal to take a polygraph

examination and of his response to the investigator's request that he do so." 471 N.E.2d at 1069-70. Before trial, the defendant moved to prevent the prosecution from introducing any evidence of the refusal and the defendant's response when asked to do so. The Court rejected the prosecution's theory that it was not trying to introduce improper evidence of polygraph results but just relevant evidence:

> Testimony that a defendant was offered a polygraph test, or that he refused one, interjects into the case inferences which bear directly on his guilt or innocence: either he failed the test - as the State presumably would not pursue charges against an innocent - or he refused to submit to testing in fear that his guilt would be shown. That which may not be accomplished directly by evidence of polygraph test *results*, may not be accomplished indirectly by references to whether a defendant sought, declined, or was offered a polygraph test.

471 N.E.2d at 1068-69. Put another way, the court noted, the "degree of prejudice" caused to a defendant when a jury, "unfamiliar with the present scientific uncertainty of the tests," hears the defendant refused to take it because it is likely to be seen as indicating "a consciousness of guilt." 471 N.Ed. 2d at 1069-70, quoting, State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962).

Here, "consciousness of guilt" is exactly what the prosecution was using the evidence for when it asked the officer if he had suggest that "a lie detector could clear Mr. Trosclair." 3RP 855. The entire purpose for admitting the evidence was to show that Trosclair was guilty, because he admitted a lie detector test would not clear him of the crime. But Trosclair could have been saying a lie detector would not clear him because they were not reliable. The prejudice of this evidence cannot be overstated, given the "seductive" nature of "lie detector" evidence and the potential

impact such evidence has on jurors. The trial court erred in refusing to grant a mistrial.

In addition, counsel's culpability in failing to raise the issue further cannot be ignored. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.3d 563 (1996); Sixth. Amend.; Art. I, § 22. Counsel is ineffective despite a strong presumption to the contrary if his conduct falls below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Here, counsel clearly thought enough of the issue to raise it once, yet he failed to raise it again - leaving open an opportunity the prosecutor decided quite openly to exploit. See 3RP 868 (prosecutor talking about how, when counsel failed to move to exclude it after mentioning it, the prosecutor looked into how to raise the issue and decided to do so). And in fact, once the bell was "rung," counsel *still* failed to move to exclude the evidence from further discussion, even orally, until days later, when he moved only to change a written statement that the jury was not going to see anyway.

Counsel was ineffective in failing to move pretrial to exclude the evidence to begin with, and as that ineffectiveness clearly allowed the prosecutor to introduce the offending evidence, that ineffectiveness prejudiced Mr. Trosclair. The court further erred in refusing to grant a mistrial after this evidence was admitted. This Court should so hold and should reverse.

3. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT

Prosecutors are unlike other attorney and enjoy special status as "quasi-judicial officers." See State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Along with the status, however, comes responsibility, including the duty to ensure that a defendant receives a constitutionally fair trial and to seek a verdict free of prejudice, based on reason and law. See, State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). As a result, a prosecutor must act in seeking justice instead of making himself a "partisan" who is trying to "win" a conviction at all costs." See State v. Rivers, 96 Wn. App. 672, 981 P.2d 16 (1999).

In this case, the prosecutor failed in all of those duties, by engaging in serious, flagrant, prejudicial and ill-intentioned misconduct. Further, counsel was, once again, ineffective in his failure to make efforts to mitigate the prejudice caused to his client by the misconduct.

a. Relevant facts

In closing argument, in discussing the standard of proof beyond a reasonable doubt, the prosecutor told the jurors they might think the burden of proof is "higher or lower" but they were required to follow the law as the Court gave it. 3RP 1902. The prosecutor then declared that jurors had a "duty" to convict if they said to themselves, "I know he did it:"

> Satisfied, if you have an abiding belief that the defendants committed the robbery, you have a duty to convict them. That's exactly what the instructions tell you. So once you are satisfied - - this is - - put this to you slightly different. At some point you are going to be sitting back in the jury room and somebody is going to say, "**I know he did it, but I would like to see more**." Well, of course you would like to see more. I know he did it but - - and **I want you to stop to think and say, I know he did it, I know he did it.** At that point you have an abiding belief in the truth of the charge. **You know he did it.**

3RP 1903-1904 (emphasis added). A moment later, the prosecutor went on:

> Do you have enough? It's not do you wish you had more. Do you have enough? There will always be something else that you would like to see. If you have an abiding belief it just means abiding, long lasting. Are you satisfied - - when you reach your verdict today, are you satisfied - - when you reach your verdict today, are you satisfied tomorrow, are you satisfied two years from now? When you wake up three years from now, I did the right thing. **It's not I'm 1,000 percent certain. It's, I know he did it.** Are you going to be satisfied two years from now? I know he did it.
>
> You know, Corey Trosclair, **if you know he committed the crime of robbery or attempt robbery, you have an abiding belief in the truth of the charge that he is guilty** of Murder in the First Degree."

3RP 1905 (emphasis added). The prosecutor also used a "Power Point" slide show tool, displaying the show during closing argument which included, presumably at the times relevant during the argument, slides telling the jury the following:

> An Abiding Belief
>
> **You are confident in your verdict today, tomorrow and two years from now, that is an abiding belief**

Ex. 164 at 21 (emphasis in original).[3]

An Abiding Belief

If you know Corey Trosclair committed the crime of Robbery or Attempted Robbery, you have an abiding belief he is guilty of Murder in the First Degree

Ex. 164 at 21 (emphasis in original).

An Abiding Belief

If you know Kisha Fisher was a participant in the Robbery or Attempted Robbery, you have an abiding belief and he [sic] is guilty of Murder in the First Degree

Ex. 164 at 21 (emphasis in original).

The prosecutor also declared:

Remember when we talked about this in jury selection? Voir dire. French for the truth, speak the truth. Verdict. Latin. We all get a fair trial. When you go back there you think about the State's right to a fair trial, as well as the defendants. Return a verdict that speaks the truth.

3RP 1905. Apparently at the same time, the prosecutor displayed a slide declaring:

Ver Dictum

Verdict

"To speak the Truth"

Ex. 164 at 22. That slide was followed by one which declared:

BENJAMIN CARDOZO

Justice, though due to the accused, is due to the accuser too.

We are to keep the balance true.

[3]The exhibits referred to herein have all been designated as clerk's papers to this Court but were not separately indexed as to page numbers so will be referred to by Exhibit number herein.

Ex. 164 at 22 (emphasis in original). The final slide declared:

RETURN VERDICTS THAT
SPEAK THE TRUTH

-KISHA FISHER IS GUILTY OF MURDER
IN THE FIRST DEGREE
-KISHA FISHER IS GUILTY OF MURDER
IN THE SECOND DEGREE
-COREY TROSCLAIR IS GUILTY OF MURDER
IN THE FIRST DEGREE
-COREY TROSCLAIR IS GUILTY OF MURDER
IN THE SECOND DEGREE

Ex. 164 at 22.

b. The arguments were flagrant, prejudicial misconduct which compels reversal

The prosecutor committed serious, prejudicial misconduct in making all of these arguments, in ways which seriously, improperly minimized and misstated the prosecutor's constitutionally mandated burden of proof and misstated the jury's duties and role.

First, the prosecutor improperly minimized and misstated the jury's duties and role and the prosecutor's burden of proof beyond a reasonable doubt by telling jurors they were convinced beyond a reasonable doubt if they simply "know" someone is guilty despite wishing they had more evidence. Under both the state and federal due process clauses, the state has the burden of proving each element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), reversed on other grounds on petition for writ of habeus corpus sub nom Hanna v. Riveland, 87 F.3d 1034 (9th Circ. 1996); 14th Amend.; Art. 1, § 3. It is misconduct for a public prosecutor, with all the

weight of his office behind him, to mislead the jury as to the relevant law, especially in a way which deprives a defendant of his full rights. See, e.g., Davenport, 100 Wn.2d at 763.

Here, the prosecutors repeatedly misstated the crucial law regarding the prosecution's constitutionally mandated burden of proof by saying that jurors could - and should - convict if they simply thought, "I know he did it," even if they "would like so see more." 3RP 1903-1904. Jurors were told to convict if they thought they had "enough" evidence, even if they wished they "had more," and that "abiding belief" just means "long lasting," that proof beyond a reasonable doubt was not "I'm 1,000 percent certain" but just "I know he did it." 3RP 1905.

These arguments were highly improper, because they effectively told jurors that they should decide the case based upon something far less than the extremely high standard of proof beyond a reasonable doubt. State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273, review denied, 170 Wn.2d 1002 (2010), is instructive. In Anderson, the prosecutor argued to the jurors that, while they do not use the phrase "beyond a reasonable doubt" every day, the standard of proof is a standard jurors apply "every single day," in such things as deciding to have elective dental surgery or whether to leave a child with a babysitter or change lanes on the freeway. 153 Wn. App. at 425. On review, this Court declared that a "prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making" were "improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State had met its burden." 153 Wn. App. at 431.

By comparing the certainty required to find guilt beyond a reasonable doubt with the certainty people use when making even very serious, significant personal decisions, this Court held, the prosecutor had "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case[.]" Anderson, 153 Wn. App. at 427-29.

Many other courts have also found such arguments to be an improper minimization and misstatement of the prosecutor's constitutionally mandated burden of proof. See Commonwealth v. Ferreira, 364 N.E. 2d 1264, 1272 (Mass. 1977); Scurry v. United States, 347 F.2d 468, 470 (U.S. App. DC 1965), cert. denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). As the highest court in Massachusetts has said, "[t]he degree of certainty required to convict is unique in the criminal law," so high that people not only do not "customarily make private decisions" using the standard but that it might not even be possible for them to do so without causing great inertia in society. Ferreira, 364 N.E.2d 1264, 1727 (Mass. 1977).

Put simply, a person can "know" something for purposes of making a personal or business decision without being anywhere close to having the degree of certainty which would be required to decide that same thing "beyond a reasonable doubt." See id. Indeed, people are willing to act on what they think they "know" even when they have a great deal of uncertainty, which is why using language focusing on being "willing to act" in describing the degree of certainty a person needs in order to be convinced beyond a reasonable doubt improperly minimizes the burden of

proof. See, e.g., Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954); Anderson, 154 Wn. App. at 432. People are willing to take great risks in their personal matters and may even take action in them sometimes on a whim. See Tillman v. Cook, 215 F.3d 1116, 1126-27, cert. denied, 531 U.S. 1055 (2000). And this Court has similarly condemned comparing the certainty jurors need to be convinced of guilt beyond a reasonable doubt with the certainty they would need to take action in everyday, even important, matters. See Anderson, 153 Wn. App. at 427-29; see State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011).

The second problem with these arguments is that the prosecutor was simply *wrong*. Repeatedly, the prosecutor declared - or projected - the idea that, if the jurors "knew" that Trosclair had committed robbery or attempted robbery, they then had an "abiding belief in the truth of the charge. . .of **Murder in the First Degree**." 3RP 1905 (emphasis added); Ex. 164 at 21 ("If you know Corey Trosclair committed the crime of Robbery or Attempted Robbery, you have an abiding belief he is guilty of Murder in the First Degree"); Ex. 164 at 21 (same slide for Kisha Fisher). But proof of robbery is not the same as proof of murder. And despite the prosecutor's efforts here, the prosecution does not meet its burden of proving beyond a reasonable doubt that the defendant had committed even felony murder by simply proving the underlying felony. See, e.g., State v. Kosewicz, 174 Wn.2d 683, 691-92, 278 P.3d 184, cert. denied, __ U.S. __, 133 S. Ct. 485, 184 L. Ed. 2d 305 (2012) (predicate felony is an element of felony murder and "merely substitutes for the mental state the State is

otherwise required to prove").

Third, this misconduct was exacerbated by the prosecutor's flagrant, prejudicial misconduct in making the argument that the jury is required to "speak the truth" or will "declare the truth" with its verdict. In Anderson, a prosecutor from the same office as in this case made virtually the same argument, declaring that "verdict" was Latin for "veredictum, which means to declare the truth," and that jurors would, by their verdict, "declare the truth about what happened." Anderson, 153 Wn. App. at 424. This Court explained why such argument was misconduct:

> A jury's job is not to "solve" a case. It is not, as the State claims, to "declare what happened on the day in question." Rather, the jury's duty is to determine whether the State has proven its allegations against a defendant beyond a reasonable doubt.

153 Wn. App. at 424.

Notably, the decision in Anderson not only involved a prosecutor from the same prosecutor's office as the prosecutors in this case, that decision condemning the "veredictum" argument was handed down by this Court more than a *year* before the trial in this case.

As a result, this Court can be confident that the misconduct was so flagrant and ill-intentioned that it compels reversal. An appellate court may deem it "to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial" when an improper argument is made well after an opinion condemning it. See State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). Indeed, this Court has found arguments flagrant and ill-intentioned even when there is no published opinion declaring it to be so, if those misstatements are grave. See State v.

Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011). The prosecutor's repeated misconduct misstated the jury's role, mislead the jurors as to their true function and told the jury to convict for the felony murder if they simply "knew" he was guilty of the underlying felony only. The misconduct was flagrant, ill-intentioned and prejudicial and no curative instruction could suffice. This Court should so hold.

4. THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED TROSCLAIR OF A FAIR TRIAL AND COMPELS REVERSAL

Even if the individual errors in this case did not compel reversal, their cumulative effect would, because that effect was to deprive Trosclair of his state and federal constitutional rights to a fair trial. See, e.g., State v. Venegas, 155 Wn. App. 507, 520, 228 P.2d 813, review denied, 170 Wn.2d 1003 (2010). Reversal is required for the combined effect of errors during trial when that effect "effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless." Id. Thus, in Venegas, this Court reversed based on cumulative error where the trial court improperly excluded evidence relevant to the defense, the prosecutor made two arguments referring to Venegas' presumption of innocence and the trial court admitted improper evidence without balancing its prejudicial effect. Id.

Here, even if this Court does not reverse based on the effect of individual errors, the cumulative effect of the errors compels such reversal. The admission of the evidence in violation of Trosclair's confrontation clause rights is an error which is presumed prejudicial, which the

prosecution cannot prove harmless. Further, Trosclair's rights to a fair trial and to counsel were violated by the improper "lie detector" evidence. If this were not enough, the prosecutor then repeatedly misstated the jury's role and told jurors to convict on an improper basis under the law

No fair trial could have occurred given these errors. The Court should have granted one of the many motions for a mistrial Mr. Trosclair made and this Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, the convictions should be reversed and this Court should order reversal and remand for a new, fair trial.

DATED this 23rd day of May, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office, first class postage prepaid to 946 County City Building, 930 Tacoma Ave. S, Tacoma, Wa. 98402, and to Mr. Corey Trosclair, DOC 817896, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362, and to counsel for the codefendant, Stephanie Cunningham, 4616- 25th Ave NE #552, Seattle, WA. 98105.

DATED this 23rd day of May, 2013.

/s/ Kathryn Russell Selk
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APPENDIX A

The verbatim report of proceedings consists of multiple volumes, not all of which are chronologically paginated. They will be referred to herein as follows

(December 7, 2011, marked "2012" nothing on record) - no references

volume containing the proceedings of January 12 and February 23, 2012, as "1RP;"

April 5, 2012, "2RP;"

May 10, 22, 29 and 30, July 12, 16, 17, 19, 23, 24, 25, 26, 30 and 31, August 1, 2, 6, 7, 8, 9, 13, 14, 15 and 24, 2012, as "3RP;"

the separately paginated proceedings of June 22, 2012, as "4RP;"

the proceedings of September 21, 2012, unfortunately using the same page numbers used in other transcripts, as "5RP."